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INTERNATIONAL MIGRATION AND THE LAW

LEGAL APPROACHES TO A GLOBAL CHALLENGE

Edited by
Angela Di Stasi Ida Caracciolo
Giovanni Cellamare Pietro Gargiulo

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ROUTLEDGE

This volume collects the final results of the Research Project of Relevant National Interest (PRIN) "International Migrations, State, Sovereignty and Human Rights: Open Legal Issues" (2019-2024). Four research units have been financed by the Italian Ministry of University and Research to carry on the PRIN, namely the units of the following Universities: Salerno, Campania "Luigi Vanvitelli", Bari "Aldo Moro", and Teramo. The researchers have worked under the guidance of Angela Di Stasi, as principal Investigator, and Ida Caracciolo, Gianni Cellamare and Pietro Gargiulo, as associate Investigators.
Adopting a multilevel and multidisciplinary approach, the book aims to explore existing and future trends in the development of migration policy from the local to the global level, highlighting the challenges and gaps in the protection of migrants, and providing concepts and empirical findings with implications also for practitioners and lawyers.

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LIST OF ABBREVIATIONS

Affari sociali internazionali	*Aff. soc. internaz.*
African Journal of International and Comparative Law	*Afr. J. Int. Comp. Law*
African Journal of Legal Studies	*Afr. J. Leg. Stud.*
American Journal of International Law	*AJIL*
American Journal of Management Science and Engineering	*AJMSE*
American Journal of Social Issues & Humanities	*Am. J. Soc. Issues Humanit.*
American Sociological Review	*ASR*
American University International Law Review	*AUILR*
American University Law Review	*AmULRev*
Annals of Military and Health Sciences Research	*Ann. Mil. Health Sci. Res.*
Annuaire européen/European Yearbook	*EurYB*
Annuaire Français de Droit international	*AFDI*
Anuario de Derecho Constitucional Latinoamericano	*ADCL*
Anuario de Derechos Humanos	*ADH*
Anuario Espanol de Derecho Internacional	*AEDI*
Anuario Mexicano de Derecho Internacional	*AMDI*
Argomenti di diritto del lavoro	*ADL*
Arizona Journal of Environmental Law & Policy	*AJELP*
Asian Journal of Law and Society	*Asian Journ. of Law and Soc.*
Autralian International Law Journal	*Austral. Int. Law. J.*

B.E. Journal of Economic Analysis & Policy	*B.E. Jour. EAP*
Berkeley Journal of International Law	*BJIL*
Blog dell'Accademia di Diritto e Migrazioni	*ADiM Blog*
Boletín Mexicano de Derecho Comparado	*BolMexdeDerechoComp*
Boston College International and Comparative Law Review	*Boston Coll. Int. Comp. Law Rev.*
British Medical Journal	*BMJ*
British Yearbook of International Law	*BYIL*
Bulletin des droits de l'homme	*Bull. dr. Homme*
Cahiers de droit européen	*Cah. dr. eur.*
California Western International Law Journal	*CWILJ*
Canada's Journal on Refugees	*Canada J. Refug.*
Cardozo Law Review	*Cardozo Law Rev.*
Cassazione penale	*Cass. pen.*
Columbia Human Right Law Journal	*Columbia HRLJ*
Columbia Journal of European Law	*Columbia JEL*
Columbia Journal of Transnational Law	*Columbia JTL*
Columbia Law Review	*Columbia Law Rev.*
Common Market Law Review	*CML Rev.*
Consulta Online - Rivista di diritto e giustizia costituzionale	*Consulta Online*
Cornell International Law Journal	*Cornell ILJ*
Corriere giuridico	*Corr. giur.*
Croatian Yearbook of European Law & Policy	*CYELP*
Daedalus	*Daed.*
Democrazia e Diritto	*Dem. dir.*
Demographic Research	*Demo Research*
Derecho PUCP: Revista de la Facultad de Derecho	*Der. PUCP*
Digesto delle Discipline privatistiche	*Dig. Disc. Priv.*
Digesto delle Discipline pubblicistiche	*Dig. Disc. Pubbl.*
Digesto penale	*Dig. pen.*
Diritti dell'uomo. Cronache e battaglie	*Dir. uomo*
Diritti umani e diritto internazionale	*Dir. um. e dir. internaz.*

Diritto comunitario e degli scambi internazionali	*Dir. com. Scambi internaz.*
Diritto penale e processo	*Dir. pen. proc.*
Diritto Pubblico	*Dir. pubbl.*
Diritto Pubblico Comparato ed Europeo	*Dir. pubbl. comp. eur.*
Diritto, Immigrazione e Cittadinanza	*Dir., Imm. e Cittad.*
Discourse, Context & Media	*DCM*
DPCE Online – Prospettive di diritto pubblico comparato	*DPCE Online*
EJIL: Talk! – Blog of the European Journal of International Law	*EJIL: Talk!*
Emory Law Journal	*Emory L.J.*
Enciclopedia del diritto	*Enc. giur.*
Enciclopedia giuridica Treccani	*Enc. giur. Treccani*
Estudios Constitucionales	*E.C.*
Ethics & International Affairs	*E. & Int. Aff.*
Études internationales	*Et. Intern.*
EU and Comparative Law Issues and Challenges Series	*ECLIC*
EU Immigration and Asylum Law and Policy Blog	*EU Migration Law Blog*
EU Law Analysis - Expert insight into EU law developments	*EU Law Analysis*
Eucrim: the European Criminal Law Associations' Forum	*Eucrim*
Eunomía. Revista en Cultura de la Legalidad	*Eunomia*
Eurojus.it	*Eurojus*
Europa e diritto privato	*Eur. dir. priv.*
Europäische Grundrechte Zeitschrift	*EuGRZ*
Europe – Le mensuel du droit de l'Union européenne	*Europe*
European Constitutional Law Review	*ECLRev*
European Foreign Affairs Review	*EFAR*
European Human Rights Law Review	*EHRLR*
European Journal of International Law	*EJIL*

European Journal of Language Policy	*Eur. J. Lang. Policy*
European Journal of Migration and Law	*Eur. J. Migr. Law*
European Journal of Political Economy	*Eur. J. Pol. Eco.*
European Law Journal	*Eur. Law J.*
European Law Review	*ELR*
European Papers – Carnets Européens – Quaderni europei	*European Papers*
European Public Law	*Eur. Public Law*
European Research Study Journal	*ERSJ*
European Yearbook on Human Rights	*EYHR*
EUWEB Legal Essays. Global & International Perspectives	*EUWEB Legal Essays*
Famiglia e diritto	*Fam. dir.*
Federalismi.it – Rivista di Diritto pubblico italiano, comparato, europeo	*Federalismi.it*
Feminist Media Studies	*Fem. Media Stud.*
Forced Migration Review	*FMR*
Foro italiano	*Foro it.*
Freedom, Security & Justice: European Legal Studies	*FSJ*
German Yearbook of International Law	*Germ. YB Int. Law*
German Law Journal	*Ger. Law J.*
Giurisprudenza Costituzionale	*Giur. Cost.*
Giurisprudenza italiana	*Giur. it.*
Giustizia civile	*Giust. civ.*
Giustizia insieme	*Giust. ins.*
Gli Stranieri	*Gli Str.*
Global Governance: a Review of multilateralism and international organizations	*GGRMIO*
Groningen Journal of International Law	*GroJIL*
Grotius	*Grotius*
Guida al diritto	*Guida dir.*
Harvard Human Rights Journal	*Harvard HRJ*
Harvard International Law Journal	*Harv. Int. Law Journ.*
Hellenic Review of European Law	*HREL*

Houston Journal of International Law	*Houston JIL*
Human Rights Law Journal	*HRLJ*
Human Rights Law Review	*HRLR*
Human Rights Quarterly	*HRQ*
Humanitäres Völkerrecht	*HV*
I Post di AISDUE – Associazione Italiana Studiosi di Diritto dell'Unione Europea	*I Post di AISDUE*
Il Blog di AISDUE – Associazione Italiana Studiosi di Diritto dell'Unione Europea	*BlogDUE*
Il Diritto dell'Unione Europea	*DUE*
Il Fallimento e le altre procedure concorsuali	*Fallimento*
Il Nuovo diritto	*I.N.D.*
India Quarterly	*India Q.*
International & Comparative Law Quarterly	*ICLQ*
International Criminal Law Review	*Int. Crim. Law Rev.*
International Development Policy | Revue internationale de politique de développement	*IDP*
International Journal for Equity in Health	*Int. Journal for Equi. Health*
International Journal of Constitutional Law	*ICLJournal*
International Journal of Intercultural Relations	*IJIR*
International Journal of Law in Context	*Int. J. Law Context*
International Journal of Middle East Studies	*Int. J. Middle East Stud.*
International Journal of Refugee Law	*Int. J. Refug. Law*
International Journal on Minority and Group Rights	*IJMGR*
International Labour Review	*Int. Labour Rev.*
International Law/Revista Colombiana de Derecho Internacional	*Rev col der intern.*
International Legal Materials	*ILM*
International Migration	*IM*
International Migration Institute – Working Paper	*Int. Migr. Inst. Work. Paper*
International Migration Review	*Int. Migr. Rev.*
International Organization	*IO*

International Review of the Red Cross	*IRRC*
International Security	*Int. Sec.*
International Studies in Human Rights	*ISHR*
ISIL Yearbook of International Humanitarian and Refugee Law	*ISIL Yearb. Intern. Hum. Ref. Law*
Italian Journal of Educational Technology	*IJET*
Italian Yearbook of International Law	*It. YB. Int. Law*
IZA Journal of Migration	*IZA Jour. Migr.*
Journal of African Economies	*JAE*
Journal of African Law	*J. Afr. Law*
Journal of African Union Studies	*J. Afr. Union Stud.*
Journal of Borderlands Studies	*JBS*
Journal of comparative family studies	*J. Comp. Fam. Stud.*
Journal of Economic Literature	*J. Econ. Lit.*
Journal of Environmental Law	*J. Environ. Law*
Journal of Epidemiol Community Health	*JECH*
Journal of Ethnic and Migration Studies	*J. Ethn. Migr. Stud.*
Journal of European Economic Association	*JEEA*
Journal of European Public Policy	*JEPP*
Journal of Information Technology & Politics	*J. Inf. Technol. Politics*
Journal of Inter American Studies	*Journal IAS*
Journal of Inter-American Institute of Human Rights	*IIHR*
Journal of International Criminal Justice	*J. Int. Crim. Justice*
Journal of International Law & International Relations	*JILIR*
Journal of International Women's Studies	*J. Int. Women's Stud.*
Journal of Labor Economics	*JLE*
Journal of Migration and Human Security	*JMHS*
Journal of Peace Research	*J. Peace Research*
Journal of Refugee Studies	*Journ. of Ref. Stud.*
Journal of Social Media Studies	*J. Soc. Media Stud.*
Journal of Transnational Law and Policy	*J. Transnat. Law Pol.*
Journal of Trasgender Health	*JTH*

Judicium	*Judicium*
Juris-classeur de Droit international	*J.-Cl.D.I.*
Justices, Revue Générale de droit processuel	*Justices, RGDP*
KoreEuropa	*K.Eur.*
La cittadinanza europea online - Rivista di studi e documentazione sull'integrazione europea	*Cittadinanza europea*
La Comunità internazionale	*Com. int.*
La Giustizia penale	*Giust. pen.*
La Legislazione penale	*Legisl. pen.*
Lavoro Diritti Europa	*Lav. Dir. Eur.*
Lavoro e diritto	*Lav. e Dir.*
Law & Society Review	*Law Soc Rev.*
Law and Practice of International Courts and Tribunals	*LPICT*
Le nuove leggi civili commentate	*Nuove leggi civ. com.*
Leiden Journal of International Law	*LJIL*
Leiden Law Blog – Leiden Law School	*Leiden Law Blog*
L'Indice penale	*Ind. pen.*
Liverpool Law Review	*Liverp. Law Rev.*
Loyola of Los Angeles International and Comparative Law Review	*LoyLAIntl&CompLRev*
Maastricht Journal of European and Comparative Law	*Maastricht JECL*
Mediterranean Journal of Social Sciences	*Mediterr. J. Soc. Sci.*
Mershon International Studies Review	*MISR*
Middle East Journal	*Middle East J.*
Migraciones Internacionales	*Migr. Int.*
Migration and Development	*Migr. & Dev.*
Migrations Société	*Migr. Soc.*
National Bureau of Economics Working Paper	*NBE Working Paper*
Nederlands Juristenblad	*NJB*
Netherlands Quarterly of Human Rights	*NQHR*
New Journal of European Criminal Law	*New J. Eur. Crim. Law*
New York University Journal of International Law and Politics	*N.Y.U. JILP*

Nomos: le attualità nel diritto	*Nomos*
Nordic Journal of International Law	*Nordic JIL*
Observateur des Nations Unies	*Obs. NU*
Ordine internazionale e diritti umani	*Rivista OIDU*
Osservatorio Associazione Italiana dei Costituzionalisti	*Oss. AIC*
Papers di Diritto europeo	*Pap. dir. eur.*
Polish Migration Review	*Polish Migr. Rev.*
Politica del diritto	*Pol. dir.*
Política y Sociedad	*Política y Soc.*
Population and Development Review	*Pop. and Develop. Rev.*
Population and Environment	*Popul. Environ.*
Public Law	*Pub. L.*
Quaderni costituzionali	*Quaderni Cost.*
Quaderni della Rassegna di diritto pubblico europeo	*Quad. Rass. dir. pubbl. eur.*
Quaderni di Rassegna Sindacale	*QRS*
Quaderni di SIDIBlog - il blog della Società italiana di Diritto internazionale e di Diritto dell'Unione europea	*Quaderni di SIDIBlog*
Quebec Journal of International Law	*QJIL*
Queen Mary School of Law Legal Studies Research Paper	*Queen Mary SLLSRP*
Questione giustizia	*Quest. giust.*
Questions of International Law	*QIL*
Rassegna forense	*Rass. Forense*
Recht	*Recht*
Recueil des Cours de l'Académie de droit international de la Haye	*RCADI*
Refugee Research Working Paper	*RRWP*
Refugee Survey Quarterly	*Refug. Surv. Q.*
Répertoire communautaire	*Rep. com.*
Research in African Literatures	*Res. Afr. Lit.*
Review of European and Comparative Law	*RECoL*
Revista CIDOB d'Afers Internacionals	*Rev. CIDOB d'Afers Int.*

Revista da Faculdade de Direito da Universidade de Lisboa	*RFDUL*
Revista de Derecho Comunitario Europeo	*Revista derecho com. eur.*
Revista de Estudios Jurìdicos y Criminològicos	*REJC*
Revista de Instituciones Europeas	*Revista Inst. Eur.*
Revista de la Facultad de Derecho de la Pontificia Universidad Catolica del Perú	*Revista Derecho PUCP*
Revista de la Fundación para el Debido Proceso Legal	*DPLF*
Revista Derecho del Estado	*Rev D.E.*
Revista Electrònica Interuniversitaria de Formacion del Profesorado	*REIFP*
Revista Interdisciplinar da Mobilidade Humana	*REMHU*
Revista Mexicana de Derecho Constitutional	*Revista MDC*
Revue belge de droit international	*RBDI*
Revue de droit comparé du travail et de la sécurité sociale	*RDCTSS*
Revue de droit international et de droit comparé	*Rev. dr. int. dr. comp.*
Revue des Arts, Linguistique, Littérature & Civilisations	*Rev. ALLC*
Revue du droit de l'Union Européenne	*RDUE*
Revue du marché commun et de l'Union européenne	*Rev. M. comm.*
Revue Études internationales	*Rev. Études internat.*
Revue européenne des migrations internationales	*REMI*
Revue française de droit administratif	*RFDA*
Revue Générale de Droit International Public	*RGDIP*
Revue générale de droit médical	*RGDM*
Revue hellénique des droits de l'homme	*RHDH*
Revue internationale de droit comparé	*RIDC*
Revue trimestrielle de droit européen	*Rev. trim. dr. eur.*
Revue trimestrielle des droits de l'homme	*Rev. trim. dr. homme*
Revue universelle des droits de l'homme	*Rev. univ. dr. homme*

Rivista AIC – Associazione italiana costituzionalisti	*Rivista AIC*
Rivista critica di diritto del lavoro	*Riv. critica dir. lav.*
Rivista del diritto della sicurezza sociale	*Riv. dir. sic. soc.*
Rivista della cooperazione giuridica internazionale	*Riv. coop. giur. internaz.*
Rivista di diritti comparati	*Riv. dir. comp.*
Rivista di diritto civile	*Riv. dir. civ.*
Rivista di diritto europeo	*Riv. dir. eur.*
Rivista di diritto internazionale	*Riv. dir. int.*
Rivista di diritto internazionale privato e processuale	*RDIPP*
Rivista di diritto privato	*Riv. dir. priv.*
Rivista di diritto processuale civile	*Riv. dir. proc. civ.*
Rivista interdisciplinare sul diritto delle amministrazioni pubbliche	*Riv. inter. dir. amm. pubbl.*
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Rivista italiana di diritto pubblico comunitario	*Riv. it. dir. pubbl. com.*
Rivista trimestrale di diritto e procedura civile	*Riv. trim. dir. proc. civ.*
Rivista trimestrale di diritto pubblico	*Riv. trim. dir. pubbl.*
Seton Hall Legislative Journal	*SJICL*
Sistema penale	*Sist. pen.*
Social Politics: International Studies in Gender, State & Society	*Soc. Politics*
Social Science Quarterly	*SSQ*
Strasbourg Observers Blog	*Strasbourg Observers*
Strategic Review for Southern Africa	*Strateg. Rev. S. Afr*
Studi sull'integrazione europea	*Studi integr. eur.*
Studies in Political Economy	*Stud. Political Econ.*
Studium Iuris	*Studium Iuris*
Sud in Europa: bollettino d'informazione sull'Unione europea	*Sud in Europa*

SUR-Revista internacional de derechos humanos/ SUR-International Journal on human rights	*SUR-RDIH/ SUR-IJHR*
Texas International Law Journal	*Texas ILJ*
Texas Law Review	*Texas L. Rev.*
The African Society of International and Comparative Law Proceedings	*AfrILPROC*
The Age of Human Rights Journal	*AHRJ*
The British Journal of Criminology	*Brit.J.Criminol.*
The Canadian Yearbook of International Law	*Canadian YIL*
The Economic Journal	*Eco. Jour.*
The European Legacy	*EL*
The Global Community:Yearbook of International Law and Jurisprudence	*Global Community YILJ*
The Indonesian Journal of Southeast Asian Studies	*The Indon. Journ. of South. Asian Stud.*
The International Journal of Human Rights	*Int. J. Hum. Rights*
The International Migration Review	*Int. Mig. Rev.*
The Italian Review of International and Comparative Law	*IRIC*
The Journal of Abnormal and Social Psychology	*J. Abnorm. Psychol.*
The Journal of North African Studies	*J. North African Stud.*
The Lancet Public Health	*The Lancet Pub. H.*
The Oxford Handbook of Language and Law	*OHLL*
The Quarterly Journal of Economics	*QJE*
Third World Quarterly	*TWQ*
Tiempo de Paz	*TDP*
Transnational Law & Contemporary Problems	*TLCP*
University of Miami Inter-America Law Review	*U. Miami Inter-Am. L. Rev.*
University of Richmond Law Review	*U Rich L. Rev*
University of Toronto Law Journal	*UTLJ*
Vanderbilt Journal of Transnational Law	*Vanderbilt JTL*

Verfassungsblog – On Matters Constitutional	*VerfBlog*
Völkerrechtsblog – International law & international legal thought	*Völkerrechtsblog*
Washington and Lee Law Review	*Wash. & Lee L. Rev.*
Work, Employement and Society	*WES*
Working Paper Harvard University	*WP Harv. Uni.*
Working Paper Osorin	*WPO*
World Trade Review	*World trade review*
Yearbook on Humanitarian Action and Human Rights	*YHAHR*
Zeitschrift für ausländisches öffentliches Recht und Völkerrecht	*ZaöRV*

PREFACE

Angela Di Stasi

This volume collects the final results of the PRIN project "International Migrations, State, Sovereignty and Human Rights: Open Legal Issues", funded by the Italian Ministry of University and Research (2019-2024) and coordinated by Professor Angela Di Stasi, University of Salerno, in her capacity as Principal Investigator, Professor Ida Caracciolo, University of Campania and Judge of the International Tribunal for the Law of the Sea, Professor Giovanni Cellamare, University of Bari "Aldo Moro", and Professor Pietro Gargiulo, University of Teramo, in their capacity as Associate Investigators.

Adopting a multilevel and multidisciplinary approach, this book examines international migration and its implications for sovereignty, international cooperation, security, and human rights. In particular, it takes into account the composite framework of international and national rules, and the role of judicial and monitoring bodies in protecting the rights of migrants, with the aim of assessing the state of the art, identifying the gaps, and formulating possible remedies.

The volume also examines the actions of various international organizations (the United Nations and its specialised agencies, in particular the International Labour Organization/ILO, the International Organization for Migration/IOM, the UNHCR, the Council of Europe, and the European Union) and regional practices, such as those of Latin America and South-East Asia, and countries, such as Mexico, Georgia, Tunisia, Italy, and the United States.

The multidisciplinary network that has produced this work brought together a wide range of legal, meta-legal, and non-legal competences and sensibilities to provide a critical and evolutionary reading of a phenomenon that, by its very nature, tends to defy rigid disciplinary boundaries.

The book is divided into six parts. The first part focuses mainly on international cooperation in the field of migration flows, as State and non-State actors have complementary and mutually supporting roles to

play in properly regulating and enhancing migration flows. The focus is on the UN system, including its specialised agencies, and on the most recent UN initiatives to promote the global management of migration flows and the integration of migrants (i.e., the Global Compact for Safe, Orderly and Regular Migration).

The second part is dedicated to the rights of migrants and their situations of vulnerability, examining several profiles linked to different geo-juridical contexts: from the social rights of irregular migrants and long-term residents in the EU system to the right to health of refugee women under international law, from the rights of women migrant workers to the rights of economic migrants in some extra-European practices, from the right to family reunification in the Latin American system to the relevance of the will of migrants in integration policies. It also examines the protection of migrants' personal data and the safeguards against expulsion in the EU legal system.

The third part examines the role of the courts in the protection of certain categories of migrants (i.e. environmental migrants, unaccompanied minors, and asylum-seekers accused of terrorist acts), the consideration of human dignity as the basis and source strengthening the respect of all rights and freedoms, and finally, the responsibilities of monitoring bodies when migrants' rights are allegedly violated.

The fourth part focuses on some recent migration trends affecting very different regions, such as Latin America, South-East Asia, Georgia, Italy, and Tunisia, and reflects, from an evolutionary perspective, on the legal solutions and practices implemented in each context. In particular, several contributions address the possible contamination between legal systems and the compatibility of the proposed models with international humanitarian law, international human rights law, and international refugee law.

The fifth part dwells on the EU migration policy and the coordination of EU Member States in migration management. In particular, it examines a number of new or renewed legal instruments and programmes, such as the new Frontex, the new Action Plan against Smuggling of Migrants, and the EU Development and Regional Protection Programmes. The practice of detaining migrants at the EU borders and the management of migration flows caused by the war in Ukraine are also addressed.

In the sixth and last part, the contributions go beyond the legal perspective and consider the links between migration and sustainable development of the host areas in quantitative terms, the analysis of Arabic texts of Moorish law with regard to the condition of irregular migrants and, finally, the role of linguistic and cultural mediators in the reception of migrants.

The book aims to explore existing and future trends in the development of migration policy from the local to the global level, highlighting the challenges and gaps in the protection of migrants, and providing concepts and empirical findings with implications also for practitioners and lawyers. All these theoretical and empirical contributions could enrich the current international legal debate on the subject by providing a comprehensive, often critical, picture of the migration issue.

September 2023

Angela Di Stasi

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Part I

THE ROLE OF INTERNATIONAL COOPERATION IN THE MANAGEMENT OF MIGRATION FLOWS

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Chapter 1

THE ROLE OF INTERNATIONAL COOPERATION IN THE MANAGEMENT OF MIGRATION FLOWS AND THE INTEGRATION OF MIGRANTS

Pietro Gargiulo

ABSTRACT: *The aim of this work is to provide an analysis of the most recent United Nations initiatives to promote global management of migration flows and the integration of migrants into the host communities. After a brief analysis of the relevant regulatory framework, the work analyzes the UN initiatives to adequately address the management of large movements of migrants. Attention is then turned to the analysis of the contents and implementation of the Global Compact for Migration which represents the most recent action plan adopted by the Organization to promote safe, orderly and regular migration.*

1. Introduction: the United Nations, the global governance of migration and the integration of migrants

As is widely known, international movements of people have become one of the characteristic phenomena of our time. It is equally well-known that current migratory flows are generated by various factors: conflicts, serious and widespread violence, economic aspirations, climate change and environmental factors, persecution, terrorism, violations of human rights. Given that these phenomena occur on a global scale and that they have occurred with unusual frequency in recent decades, it is easy to understand why "the number of international migrants is estimated to be almost 272 million globally, with nearly two-thirds be-

ing labour migrants". At first glance the number may seem huge, but on close consideration it constitutes a small percentage, 3.6%, of the world's population.

Some other date may be useful to delineate the current characteristic of international migration: 52% of international migrants were male, while 48% were female; 74% of all international migrants were of working age (20-64 years). Regarding the countries of origin of international migrants, India ranks first (15.5 million), followed by Mexico (11.8 million) and China (10.7 million). The United States remains the top destination country for international migrants. Germany is the second top destination for international migrants. [1]

International migration is a phenomenon that affects all continents, but this fact is not always correctly represented. Indeed, media attention is often dominated by a Eurocentric approach aimed at emphasizing the irregular movements of people and the tragedies affecting irregular migrants especially in the Mediterranean Sea. [2]

International migration is also a complex phenomenon that involves in its governance the origin, destination, and transit States (States through which migrants may travel), as well as the States where migrants are hosted after crossing national borders. Despite this, the governance of the migration phenomenon remains mainly entrusted to the politics and legislation of individual States. The latter have the competence to decide on the entry and stay of foreigners on their territory. However, this does not mean that there are no forms of international cooperation aimed at regulating the phenomenon.

The main objective of this work is to analyse the most significant initiatives of international cooperation for the governance of migratory flows and for the integration of migrants.

The analysis will focus, in particular, on the activities of the United Nations because these constitute a fundamental point of reference in order to obtain a picture of the developments of international cooperation on the two issues we have indicated. Indeed, on these issues and many others related to migration, it is the entire UN system that comes to the fore. The specialized agencies, programs, funds, offices that make

[1] These data are taken from IOM, *World Migration Report 2020*, 2019, 21 ff.

[2] M. SCIPIONI (2018), *Failing forward in EU migration policy? EU integration after the 2015 asylum and migration crisis*, in *JEPP*, 25(9), 1357-1375; D. DAVITTI (2018), *Biopolitical borders and the state of exception in the European migration 'crisis'*, in *EJIL*, 29(4), 1173-1196.

up the "family" of the United Nations, thanks to their role and their activities, have made a significant contribution to the knowledge of the phenomenon of migration and the problems related to migrants.

In this chapter we will focus attention, first of all, on the initiatives that have been implemented within the UN system since the start of the new millennium, also with the aim of optimizing the work between the various institutions that deal with migration. Secondly, we will address the analysis of the content and implementation of the Global Compact for Safe, Orderly and Regular Migration (GCM) which, as is known, constitutes the last important document for understanding the developments and trends of international cooperation on migration. [3]

Before that, in the following paragraph, we shall provide a concise analysis of the relevant international normative framework on migration as this constitutes the reference basis for all the international cooperation initiatives we shall analyse.

2. The relevant international normative framework on migration: a concise analysis

As already indicated above, the analysis of international cooperation in the field of governance of migratory flows and migrant integration policies in destination States cannot be separated from an examination, albeit a summary one of the relevant international norms on the subject. [4]

The legal rules to which we refer have been developed over time and belong to different international regulatory contexts. This means that the governance of migration finds a normative point of reference in numerous multilateral agreements which deal with the issue of movement of persons under various perspectives.

One aspect that needs to be emphasized preliminarily is that international law recognizes an important role for States, which have the authority to regulate the admission, removal, residence, and naturalization

[3] M. KLEIN SOLOMON, S. SHELDON (2018), *The global compact for migration: From the sustainable development goals to a comprehensive agreement on safe, orderly and regular migration*, in *Int. J. Refug. Law*, 30(4), 584-590; T. GAMMELTOFT-HANSEN (2018), *The normative impact of the global compact on refugees*, in *International Journal of Refugee Law*, *30*(4), 605-610; W. KÄLIN (2018), *The Global Compact on Migration: a ray of hope for disaster-displaced persons*, in *Int. J. Refug. Law*, 30(4), 664-667.

[4] V. CHETAIL (2019), *International Migration Law*, Oxford, 1.

of migrants. However, their competence in the matter is limited by the rules of international law, especially agreements, which they have voluntarily accepted.

The main normative framework, the one to which we will pay greater attention in this chapter, is the international human rights law, within which an essential role is played by the Universal Declaration of Human Rights (1948) and by the so-called "core treaties" of the United Nations.

The other international normative frameworks which are relevant for understanding the variety and complexity of the international rules relating to the phenomenon of migration are the following: international refugees law embodied in the Geneva Convention[5] and its Protocol;[6] international labour law which includes certain conventions negotiated under the auspices of the International Labour Organization (ILO);[7] international criminal law as regards trafficking and smuggling;[8] international maritime law and international civil aviation law as regard modes of movements of migrants;[9] and more recently international en-

[5] See *Geneva Convention on the Status of Refugees*, adopted in 1951 and which came into force in 1954.

[6] See *Protocol Relating to the Status of Refugees*, adopted in 1967 and which came into force that same year.

[7] We refer in particular to the folllowing conventions: *Migration for Employment Convention* (Revised) (*ILO Convention no. 97*) adopted in 1949 and which came into force in 1952; *Convention Concerning Migration in Abusive Conditions and the Promotion of Equality of Opportunities and Treatments of Migrant Workers* (*ILO Convention no. 143*) adopted in 1975 and which came into force in 1978; *Convention Concerning Decent Work for Domestic Workers* (*ILO Convention no: 189*) adopted in 2011 and which came into force in 2013.

[8] See *UN Convention Against Transnational Organized Crime, and the Protocol to Prevent, Suppress and Punish Trafficking Persons, Especially Women and Children*, adopted in 2000 and which came into force in 2003; see also the *Protocol Against Smuggling of migrants by Land, Sea and Air*, adopted in 2000 and which came into force in 2004.

[9] See the *International Convention for the Safety of Life at Sea, as Amended (SOLAS)* adopted in 1974 and which came into force in 1980; the *International Convention on Maritime Search and Rescue, as Amemded (SAR)* adopted in 1979 and which came into force in 1985; *UN Convention on the Law of Sea (UNCLOS)* adopted in 1982 and which came into force in 1994; the *Convention on International Civil Aviation* (Chicago Convention adopted in 1944 and which came into force in 1947).

vironmental law as regards the phenomenon of climate change and "environmental migrants". [10]

As previously indicated, the normative framework to which we would like to reserve some specific consideration is international human rights law. Relevant in this context are the Universal Declaration of Human Rights (1948) and some UN "core treaties" that provide a sure point of reference for the reconstruction of human rights applicable to migrants. This is because the human rights enshrined in the treaties in question must be guaranteed by State parties not only to their own nationals but to everyone on their territory or under their jurisdiction, regardless of their status as migrants or other characteristics.

Reference is made here, first of all, to the two Pacts of 1966, on civil and political rights and on economic, social and cultural rights respectively. [11] Then follow the international agreements relating to the elimination of all forms of racial discrimination and all forms of discrimination against women, [12] and the treaties against torture, [13] on the rights of the child, [14] on the protection of the rights of migrant workers and members of their families, [15] on the rights of the disabled, [16] on the protection of people from enforced disappearance. [17]

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[10] Among the most relevant agreements, see the *UN Framework Convention on Climate Change (UNFCCC)* adopted in 1992 and which came into force in 1994 and *the Paris Agreement* adopted in 2015 and which came into force in 2016. On this issue see J. MCADAM (ed.) (2012), *Climate Change, Forced Migration, and International Law*, Oxford, 1; J. TOSCANO (2015), *Climate Change Displacement and Forced Migration: An International Crisis*, in *AJEP*, *6*, 457.

[11] See the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* both of which came into force in 1976.

[12] See the *International Convention on the Elimination of All Forms of Racial Discrimination* adopted in 1966 and which came into force in 1969 and the *Convention on the Elimination of All Forms of Discrimination Against Women* adopted in 1979 and which came into force in 1981.

[13] See the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* adopted in 1984 and which came into force in 1987.

[14] See the *Convention on the Rights of the Child* adopted in 1989 and which came into force in 1990.

[15] See the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* adopted in 1990 and which came into force in 2003. About this topic, among others, see A. DESMOND (2015),

It is not possible in this paper to adequately examine the content of the treaties in question. However, it seems useful to us to focus attention on some principles and rights that more than others characterize the protection of migrants.

On a general level, it should be emphasized that the "core treaties" set out civil, political, economic, social and cultural rights that are inherent to all human beings due to the common adherence of all State parties to the respect and protection of human dignity.

With regard to the rights that State parties are obliged to concede to migrants, worth highlighting immediately is the right to life. From this can be derived indirectly protection against refoulement or expulsion to a country in which there is a specific and concrete risk to the person's life.

Another fundamental right concerns the prohibition of subjecting the person (the migrant) to torture or other inhuman or degrading treatment. The State party is not only obliged not to engage in prohibited conduct, but must also ensure that through refoulements or expulsions the rights of the migrant subject to its jurisdiction are not violated.

The right to protection of private and family life, which, as far as migrants are concerned, relates to the issue of family reunification, also deserves special emphasis. This right implies that the expulsion or non-admission of foreigners linked by family ties with legally resident migrants is not permitted. However, the right in question can be limited to certain conditions if provided for by law or because they are necessary for some fundamental purposes of the State.

Finally, the right to freedom of movement also deserves a mention. This right guarantees to the migrant who lawfully is within State territory the right to freedom of movement and freedom to choose his or her residence. The same right provides for the freedom of everyone to leave any country, including his or her own, and that no one may be arbitrarily deprived of the right to enter his or her own country. However, the State is permitted to impose restrictions as provided for by law or if

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The triangle that could square the circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, in *Eur. J. Migr. Law*, *17*(1), 39-69.

[16] See the *Convention on the Rights of Persons with Disabilities* adopted in 2006 and which came into force in 2008.

[17] See the *International Convention for the protection of All Persons from Enforced Disappearance* adopted in 2006 and which came into force in 2010.

they are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others.

3. UN initiatives on migration since the turn of the Millennium

As already anticipated, with the beginning of the new century, the United Nations has adopted a series of initiatives aimed at strengthening and optimizing the work of the Organization on migration.

A first initiative that is worth mentioning is the establishment by the Secretary General of the UN and some States, in December 2003, in Geneva, of the Global Commission on International Migration (GCIM).[18] The main objective of this panel of experts from different regional areas was to promote a comprehensive debate on numerous relevant aspects regarding international migration. In the final report of its work,[19] adopted in 2005, the GCIM underlined the need to base migration policies on shared objectives and a common vision, while recognizing that in the international context of the time there was no general *consensus* for the introduction of a global governance system for international migration that would include the adoption of new international rules or the creation of new institutions. However, it does not fail to indicate certain principles which should inspire cooperation between States for the adoption of comprehensive, coherent and effective migration policies. Below, in line with the analysis we are proposing, we shall first of all focus on principle VI concerning "Enhancing governance: Coherence, capacity and cooperation" and then on principle IV concerning "Diversity and cohesion: Migrants in society".

The first principle is relevant in order to understand the proposals made to strengthen migration governance; the second instead more directly concerns the issue of the integration of migrants.

Principle VI dwells on the different levels of governance that come to the fore to encourage the adoption of migration policies such as those indicated.

At national level, States should adopt coherent migration policies, based on shared objectives and clear criteria for the admission and resi-

[18] See among others A. PÉCOUD, P. DE GUCHTENEIRE (2006), *International migration, border controls and human rights: Assessing the relevance of a right to mobility*, in *JBS*, *21*(1), 69-86.

[19] Global Commission on International Migration (2005), *Migration in an Interconnetted World: New Directions for action*, available online.

dence of migrants consistent with international law, including human rights law. In the report, the GCIM emphasizes that international migration is a complex phenomenon relevant to a broad number of issues, including development, trade, labour, human rights, gender equity, health, security and border control. So, governance at national level should be effectively coordinated among all national institutional actors and also involve non-state actors, such as non-governmental organizations representative of civil society. [20]

Interstate cooperation at bilateral level is also a valuable means of addressing migration issues. The GCIM's report underlines that bilateral agreements between States of origin and destination are an indispensable tool for managing specific issues such as entry, residence, migrant rights, consular protection and the return of migrants with irregular status.

As regards cooperation at regional level, the GCIM highlights the important results of the regional consultative processes to facilitate cooperation and dialogue between States and foster concerted policies on migration governance. However, the GCIM also underlines the limits of cooperation at regional level constituted by the lack of attention to issues such as: the relationship between migration and development; the human rights of migrants; the involvement of civil society and the private sector; interregional consultation.

Finally, in the part relating to international cooperation at global level, the GCIM's report highlights, first of all, the wide range of initiatives of States, international organizations and non-governmental stakeholders which is clear evidence of the importance of migration as a global issue which needs to be addressed at multilateral level. Especially with regard to international organizations, the report notes the proliferation of initiatives by various UN institutions, offices and programs, as well as other organizations such as the IOM, the ILO or the WTO. However, the document also highlights the existence of unnecessary overlaps that limit the possibility of coherent and coordinated responses to the challenges posed by international migration, also due to the absence of adequate funds. The document highlights an essential limit in the absence of coordination between the various entities that deal with the phenomenon of migration at international level. [21] According to the GCIM, effi-

[20] *Ivi*, 67 ff.

[21] The GCIM is very critical of the UN's delay in establishing a specialized agency on migration – at the time the IOM operated outside the United Nations system – and in basing its activities in the field on institutions, offices and

ciency, policy consistency, pooling and exchange of expertise, sharing ideas and information in a more systematic manner are the advantages to be gained from enhanced coordination between the various organizations involved in the area of international migration. For that reason, the GCIM proposed to the UN Secretary-General "the immediate establishment of a high-level inter-institutional group, to pave the way for the creation of an Inter-agency Global Migration Facility in 2006". [22]

With regard to principle IV, more directly connected to the issue of the integration of migrants in the host societies and communities, the GCIM, after stating that "States have a right to determine their own policies with respect to the situation of migrants in society", underlines that they must ensure that such policies are consistent with the principle of international human rights law to which they have adhered. [23] In particular, the GCIM underlines the need for States to ensure that all migrants are able to exercise all of their fundamental human rights and benefit from minimum labour standards as guaranteed by relevant ILO Conventions. However, respect for fundamental rights alone cannot ensure the correct and effective integration of migrants. On this aspect, the GCIM report distinguishes between the situation of authorized and long-term migrants and that of temporary migrants and migrants with irregular status. The former must be fully integrated into society and the "integration process should value social diversity, foster social cohesion and avert the marginalization of migrant communities". [24] To promote a coherent integration process, the GCIM considers it necessary that all actors involved (national and local authorities, entrepreneurs, members of civil society) should work in active partnership with migrants and their associations). In particular, it seems appropriate to underline the GCIM's reference to the concept of active citizenship. It is with reference to this concept that the importance of involving authorized and long-term migrants in political processes is underlined, guaranteeing

programs whose mandates focus on specific aspects and thematic or geographical contexts. Furthermore, the report notes that agencies and institutions such as the World Bank, the WTO, the UNCTAD, the UNDP are not involved in the management of the migration phenomenon, while the link between migration and the specific issues of their mandates is increasingly evident. See Global Commission on International Migration (2005), *Migration in an Interconnetted World: New Directions for action*, cit., 73 ff.

[22] *Ivi*, 76.

[23] *Ivi*, 43.

[24] *Ivi*, 44.

them the right to vote in local elections and, above all, providing speedy and convenient access to citizenship for migrants who choose to remain permanently in the host country. Indeed, the possibility of becoming a citizen of the country in which one lives permanently is the prerequisite for ensuring the effective integration of migrants.[25]

As regards temporary migrants and migrants with irregular status, the GCIM report states that usually they do not have the right to integrate in the society where they are living. However, "their rights should be fully respected and they should be protected against exploitation and abuse".[26]

The second initiative which we think ought to be examined in this context is the Global Migration Group (GMG), an inter-agency group established in 2006 by the UN Secretary-General based on a recommandation from the GCIM. At the time it ceased operations, in 2018, the GMG comprised as many as 22 agencies of the UN system whose main objective was to encourage the adoption of a more coherent, coordinated and comprehensive approach to international migration. Indeed, the GMG focused its activities on the human rights of migrants adopting, in 2010, a landmark joint statement on the human rights of international migrants in an irregular situation,[27] and, in 2018, a document that contains the principles and guidelines for the protection of migrants in vulnerable situations.[28]

4. Preparing the UN for dealing with large movements of migrants

In the middle of the second decade of the twenty-first century, the international community's ability to respond to large movements of people was severely tested by a series of serious incidents in different parts of the world.

It was in that period that a number of initiatives were launched within the United Nations with the aim of strengthening international coop-

[25] *Ivi*, 47.

[26] *Ivi*, 81.

[27] *Statement of the Global Migration Group on the Human Rights of Migrants in Irregular situations*, available online.

[28] *Principles and Guidelines on the Human Rights Protection of Migrants in vulnerable situations*, available online.

eration in the field of migration. The starting point of this new impetus of the Organization to face the challenges deriving from large movements of migrants is certainly the New York Declaration for refugees and migrants. Adopted by the General Assembly in 2016, the Declaration is a document of utmost importance for the issues examined in this work.[29] On a general level, it is important to underline two aspects. The first is the commitment made by the UN member States to address the question of large movements of refugees and migrants through international cooperation and in compliance with their rights and obligations under international law. The second concerns the relationship established between the implementation of the goals of the 2030 Agenda for Sustainable Development and the promotion of orderly, safe, regular and responsible migration. It is no coincidence that the Declaration sets out steps towards the achievement of a global compact for safe, orderly, and regular migration.[30]

As regards strengthening global governance of migration, the Declaration, first of all, welcomes the agreement to bring the IOM into a closer legal and working relationship with the United Nations as a "related organization". The agreement in question establishes the legal framework for the cooperation and coordination of the two international entities, recognizing the IOM as an organization with a global leading role in the field of migration.

Secondly, the Declaration underlines the commitment of the UN member States to strengthen cooperation between countries of origin, transit and destination to facilitate migration in line with the 2030 Agenda on Sustainable Development, building on existing partnership mechanisms at bilateral, regional and international levels.

As regards the integration and well-being of migrants in host societies, the Declaration addresses the issue by emphasizing the contribution of representative civil society organizations, including non-governmental organizations, and encourages deeper interaction of these organizations with governments to find answers to the challenges and opportunities posed by international migration.

The last initiative that needs to be mentioned in order to give an exhaustive picture of the activities of the United Nations in the management of large movements of migrants is the establishment of the United

[29] See UN Doc. A/RES/71/1 adopted by the General Assembly on 19 September 2016.

[30] See Annex II to the Resolution 71/1 quoted in the previous footnote.

Nations Network on Migration (Network). In 2018, the UN Secretary-General replaced the GMG with a new inter-agency coordination mechanism, the Network, to ensure effective, timely and coordinated support to member States in the implementation, follow-up and review of the global compact on migration to be adopted that same year.[31] Other goals of the Network are: "to act as a source of ideas, tools, reliable data and information, analysis and policy guidance on migration issue"; "to promote the application of relevant international and regional norms and standards relating to migration and the protection of the human rights of migrants"; "to provide leadership to mobilize coordinated and collaborative action on migration by the UN system".[32]

As far as membership is concerned, the Network is made up of entities of the United Nations system which voluntarily intend to become members and for which migration constitutes an important part of their mandate.[33] Network members contribute to the planning and implementation of the Network's objective, promote coherence on migration within the UN system, and provide input and advice to the Executive Committee. The latter is the decision-making body of the Network. It is composed of those entities of the UN system with "clear mandates, technical expertise and capacity in migration related fields".[34] As regards functions, the Executive Committee "provides overall guidance to the work of the Network, setting strategic priorities to support member States in the effective implementation, follow-up and review of the GCM". Furthermore, the Executive Committee supports the IOM in coordinating the work of the Network; provides guidance for reporting by the Network to the Secretary-General; decides on the annual workplan for the Network; determines the establishment, focus and composition of the Working Groups. The latter play an important role as they

[31] UN Doc. A/72/643, *Making Migration Work for All*, Report of the Secretary-General, 12 December, 2017, para. 70.

[32] See *Terms of Reference for the UN Network on Migration*, available online.

[33] *Ivi*, para. 3. Initially the Network was composed of thirty-nine entitities of the UN System. For the list see annex II to the document cited in the previous footnote.

[34] The current members of the Executive Committee are: Department of Economic and Social Affairs, ILO, IOM, Office of the High Commissioner for Human Rights, United Nations Development Programme, United Nations High Commissioner for Refugees, United Nations Children's Fund, United Nations Office on Drugs and Crime, WHO, The World Bank.

deal with specific issues and provide technical advice to the Network in its activities. Their activities are guided by work plans established in consultation with the Executive Committee and consistent with the overall Network plan.

Again with regard to the structure, it is necessary to point out that the IOM has assumed the role of Coordinator and Secretariat of the Network. The IOM as Coordinator is entrusted with a particularly important role as it must promote collaboration among Network members in all aspects of its functioning and work. The same also applies to the Secretariat, because the IOM, among other functions, must also: provide support to all constituent parts of the Network in the discharge of their functions; coordinate the preparation of the annual work plan, in line with the input from Network members; facilitate the Network's support to Member States in their application of the GCM.

Finally, in order to contribute, on a voluntary basis, to the collection of technical, financial and human resources necessary for the implementation of the GCM, the Network provides a capacity-building mechanism whose element of greatest interest is constituted by a global knowledge platform through which it is possible to explore data, documents and more, useful for the implementation of the GCM.

5. A common approach to managing international migration: the Global Compact on Migration

As previously indicated, in parallel with the changes introduced within the United Nations system for the management of large migratory flows, the Member States had also started processing the GCM. As is widely known, the GCM is the most recent document on the global architecture for international cooperation on migration.

The negotiations for the development of the GCM took place between 2017 and 2018 through extensive consultations between States and with the involvement of all migration stakeholders. The final text of the GCM was adopted at the Intergovernmental Conference held in Marrakech (Morocco), on December 10 and 11, 2018. Subsequently, the Marrakech compact was approved by the United Nations General Assembly on December 19, 2018.[35] The GCM defines itself as a legally

[35] See UNGA resolution 73/195 which contains, as an attachment, the text of the Global Compact on Safe, Orderly and Regular Migration.

non-binding cooperative framework built on the commitments agreed by States in the New York Declaration for Refugees and Migrants. Thus, the GCM is a document of a predominantly political nature whose main objective is to establish the strategy for the global governance of migration through the strengthening of international cooperation.[36]

Turning to the content of the GCM, it is divided into twenty-three objectives which must be achieved keeping in mind ten guiding principles. The latter are indicative of the document's overall approach to migration governance. First of all, the strong human dimension that the GCM proposes, placing the person at the centre of its strategy and emphasizing the need to promote the well-being of migrants and members of communities in countries of origin, transit and destination. In reiterating, then, the non-binding nature of the document, the transnational character of the migratory phenomenon is underlined and consequently the absolute need for international, regional and bilateral cooperation to address it. Of course, the sovereign right of States to determine their migration policies and their prerogative to govern migration within their jurisdiction, in conformity with international law, is reaffirmed. Nevertheless, the GCM also recognizes that respect for rule of law,[37] due process and access to justice are fundamental aspects of migration governance that not only States but also public and private institutions, as well as persons themselves, must respect. Particularly important among the principles of the GCM is the reference to sustainable development. The document underlines the fact that the Agenda 2030 has recognized migration as a multidimensional reality of great importance for the sustainable development of the countries of origin, transit and destination, which requires coherent and comprehensive responses. The protection of the human rights of all migrants is stated as a point of reference for the implementation of the GCM and is accompanied by the commitment of States to eliminate all forms of discrimination against migrants, including racism, xenophobia, and intolerance. Gender equality and the protection of women's and children's rights are also consid-

[36] V. CHETAIL (2020), *The Global Compact for Safe, Orderly and Regular Migration: a kaleidoscope of international law*, in *International Journal of Law in Context*, *16*(3), 253 ff.

[37] M. PANIZZON, D. VITIELLO, T. MOLNÁR (2022), *The Rule of Law and Human Mobility in the Age of Global Compacts: Relativizing the Risks and Gains of Soft Normativity?*, in *Laws*, *11*(6), 89.

ered priority principles to be taken into account in promoting the application of the GCM. Finally, further principles related to the application of the GCM concern the need to promote a global approach to migration based on the actions of governments and societies, with the involvement of all stakeholders.

Based on the principles indicated, the GCM sets out twenty-three objectives, each of which provides for a commitment followed by a broad indication of actions deemed relevant in order to ensure safe, orderly and regular migration. It is not possible here to undertake a detailed examination of all the objectives. We shall nevertheless focus attention on those most relevant from the perspective of migration governance and migrant integration, i.e., the two overarching issues under analysis in this paper.

As regards the first aspect, objective 23 is extremely important: "To strengthen international cooperation and global partnership for safe, orderly and regular migration". For the realization of this objective, States reaffirm their commitment to support each other through enhanced international cooperation and a revitalized global partnership, reaffirming the centrality of a comprehensive and integrated approach to facilitate safe, orderly and regular migration. In addition, a further commitment is expressed to take the necessary measures to address the challenges with respect to the implementation of the GCM, emphasizing the specific situation of African countries, least developing countries, landlocked developing States, small island developing States and middle-income countries. Finally, the commitment to promote the mutual strengthening of the GCM and other international frameworks is reaffirmed, especially the 2030 Agenda for sustainable development.[38] Briefly, the actions indicated to facilitate the implementation of objective 23 are the following: Support other States through the provision of financial and technical assistance; Increase international and regional cooperation to accelerate the implementation of the 2030 Agenda in geographical areas from which irregular migration originates; Involve and support local authorities in the identification of needs and opportunities of international cooperation for the implementation of GCM; Make use of the capacity-building mechanism to assist States in the implementation of the GCM; Enter into bilateral, regional and international partnerships for the elaboration of solutions to migrant issues of common interest.[39]

[38] See para. 39 of the GCM cited at the previous footnote.

[39] *Ibidem*.

In relation to the second aspect, several objectives are relevant, but the most important is Objective 16: "To empower migrants and societies to realize full inclusion and social cohesion". In this context, States are committed to fostering inclusive and cohesive societies by allowing migrants to become active members of host communities. This is based on a commitment to respect each other's rights and obligations, including compliance with the laws and customs of the host country. States also commit themselves "to strengthen the welfare of all members of societies by minimizing disparities, avoiding polarization and increasing public confidence in policies and institutions related to migration".[40]

To achieve the commitments indicated, the GCM proposes a series of actions among which we believe the most important are the following: To promote mutual respect for the cultures, traditions and customs of host communities and migrants; To establish pre-departure and post-arrival programs to promote knowledge of the legal and social norms of the destination country and to promote basic language training for migrants; To promote the integration of migrants through labour market inclusion, family reunification, education, non-discrimination and health care; To strengthen the role of migrant women by fostering the elimination of gender discrimination, especially as regards access to employment and relevant basic services, and by promoting "their full, free and equal participation in society and the economy"; To establish community centres and programmes at local level to facilitate "intercultural dialogue, sharing of stories, mentorship programme and development of business ties" to improve integration and foster mutual respect; To develop "peer-to-peer training exchange, gender-responsive, vocational and civic integration courses and workshops" to facilitate the exchange of educational experiences; "To support multicultural activities through sports, music, art, culinary festivals, volunteering and other social events that will facilitate mutual understanding and appreciation of migrant culture and those of destination communities"; To foster the integration of migrant children in school communities by promoting knowledge of the migration phenomenon and encouraging respect for diversity and inclusion and preventing any form of discrimination, including racism, xenophobia and intolerance.

It is easy to understand that as regards the aspects indicated, the GCM, while not lacking in some significant innovations, focuses attention on issues that have long been at the centre of the reflections and

[40] *Ivi*, para. 32.

activities of the entities of the United Nations system concerned with the strengthening of migration governance. However, it also represents the first serious attempt to establish a comprehensive action strategy for the management of large migratory flows through the strengthening of multilevel cooperation (bilateral, regional, international).

6. "From promise to action": the implementation of the GCM

In Resolution 73/195, the General Assembly requested the Secretary-General to report to it on a biennial basis on the implementation of the GCM and on the activities of the United Nations in this regard. To date, the Secretary General has presented two reports.[41] These documents highlight not only progress but also the many challenges and gaps that stand in the way of the full implementation of the GCM.[42]

Since the adoption of the GCM in 2018, international migration has remained a particularly important but also highly controversial issue. This is also because of the fallout from the COVID-19 pandemic. First, the pandemic has changed international migration in several ways.[43] Restrictions on mobility and entry requirements have significantly altered the conditions for admission, stay, work and return. Discrimination and xenophobia have increased and contributed to creating a climate in which migrants are considered a threat. Secondly, migrants have been among the groups of people who have been exposed more than others to the risk of coronavirus infection, restrictions in access to health and social protection services, loss of jobs, and inability to access online educational activities and other childcare services. However, it is worth noting that some countries have recognized the role that migrants play in many sectors and services and, as a result, have adopted policies or

[41] See UN Docs A/75/542, 26 October 2020 and A/76/642, 27 December 2021.

[42] T. BLOOM (2019), *When migration policy isn't about migration: Considerations for implementation of the global compact for migration*, in *Ethics & International Affairs*, *33*(4), 481-497; S. CARRERA, K. LANNOO, M. STEFAN, L. VOSYLIŪTĖ (2018), *Some EU governments leaving the UN Global Compact on Migration: A contradiction in terms?*, in *CEPS Policy Insight*, (15), available online.

[43] K.L. ALLINSON, N. BUSUTTIL, E. GUILD, (2021), *Implementing the UN Global Compacts for Refugees and Migrants in Times of Pandemic: A View from the EUMS*, in *EYHR*, 319-347.

practices to ensure non-discriminatory access to healthcare and vaccines and employment protection. In any case, it must be recognized that many problems remain in the governance of migration and too many migrants live in conditions of extreme vulnerability.

Despite the difficulties indicated, the documents on the implementation of the GCM highlight how the principles, objectives and actions established by it continue to represent a point of reference and a guide for the States "to make migration work for all".[44] Indeed, the multilevel cooperation that the GCM seeks to develop is deemed essential to create more inclusive societies and ensure that "migrants are more effectively integrated into communities and economies".[45]

Despite the many difficulties imposed by the pandemic crisis, States have reacted positively to the implementation of the GCM, albeit with different approaches: Some (few) have adopted specific national plans; others have incorporated the Compact into the context of the already existing political framework; still others believe that the national plans for managing the migratory phenomenon are already in line with the provisions of the Compact.

Based on State practices, it is possible to highlight other challenges that affect GCM implementation: "limited resources, technical and technological capacity; inadequate coordination within Governments and with stakeholders; the complexity of irregular migration; and the need to simplify procedures and generate greater awareness of regular pathways".[46]

We have already indicated the negative effects of the pandemic on the achievement of 2030 Agenda goals. However, the pandemic has also emphasized the vital role that migration plays in our economies and societies and the need to better protect, strengthen and promote the management of migrants. This is considered essential to restart a positive trend for the achievement of the objectives of the 2030 Agenda in the current decade.

Another aspect that the Secretary-General's analysis highlights in order to promote a concrete and effective implementation of the GCM concerns the ability of States to reduce the negative effects of natural disasters, climate change and environmental degradation, which are factors that favour the migratory phenomenon. Within the United Nations

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[44] See UN Doc. A/76/642, cit., para. 6.

[45] *Ivi*, para. 8.

[46] *Ivi*, para. 13.

system, projects already exist that try to favour the reduction of mobility connected to these factors. However, the prevailing view is that the efforts of States in these areas need to be strengthened to address the implication for migration.

There is one last aspect of the analysis relating to the application of the GCM that we consider useful to point out. This concerns the promotion of safe and regular migration. As already reported, the pandemic has negatively affected the migration system even though demand for migrant workers remains strong. In order to implement the GCM, this requires States to make a greater effort to adopt measures to facilitate entry and residence of migrants.[47] The commitment of States in this perspective is of utmost importance in preventing and addressing situations of vulnerability that characterize the migratory phenomenon.[48]

7. Conclusion

To assess the progress of international cooperation on migration governance and migrant integration, we have focused our analysis on two aspects. The first concerns the UN's most recent institutional transformations to prepare the Organization for the management of large migratory flows. The second concerns the GCM, the document that represents the most recent attempt by the UN to adopt an overall action plan to address the many problems that characterize the mobility of people in the 21st century.

With regard to the implementation of the GCM, the lights and shadows of international cooperation on migration have been highlighted. These were confirmed in the most recent document produced by the IOM on the subject.[49]

As regards the governance of migration, the document underlines the need to facilitate regular migration by making entry and stay procedures for migrants easier, more accessible and more transparent. In relation to the integration of migrants, the importance of establishing the conditions to encourage the creation of more inclusive and cohesive so-

[47] *Ivi*, para. 60.

[48] I. ATAK, D. NAKACHE, E. GUILD, F. CRÉPEAU (2018). *'Migrants in Vulnerable Situations' and the Global Compact for Safe Orderly and Regular Migration*, in *Queen Mary SLLSRP*, (273).

[49] IOM (2022), *Global Compact for Migration Implementation in Practice: Successes, Challenges and Innovative Approaches*, 1.

cieties with the support of both migrants and local communities is underlined.

Despite the failures and challenges that still remain for a full implementation of the GCM, the hope is expressed that all the actors involved will understand that much more can be done through international cooperation than through individual initiatives.

Chapter 2

INTERNATIONAL ORGANISATION ON MIGRATION, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, AND "MIXED MOVEMENTS": MIGRATION GOVERNANCE BETWEEN COOPERATION, OVERLAPPING MANDATES, AND THE INFLUENCE OF THE STATES

Annalisa Geraci

ABSTRACT: *The purpose of this paper is to examine the relationship between IOM and UNHCR starting from three data: the increasing presence of mixed flows of migrants, the problem of categorizing the migrant (forced/regular), and the revitalization of migration governance. The analysis next turns to the progressive expansion of the mandates of IOM and UNHCR, the peculiar and similar characteristics of the two entities, and the resulting "competition" of responses that affect the efficacy and validity of the actions promoted in the migration sphere. With the revitalization of migration governance through the 2016 New York Declaration, the IOM liaison agreement to the UN, and the development of the two Global Compacts have the roles and respective mandates of IOM and UNHCR become clearer? Or do opportunities for tension and competition between the two entities remain? This competition of actions, combined with the lack of proper coordination and the presence of mixed flows, continues to raise several critical issues, especially for the protection of migrants.*

1. The growth of mixed migrant flows and the revival of international migration governance: an analysis of the context...

The key objective of this paper is to examine the relationship between the International Organisation on Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR) starting with three facts: the revitalisation of migration governance, the problem of migrant categorisation (refugee/economic) and the increasing presence of mixed flows of migrants over the years. These elements provide an overview of the difficulties of coordination and the roles acquired over time by the two entities in the current international context.

"Since earliest times, humanity has been on the move",[1] so began the *New York Declaration on Refugees and Migrants*, unanimously adopted by the United Nations General Assembly on 19 September 2016. With this document, the international community confirmed an awareness of the presence of massive flows of migrants; the fragmented nature of existing legal frameworks; and the difficulty of managing international mobility in the absence of effective international cooperation. A few months earlier, the UN Secretary General himself developed a report, in preparation for the September 2016 High-Level Summit, in which he indicated: a) trends in migration flows; b) the causes of large movements of refugees[2] and migrants; and c) the need to address mixed flows through international cooperation and action. The Report confirmed the progressive increase in human mobility by providing specific data on the scale of migration: "in 2015 the number of international migrants and refugees reached 244 million, an increase of 71 million, or 41 per cent, from 2000. International migrants as a proportion of the global population increased from 2.8 per cent in 2000 to 3.3 per cent in 2015".[3] This was followed by

[1] UN General Assembly (2016), *New York Declaration for Refugees and Migrants*, UN Doc. A/RES/71/1.

[2] The term refugee is understood to mean: an individual who is outside the country of which he/she is a citizen or, in the case of stateless persons, in which he/she habitually resides, and is unwilling or unable to return because of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. The third category, that of displaced persons, includes those individuals who, due to internal conflicts and instability, are forced to abandon their homes and move without crossing the borders of their own country.

[3] UN General Assembly (2016), *In Safety and Dignity: addressing Large Movements of Refugees and Migrants*, UN Doc. A/70/59, 21 April.

a series of considerations and recommendations by the UN Secretary-General: the recognition of the inadequacy of migration policies at national level, the fragmented nature and the emergency nature of such policies, and the difficulty in implementing the promoted responses. Particularly relevant was the acknowledgement of a close relationship between: the awareness of not being able to respond to the migratory challenge "in short order" and the recognition of the "growth in the membership, activities and reach of the International Organization for Migration (IOM), which currently has 162 member States, a presence in some 150 countries and more than 8,000 staff working mainly in the field" (to which we will return later). [4]

Going back to the Declaration, this promoted a survey of the rules of international law applicable to the two categories mentioned. These people leave their country of origin or habitual residence for humanitarian or economic reasons, although it can be said that it is difficult to categorise migrants in either dimension because of the motivations that drive them to move. Human mobility may in fact be determined by the search for new economic opportunities or by the need to escape armed conflicts, poverty, persecution, terrorism or, more generally, human rights violations. [5] In recent times, additional motivations – those related to natural disasters and rapid or slow-onset climate change – are increasing migration flows, calling for stronger responses to address 'mass movements'.

While the New York Declaration represented an important stance of the international community on migration issues, [6] bringing the refugee and migrant dimensions "under the same umbrella". [7] On the other, the

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[4] *Ivi*, 5, para. 14.

[5] Among other documents, see IOM (2017), *Mixed Migration Flows in the Mediterranean*; UNHCR (2010), *Refugee Protection and Mixed Migration: A 10-Point of Action*.

[6] Among others see P. GARGIULO (2020), *Recenti tendenze della cooperazione internazionale in materia di migrazioni. Contenuto, potenzialità e limiti del Global Compact on Migration*, in *Rivista OIDU*, 1 ff.; D. VITIELLO (2018), *Il contributo dell'Unione europea alla governance internazionale dei flussi di massa di rifugiati e migranti: spunti per una rilettura critica dei Global Compacts*, in *Dir., imm. e cittad.*, vol. 3; S. MORETTI (2021), *Between refugee protection and migration management: the quest for coordination between UNHCR and IOM in the Asia-Pacific region*, in *TWQ*, *42*(1).

[7] See C. THOUEZ (2019), *Strengthening Migration Governance: The UN as 'Wingman*, in *J. Ethn. Migr. Stud.*, 45(8), 1242-1216; S. MORETTI (2021), *Between refugee protection*, cit.

two dimensions maintained a clear separation in the second part of the document. In the Declaration, in fact, two sections were developed that addressed the discipline of asylum and that of migration in a sectoral manner, concretely creating two parallel paths: the annexes (I and II).[8] The latter defined the instruments for the realisation of the sectoral objectives (refugee and migration). In the first, a comprehensive refugee response framework was promoted, entrusting its development to the UNHCR with the definition of a *Global Compact on Refugees*.[9] In the second annex, the preparation of a *Global Compact for Safe, Orderly and Regular Migration*[10] coordinated by the International Organisation on Migration (IOM) in its new role as a UN "related organization"[11] was promoted.

The maintenance of the division between asylum and the broader migration discipline reaffirmed a cautious approach to the mandates and activities of the two key migration agencies (UNHCR and IOM),[12] and the willingness of states to maintain a separation between asylum and economic migration. A closer look at the Declaration confirms the substantial preservation of a dichotomy: that between refugee and economic migrant. This distinction is not favourable to an adequate management of 'mass movements' and 'mixed migration flows'. In fact, in the absence of the requirements for refugee status or other forms of complementary protection, the risk for the person concerned is that of running into gaps in protection for him or herself.[13] Ensuring the protection of the 'fleeing' migrant continues to be no easy task: this is because one must navigate within a complex set of covenant human rights norms, together with those dealing with refugees. According to part of the doctrine, however,

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[8] UN General Assembly, *New York Declaration for Refugees and Migrants*, UN Doc. A/RES/71/1, Annexes I-II.

[9] See *Global Compact on Refugees*, UN Doc. A/73/12 (Part II).

[10] See *Global Compact for Safe, Orderly and Regular Migration* (2018), UN doc. A/RES/73/195, 19 December.

[11] UN General Assembly (2016), *Agreement concerning the Relationship between the United Nations and the International Organization For Migration*, UN doc. A/RES/70/296, 5 August.

[12] A. BETTS, L. KAINZ (2017), *The History of Global Migration Governance*, in *RSC Working Paper Series No.*, 122.

[13] See D. VITIELLO (2018), *Il contributo dell'Unione europea*, cit.; G. CATALDI (2018), *La distinzione tra rifugiato e migrante economico*, in G. NESI (ed.), *Migrazione e diritto internazionale: verso il superamento dell'emergenza?*, Napoli, 593.

recourse to international human rights law has some limitations: first, in relation to the territorial scope of human rights treaties. In this case, the protection of migrants could be limited by virtue of agreements with contracting states that, *de facto*, block migrants in third countries from exercising their right to leave the country.[14] The second concerns the treatment of foreigners within the territorial jurisdiction of the state party. Human rights treaties allow contracting parties to differentiate in their treatment of foreigners, for justified reasons and in accordance with the principle of proportionality, depending on the nature and strength of the link they have with the host state.[15] It is also true that none of the attempts to restore unity to the fragmented regulation of migration have produced significant impacts at universal level.[16]

The New York Declaration and the subsequent endorsements of the two 'Global Compacts' go to join another important step: the IOM's 2016 Agreement with the United Nations and the organisation's entry into the UN system as a 'related organisation'.[17] This agreement is particularly interesting, especially in relation to the purpose of this paper. The agreement defines the ways in which the United Nations and the International Organisation for Migration relate to each other to strengthen their cooperation and improve their ability to fulfil their respective mandates (in the interests of migrants and their member states). As will be discussed further below, while the IOM's acquisition of 'related organisation' status has allowed for a greater involvement of the organisation in the IOM system, we need to understand how it has affected not

[14] See T. GAMMELTOFT-HANSEN, J.C. HATHAWAY (2015), *Non-Refoulement in a World of Cooperative Deterrence*, in *Columbia JTL*, 235 ff.

[15] See U. VILLANI (2013), *Linee di tendenza della giurisprudenza della Corte europea dei diritti dell'uomo relativa agli stranieri*, in F. MARCELLI (ed.), *Immigrazione, asilo e cittadinanza universale*, Napoli, 273 ff.; D. VITIELLO (2018), *Il contributo dell'Unione europea*, cit.

[16] See R. CADIN (2014), *Protection "of" or "from" Migrants? The Failure of Western Countries to Ratify the UN Convention on Migrant Workers' Rights*, in *KoreEuropa*; International Law Commission (ILC), *Draft Articles on the Expulsion of Aliens, with Commentaries*, UN Doc. A/69/10, 2014, para. 45; C. TOMUSCHAT (2013), *Expulsion of aliens: the International Law Commission's draft articles*, in G. JOCHUM, W. FRITZEMEYER, M. KAU (eds.), Grenzüberschreitendes Recht – Crossing Frontiers: Festschrift für Kay Hailbronner, Heidelberg, 662 ff.

[17] UN General Assembly (2016), *Agreement concerning the Relationship between the United Nations and the International Organization For Migration*, A/RES/70/296, 5 August.

only the IOM's role, but also its 'cooperative dialogue' in relation to another key agency in the context of migration: the UNHCR. The reinvigoration of international migration governance and the entry of the IOM into the UNHCR system should have led to more adequate and better coordinated responses of the international community in different crisis contexts (refugee protection management and migration *'tout court'*). The greatest perplexity would seem to have arisen in those borderline situations, i.e., somewhere between the GCM and the GCR, although there has been a search for complementarity between the two pacts. These doubts were then joined by criticism regarding the status of the IOM and its capillary presence in various areas of international migration.[18] And, on the effective coordination between IOM and UNHCR.

The analysis will therefore focus on the progressive expansion of the mandates of IOM and UNHCR, on the peculiar and similar characteristics of the two entities and on the consequent 'competition' of responses that affects the effectiveness and validity of the actions promoted in the field of migration.[19] Does the relaunch of migration governance succeed in clarifying the roles and respective mandates of the IOM and UNHCR? Or do opportunities for tension and competition between the two entities remain? This competition of actions, combined with the lack of proper coordination and the presence of mixed flows, continues to raise several critical issues, especially for the protection of migrants.

2. Creation and gradual expansion of IOM and UNHCR mandates

Both the UNHCR and the IOM were created in 1951. The former was set up to replace the IRO as a subsidiary body of the UN General Assembly to deal with refugees from World War II.[20] The UNHCR as-

[18] E. GUILD, S. GRANT, K. GROENENDIJK (2017), *IOM and the UN: Unfinished Business*, in *Queen Mary SLLSRP*, No. 255, available online; N.R MICINSKI., T.G. WEISS (2016), *International Organization for Migration and the UN System: A Missed Opportunity,* in *Future UNDS Briefing*, No. 42.

[19] A. KOCH (2014), *The Politics and Discourse of Migrant Return: The Role of UNHCR and IOM in the Governance of Return*, in *J. Ethn. Migr. Stud.*, 40(6), 905-923; J. ELIE (2010), *The Historical Roots of Cooperation between the UN High Commissioner for Refugees and the International Organization for Migration*, in *GGRMIO*, 16(3), 345-360.

[20] For an analysis of UNHCR's evolution: J. CRISP (2020), *UNHCR at 70,*

sumed, with the approval of the 1951 Geneva Convention and its 1967 Protocol, the supervisory role in the interpretation and application of both legal instruments.[21] The migration issue and the increase of people 'in need of protection' have made it necessary to broaden the UNHCR's mandate to include additional vulnerable groups: internally displaced persons and stateless persons.[22] Over the years, in fact, new areas of intervention have been added for the UNHCR: since 1972, it has been dealing with the assistance of displaced persons, that is, those who, due to conflicts, have to move around while remaining in the territory of their own country;[23] in 1974, the High Commissioner's assistance was expanded to include stateless persons, people who risk being denied their rights because they do not possess citizenship in any state.[24]

Under the 1951 Geneva Convention and its 1967 Protocol, the Agency continued to cooperate with states to ensure the protection of refugees and the fulfilment by countries of their international obligations in this regard. Beyond the broadening of the categories included in the mandate of the High Commissioner for Refugees, over the years the Agency continued to experience operational instability linked to the

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An Uncertain Future for the International Refugee Regime, in *GGRMIO*, 26, 359-368.

[21] See W. KÄLIN (2003), *Supervising the 1951 Convention relating to the Status of Refugees: Article 35 and beyond*, in E. FELLER, V. TÜRK, F. NICHOLSON (eds.), *Refugee Protection in International Law. UNCHR's Global Consultation on International Protection*, Cambridge, 613 ss.; V. TÜRK (2003), *UNHCR supervisory responsibility*, New Issue in *RRWP*, 67, 4 ff; F. CHERUBINI (2012), *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione europea*, Bari, 1 ff.; G. VICINI (2017), *Illecito internazionale e diritto dei rifugiati: la responsabilità dei Paesi di origine e dei Paesi di asilo*, in A. SPAGNOLO, S. SALUZZO (eds.), *La responsabilità degli stati e delle organizzazioni internazionali: nuove fattispecie e problemi di attribuzione e di accertamento*, Milano, 103.

[22] UNHCR (2013), *Note on the Mandate of the High Commissioner for Refugees and his Office*, available online.

[23] IDPs are defined as "persons or groups of persons who have been forced to flee or leave their homes or places of habitual residence as a result of armed conflicts, internal strife or systematic violations of human rights, and who have not crossed an internationally recognized state border". See L.T. LEE (2001), *The Refugee Convention and Internally Displaced Persons*, in *Int. J. Refug. Law*, 363.

[24] See UN General Assembly (1975), *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, Un Doc. A/RES/3274(XXIX).

General Assembly's consideration of the renewal of its mandate every five years. It was only in 2003 that UNHCR saw its position stabilised by Resolution 58/153 of 22 December 2003, in which the UN General Assembly decided to grant the agency a permanent mandate. This decision, in fact, removed the time limitation on the continuation of the "Office of the High Commissioner contained in its Resolution 57/186 until the refugee problem is solved".

The UNHCR provides international protection and promotes durable solutions for refugees and other vulnerable groups within the scope of its Statute, acting under the authority of the General Assembly. These purposes, under Art. 35 of the 1951 Geneva Convention, must be supported by States, which are obliged to cooperate with the UNHCR in the exercise of its mandate. This provision thus created a link between the Agency and the State Parties, recognising the former's supervisory role in relation to States' conventional obligations. Nonetheless, this 'control' function, although important, cannot be equated with the jurisdictional activity typical of the treaty bodies provided in the main international human rights protection treaties.[25] Unlike the treaty bodies, in fact, the UNHCR has not acquired a formal judicial power of control to be able to assess the violation by States of their conventional obligations.[26]

As mentioned earlier, the UNHCR could not be, at least in the initial phase of its existence, an operational body.[27] The Statute limited its functions to seeking durable solutions to the refugee problem "by assisting Governments and, subject to the approval of the Governments concerned, private organisations".[28] This is why the UNHCR made use of cooperation with intergovernmental and non-governmental organisa-

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[25] The complete list is available on the website of the United Nations High Commissioner for Human Rights (OHCHR), *The Core International Human Rights Instruments and their monitoring bodies*.

[26] E. MASSA (2019), *L'evoluzione del diritto internazionale dei rifugiati attraverso la partecipazione dell'ACNUR alla funzione giurisdizionale*, in *Com. Int.*, (3), 419-445; W. KÄLIN (2003), *Supervising the 1951 Convention*, cit.; F. CHERUBINI (2012), *L'asilo*, cit., 1 ff.

[27] See J. ELIE (2010), *The Historical Roots*, cit.; R. CADIN (2018), *Ultimi sviluppi sull'Organizzazione Internazionale per le Migrazioni: l'ingresso nel sistema delle Nazioni Unite e la proposta di creare una governance euro-mediterranea dei flussi migratori,* in *FSJ*, vol. 3, 11.

[28] See *Statute of the Office of the United Nations High Commissioner for Refugees* (1950), Res. no. 428 adopted by UN General Assembly, UN Doc. A/RES/428(V), para. 1.

tions from the outset and continued to do so later when it acquired autonomous operational capacities. These certainly include the Intergovernmental Provisional Committee for the Movement of Migrants from Europe (PICMME), which later became the current International Organisation for Migration. The organisation was initially established to support European states in the resettlement of some 11 million people displaced because of the Second World War. For some time, the Organisation offered logistical-operational support in the relocation of migrants to countries that offered opportunities for orderly migration as well as readmission and voluntary repatriation activities. From 1951 to 1989, it changed its name several times, before finally taking its current one.[29] This transformation came about because of the constant expansion of the activities it managed: from a 'logistics' agency,[30] operating mainly at regional level, to an organisation with a global presence and activity.

The IOM works with national governments and civil society in several areas related to the complex phenomenon of migration. The organisation's strategic objectives are diverse, among them: a) to provide safe and reliable services to persons in need of international assistance; b) to offer advice and operational support to states, intergovernmental and non-governmental organisations; c) to identify the causes that prompt individuals to move from their country of origin and, consequently, to seek the most congenial solutions to enable them to live a more dignified life; and finally, d) to develop programmes that facilitate the voluntary return and reintegration of displaced persons, refugees and migrants in general. The IOM, as we have seen, is an organisation independent of the United Nations. For example, the organisation has no obligation to report annually to the General Assembly on its activities. Indeed, the IOM, in its autonomy, "may, if it decides appropriate, submit reports on its activities to the General Assembly".[31] However, while

[29] The Intergovernmental Provisional Committee for the Movement of Migrants from Europe (PICMME) took on the name Intergovernmental Committee for Migration (ICM) in 1980, thus losing its European connotation (Resolution 624 of 19 November 1980). On 20 May 1987, the Committee's Council approved the amendments to the 1953 Constitution (in force since 14 December 1989) with Resolution 724 and the ICM took on its current name of International Organisation for Migration (IOM).

[30] M. BRADLEY (2017), *The International Organization for Migration (IOM): gaining power in the forced migration regime*, in *Canada J. Refug.*

[31] The Draft Agreement between UN and IOM was approved by resolution 70/296 of 25 July 2016. According to Art. 16, the Agreement came into force

the IOM maintains its independence with the United Nations, the same cannot be said in relation to the States that are part of the Organisation itself. This is because the activities and projects carried out by the agency are financed by its member states; hence, there is a close link between the IOM's activities and the interests of those countries.

Having analysed, albeit briefly, the birth and expansion of the mandates of IOM and UNHCR, in the next section we will focus on the characteristics that bring the two entities closer together and differentiate them.

3. The characteristics of IOM and UNHCR: elements of similarity and differentiation

In terms of mandate, as we have seen, both UNHCR and IOM have broadened their scope. The former, from dealing with refugees under the 1951 Convention and its 1967 Protocol, has over the years moved on to include categories other than refugees and asylum seekers in its mandate, such as IDPs and stateless persons.[32] The latter has also significantly broadened its mandate[33] over the years to include under the generic term 'migrants' all subjects on the move, regardless of their status and motivations for moving from their country of origin (or habitual residence), or into portions of territory within their own country.[34] It is precisely this widening of the scope of action of the two entities that has created friction in relations between the IOM and the UNHCR over time.[35] Above

upon signing (para. 1), i.e. on 16 September 2016, and also from that date repealed the previous Agreement on Cooperation between the two organisations of 25 June 1996 (para. 2). On this topic, see E. GUILD, S. GRANT, K. GROENENDIJK, *IOM and the UN*, cit.

[32] According to J. Crisp, in a relatively short period of time the UNHCR: «has indeed been transformed from the Office of the High Commissioner for Refugees into something which is beginning to resemble an office of the High Commissioner for Forced Migrants», J. CRISP (2010), *Refugees, Persons of Concern, and People on the Move: The Broadening Boundaries of UNHCR*, in *Canada J. refug.*, 26(1), 73-76.

[33] See R. PERRUCHOUD (1992), *Persons Falling under the Mandate of the International Organization for Migration (IOM) and to Whom the Organization May Provide Migration Services*, in *Int. J. Refug. Law*, 4(2), 205 ff.

[34] IOM (2019), *Glossary on Migration*, in *International Migration Law Series*, No. 34, 232.

[35] A. PÉCOUD (2018), *What Do we Know about the International Organiza-*

all, the latter has taken a defensive stance towards the IOM and its omnipresence, reaffirming its protection mandate and the difference between the people falling within its sphere of competence and the broader category of 'migrants'.[36] While the UNHCR's intention is clear, namely, to reaffirm the persons who are beneficiaries of its protection mandate, creating a clear demarcation between refugees and migrants could put at risk some persons who, while they may not fall under the category of refugees, at the same time, experience situations of great vulnerability.[37] Especially in the ever-increasing context of mixed flows of migrants.

Furthermore, it is interesting to focus on the issue of the protection mandate given to the UNHCR and the lack of the same for IOM. Since this, part of the doctrine has often raised criticism about the expansion of IOM's role and activities, raising strong doubts about the organisation's responsibility in relation to the protection of migrants' rights.[38] Concerns that, among other things, remain according to part of the doctrine even after the UN-IOM agreement signed in September 2016.[39] Although with it one can only acknowledge: an evolution in the relationship between the two entities and a commitment by the IOM to conduct its activities "in accordance with the Purposes and

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tion for Migration?, in *J. Ethn. Migr. Stud.*, 44(10), 1621-1638; M. GEIGER (2018), *Ideal Partnership or Marriage of Convenience? Canada's Ambivalent Relationship with the International Organization for Migration*, in *J. Ethn. Migr. Stud.*, 44(10), 1639-1655.

[36] The need to clarify the distinction is confirmed by UNHCR statements: «Conflating refugees and migrants can have serious consequences for the lives and safety of refugees. Blurring the two terms takes attention away from the specific legal protections refugees require. It can undermine public support for refugees and the institution of asylum at a time when more refugees need such protection than ever before. We need to treat all human beings with respect and dignity. […] At the same time, we also need to provide an appropriate legal response for refugees, because of their particular predicament», See UNHCR viewpoint: '*Refugee' or 'migrant' – Which is right?*, Section news, July 2016. See also H. CRAWLEY, D. SKLEPARIS, (2018), *Refugees, Migrants, Neither, Both: categorical Fetishism and the Politics of Bounding in Europe's 'Migration Crisis*, in *J. Ethn. Migr. Stud.*, 44(1), 48-64; J. ELIE (2010), *The Historical Roots of Cooperation*, cit.

[37] S. MORETTI (2021), *Between refugee protection*, cit.

[38] See A. PÉCOUD (2018), *What Do we Know*, cit.; M. GEIGER (2018), *Ideal Partnership*, cit.; E. GUILD, S. GRANT, K. GROENENDIJK (2016), *IOM and the UN*, cit.

[39] *Ibidem*.

Principles of the Charter of the United Nations and with due regard to the policies of the United Nations furthering those Purposes and Principles and to other relevant instruments in the international migration, refugee and human rights fields".[40] This was a crucial step because the IOM Constitution lacks any reference to the United Nations Charter and respect for human rights. Other doctrine, however, holds that the IOM is obliged to protect migrants and to respect human rights more generally without the need for an amendment to its Constitution. The obligation derives, according to Chetail "from a threefold legal basis: the internal law of the organisation, as informed by the practice of its governing body; the international agreement concluded in 2016 with the UN; and the general rules of international law, including *jus cogens* norms".[41] Adding that it would need to be verified, however, how far the existing legal dimension is respected in practice and what implications this might have on the organisation.

On the other hand, to highlight the lack of evolution of the IOM in the field of human rights protection, part of the doctrine has drawn attention to the choice of the status of related organisation,[42] although the possibility of acquiring the status of a specialised institute of the United Nations had been feared. Adding to this the defining element of the IOM as enshrined in Art. 2(3) of the 2016 Agreement. In it, the IOM was recognised "as an independent, autonomous and non-normative international organisation in the working relationship with the United Nations established by this Agreement". We focus here on the first issue because it is useful in the comparative analysis between the IOM and the UNHCR.

The acquisition by the IOM of the *status* of 'related organisation' places it in an 'intermediate position': it is neither outside the UN system nor fully within it. In essence, the *status* would allow the IOM to maintain a broader autonomy than that of the specialised institute, providing a generic obligation to cooperate and consult with the United Nations.[43] Stricter coordination, on the other hand, is required of the

[40] Pursuant to Art. 2(5).

[41] See V. CHETAIL (2022), *The International Organization for Migration and the Duty to Protect Migrants: Revisiting the Law of International Organizations*, in J. KLABBERS (ed.), *The Cambridge Companion to International Organizations Law*, Cambridge, 244-264.

[42] E. GUILD, S. GRANT, K. GROENENDIJK (2016), *IOM and the UN*, cit.; A. PÉCOUD (2018), *What Do we Know*, cit.

[43] Pursuant to Art. 3(1), UN-IOM Agreement 2016.

UNHCR. By Statute this acts under the authority of the UN General Assembly. An important body related to UNHCR's work is the Executive Committee of the Programme of the UN High Commissioner for Refugees (ExCom). This body was established by the United Nations Economic and Social Committee (ECOSOC) in 1958. The Executive Committee exerts considerable influence on the UNHCR through two basic functions: decision-making and advisory. For the first, the Executive Committee evaluates its work, determines the policies on which it will develop programmes and approves the organisation's budget. For the second, the Executive Committee developed its function by producing annual conclusions on international protection issues. [44]

Another element on which a difference between the two organisations has emerged over time is the degree of autonomy. About this point, part of the doctrine has considered the UNHCR more independent than the IOM due to its clear protection mandate and funding system. Contrast this independence with the dependence of the IOM, describing the latter as an 'opportunistic service provider for states' [45] that bases its funding system on the attractiveness of the programmes it promotes. [46] However, UNHCR's funding system also includes a large share from voluntary donors. This is partly financed by the UN for the agency's administrative and operational costs. For other activities and programmes promoted by the UNHCR, funding comes from voluntary donors (usually states). And of these, most funding (around 80 per cent) comes from the US, Europe, and individual EU countries (e.g., Germany). [47] Therefore, if one relies

[44] On the role of UNHCR see, among others: G. GOODWIN-GILL (2020), *The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law*, in *ICLQ*, vol. 69; J. SZTUCKI (1989), *Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, in *Int. J. Refug. Law*, 285 ff.; A. CORKERY (2006), *The Contribution of the UNHCR Executive Committee to the Development of International Refugee Law*, in *Austral. Int. Law J.*, 97 ff., A. DEL GUERCIO (2016), *La protezione dei richiedenti asilo nel diritto internazionale ed europeo*, Napoli, 30 ff.; V. CHETAIL (2019), *International Migration Law*, Oxford, 370 ff.

[45] See A. PÉCOUD (2018), *What Do we Know*, cit., 1622 ff.

[46] See A.L. HIRSCH, C. DOIG (2018), *Outsourcing Control: The International Organization for Migration in* Indonesia, in *Int. J. Hum. Rights*, 22(5), 681-708.

[47] See S. THORVALDSDOTTIR, R. PATZ, K.H. GOETZ (2018), *What Drives Expenditure Allocation in IOs? Problem Pressure, Donor Interests, and Bureaucratic Resource Mobilization in UNHCR and IOM*, in *APSA Annual Meeting*, vol. 30, Boston, 2 ff.

on the influence of state funding on UNHCR and IOM, both entities are affected.

As Moretti well pointed out, "reality is much more complex".[48] The UNHCR and IOM have both expanded their spheres of competence, the UNHCR having included new subjects under its protection mandate. The IOM has been doing this for several years and continues to promote activities aimed at migration management which are attentive to the protection of migrants' rights. In theory, the formal elements pointing this way are certainly the 2016 UN-IOM agreement and the inclusion of the 'protection of rights' aspect in its strategic and policy documents.[49] As regards 'autonomy', it was seen earlier that there is no entity that can be said to be fully autonomous in its choices of policy and action in the field. The UNHCR, being within the UN system, has less autonomy than the IOM, but even the latter cannot but be said to be dependent on the will of its States Parties in terms of how it finances its activities.

Sharp differences can be found in the UNHCR's role as supervisor in the interpretation and application of the 1951 Geneva Convention and its 1967 Protocol. The IOM on the other hand has no such role. As clarified in the 2016 Agreement, this is a "non-normative international organization". With this definition, some have found a clear desire on the part of the organisation to put a distance between itself and the 'normative dimension' of its activities,[50] while others have interpreted it as 'confirming' the operational character of the international organisation.[51]

4. Cooperation (competition?) between IOM and UNHCR

The broadening of the mandates of the two entities and the rise of complex situations to be managed in the context of 'mixed migration flows' have created opportunities to promote cooperation between IOM and UNHCR. But they have also brought out elements of 'friction' and 'com-

[48] S. MORETTI (2021), *Between refugee protection*, cit.

[49] Among other documents, see IOM (2009), *The Human Rights of Migrants – IOM Policy and Activities*, MC/INF/298.

[50] E. GUILD, S. GRANT, K. GROENENDIJK, *IOM and the UN*, cit.

[51] R. CADIN (2018), *Ultimi sviluppi sull'Organizzazione Internazionale per le Migrazioni*, cit.

petition' in determining the roles and competences of the two pillars of international migration governance. The IOM and the UNHCR have a long history of collaboration and cooperation dating back to the establishment of the two entities. In the early years, the IOM supported UNHCR in resettling refugees and managing migration flows in post-World War II Europe. Since then, the two organisations have collaborated on a wide range of refugee, asylum seeker and migrant issues.

During the 1980s and 1990s, cooperation continued to evolve as the number of refugees and people displaced by conflicts and natural disasters increased worldwide. IOM played an important role in supporting the UNHCR's efforts to provide protection and assistance to refugees and IDPs in crisis situations, such as in Bosnia and Herzegovina, Kosovo, and East Timor.[52]

In the late 1990s, the IOM and the UNHCR strengthened their collaboration through the signing of a *Memorandum of Understanding* (MoU) that outlined areas of cooperation and coordination between the two organisations. The MoU established a framework for collaboration in areas such as emergency response, protection, and resettlement.[53] Analysing the Memorandum, the *ratio* can be understood: to clarify for each sector and subject to which efforts are directed the competencies of both entities: "operational cooperation must be decided on a case-by-case basis. Smooth consultation mechanisms need to be established to ensure that overlap is minimised, and complementarity of efforts and expertise is maximised, in all situations. Even in situations where either UNHCR or IOM assumes primary responsibility for IDPs, consultations between both organisations on specific forms of cooperation will take place" (para. 24).

The fears are clear: the encroachment of their respective mandates, but they are justified by the fact that both entities are increasingly present in the various global contexts and mixed flows of migrants.

Due to the presence of mixed flows, as explored by Moretti, the context of the Asia-Pacific Region was useful to understand the 'on the ground' collaboration between the UNHCR and the IOM. With the Regional Cooperation Agreement (RCA) that IOM and the Australian

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[52] See R. BLACK (2001), *Return and Reconstruction in Bosnia-Herzegovina: Missing Link, or Mistaken Priority?*, in *SAIS Review (1989-2003)*, 21(2), 177-99.

[53] UNHCR (1997), *Memorandum of Understanding between the United Nations High Commissioner for Refugees and the International Organization for Migration*, 15 May.

and Indonesian governments signed in October 2001,[54] coordinated actions between IOM and UNHCR were promoted, but frictions were also evident. The latter, due to an obvious imbalance in the role of the IOM over the UNHCR, especially when considering the funding made available to one and the other entity.[55] This lack of adequate funding to the UNHCR resulted in a lack of effectiveness of the UNHCR within its mandate. And consequently, a deterioration in the protection of those 'in need of protection'.[56]

The relationship between the IOM and the UNHCR continues to be vibrant. It is not easy to see how smoothly they can cooperate in implementing their activities in various crisis contexts, but it is certainly necessary. The reinvigoration of international migration governance has led to questions about the validity of existing legal frameworks. But it has also allowed two pathways to be defined through the two *Global Compacts*, making the UNHCR and the IOM responsible for determining one and the other respectively (in a clarifying but perhaps overly 'binary' perspective).

In 2019, a joint letter of the IOM and the UNHCR sought to clarify their cooperation again, considering the renewed framework for international cooperation on migration. The letter opens with an immediate reference to the two *Global Compacts* as useful tools to regain closer and more effective cooperation, reiterating the distinction between migrants and refugees, thus perpetuating the dichotomy (economic migrant and refugee). This is partly necessary for the formal identification of spheres of competence (of the UNHCR and the IOM), but as we have seen, it is always poorly functional in the management of 'migrants' in the field. Where, in fact, the difference is often not so clear, and subjects' risk not being treated appropriately with respect to their vulnerabilities. The document confirms the IOM's commitment to ensure respect for international refugee law. It then recalls that persons in need of international protection fall under the mandate of the UNHCR, while migrants in vulnerable situations fall under that of the IOM. The '*ratio*' for managing

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[54] CILIS – Center for Indonesian Law, Islam and Society, *Stalemate: Refugees in Indonesia — Presidential Regulation No 125 of 2016, Policy Paper*, Melburne.

[55] See S. MORETTI (2021), *Between refugee protection*, cit.; S. KNEEBONE (2014), *The Bali Process and Global Refugee Policy in the Asia-Pacific Region*, in *Jour. of Ref. Stud.*, 27(4), 596-618.

[56] S. TAYLOR (2014), *Civil Society and the Fight for Refugee Rights in the Asia Pacific Region*, in A. FRANCIS, R. MAGUIRE (eds.), *Protection of Refugees and Displaced Persons in the Asia-Pacific Region*, Farhnam, 35-52.

mixed movements of migrants is potentially resolved in this way: when there is a predominant presence of refugees along certain migratory routes, the lead role should be assumed by the UNHCR. Otherwise, i.e., when the context is mostly composed of migrants, the response will be IOM-led and, where appropriate, UNHCR-supported. When there are situations where it is difficult to clearly determine a preponderance of refugees or migrants, the IOM and the UNHCR will work 'hand-in-hand' through coordination platforms. In the document, reference is made to the activation of a specific 'Platform on Disaster Displacement'.

The premises for a renewed framework of cooperation would seem to exist, at least on paper. However, if one looks at the document reviewing the most recent developments in the UNHCR's strategic partnerships, one realises that the commitments made are difficult to maintain in practice.[57] Indeed, the document confirms that "cooperation with the International Organisation for Migration (IOM) remained critical throughout, both in terms of managing mixed movements as well as in situations of internal displacement". Evidently causing the good intentions and commitments made to promote cooperation between the IOM and the UNHCR to fail.

5. Conclusion

Since their foundation, the UNHCR and the IOM have necessarily had to relate and coordinate in the field of international migration. The 'how' and 'effectiveness' of their relationship as seen continues to have no clear positive effects on the management of migrants and refugees. On the one hand, the UNHCR reaffirming its role and protection mandate to strengthen its position and, at the same time, ward off IOM 'incursions'. On the other hand, the latter trying to strengthen its position around migration by deepening its relations with the Onusian system (as a related organisation). The UNHCR's defensive attitude makes us realise that there are several contexts in which the activities of the two entities have been affected by the 'competition' of actions. Even more so when one looks at the lack of funds, as reported by UNHCR, compared to the needs and appeals promoted by the Agency.[58] This, inevitably, places UNHCR

[57] See Executive Committee of the High Commissioner's Programme (2022), *Strategic partnerships and coordination* (*including UN reform*), EC/73/SC/CRP.6, 18 February.

[58] See UNHCR (2020), *Funding Update 2020, Global Overview*, December; UNHCR (2020), *Consequences of underfunding in 2020*, September.

in a dimension of 'ineffectiveness' or 'weakness', leading to potential negative effects on the protection of refugees and those 'in need of protection'.

The UN Summit held in New York in September 2016 and the subsequent development of the two Global Compacts were supposed to address the issues and promote a renewed, stronger governance framework in migration. The soft law acts approved allowed for the possibility of renewing and promoting new commitments by the international community due to the scale of the migration phenomenon at international level. Although, as noted above, the continued division between the asylum and broader migration disciplines reconfirmed a cautious approach to the mandates and activities of the two key migration agencies (UNHCR and IOM).

The increasing presence of mixed flows of migrants does not help the UNHCR and the IOM to find the right coordination within their mandates and activities. In fact, to date, there are still clear uncertainties about how the UNHCR, and the IOM should coordinate. In some crisis contexts, the establishment of coordination mechanisms has not worked as well as it could have.[59] And probably, even the creation of *'ah hoc*' instruments has not facilitated the promotion of cooperation between the two entities, perhaps bringing more 'complexity within complexity'.

Commitments to cooperate and the willingness on the part of the IOM and the UNHCR to establish coordination modalities in shared documents have not resulted in concrete complementary actions between the two entities. The joint letter of 2019 certainly represents an opportunity to clarify activities and respective roles, especially in the context of 'mixed migration flows', but so far it has proven to be not effective enough.[60] In fact, a more formal agreement between UNHCR and IOM would be desirable in which the roles, responsibilities, and coordination modalities between the two entities are identified to reduce opportunities for competition, better address migration, and avoid negatively affecting migrants and their rights.

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[59] See IRIN (2017), *Bangladesh Resists Greater UNHCR Role in Rohingya Crisis*, 23 October.

[60] See Executive Committee of the High Commissioner's Programme (2022), *Strategic partnerships and coordination (including UN reform)*, EC/73/SC/CRP.6, 18 February.

Chapter 3

MEXICO AND THE UNITED STATES OF AMERICA: FEASIBLE MUTUAL MIGRATION AGREEMENTS IN THE LIGHT OF AGENDA 2030

Alejandra Olay Cheu

ABSTRACT: *In the current global governance scenario, both State and non-State actors play complementary and reciprocal supporting roles in the achievement of the Agenda 2030. The Sustainable Development Goal 10 (SDG 10) is to "reduce inequality within and among countries", and specifically, target 10.7, it encourages States to "facilitate orderly, safe, and responsible migration and mobility of people, also through the implementation of planned and well-managed migration policies". Furthermore, on 10 December 2018 the United Nations adopted the non-binding Global Compact for Safe, Orderly and Regular Migration, that foresees 23 objectives in total. Internal migration policies impact directly on both economies and civil societies, as well on their diplomatic relations. Therefore, a dialogue between legal sources should be put in place to properly regulate and enhance the migration flow. This article aims, firstly, at mentioning some aspects of the migration global governance, and, secondly, at identifying specific issues of Mexico-USA migration addressable by binational efforts. Finally, a short list of recommendations will be drafted in order to draw the perimeter of a feasible mutually agreed USA-Mexico program on remittances. There is no extensive research on the aforementioned matter, since traditionally, bilateral cooperation has been underestimated in this topic, and every State issues its own internal regulations.*

1. Migration governance key dynamics

In the past decades, migration in the Americas, was frequently perceived as a dynamic between immigration and emigration societies. Even if there has been always some migration among countries in the region, the phenomenon did not reach the current scale. Nowadays, the people flow is so intense, that one single country may play the role of State of origin, destination, transit, and even return of migrants, as it occurs with Mexico.

Notwithstanding with the fact that, Mexico, USA and Canada have been commercial partners since 1994 with the signing of the North American Free Trade Agreement (NAFTA), that fostered the main free trade area of the world – at that moment –, migration topics have not been fully solved nor tackled by means of any specific regional, or bilateral migration binding agreement. While regarding trade, States agree that it's beneficial to reduce the barriers to the circulation of goods, services and capital; however, the same focus is not applicable or politically acceptable, for the movement of individuals.

Furthermore, migration governance cannot be regulated in the same way as international trade nor ethically nor technically talking. Movements of goods and capital do not have the same implications as the movement of human beings the approach should be centered on human rights and should comprise other work groups during the negotiation process, such as, NGO's and IT panels, because any migration governance must include the perspective of the migrant as an individual. [1]

Even though migration governance is regulated by a complex framework integrating binding agreements (multilateral governance on a global level) and informal discussion forums (multilateral governance through cooperation on a regional level), [2] migration is still mostly left to unilateral, national policy making, even in integrated areas such as the European Union.

Even if migration keeps being regulated mainly by the national Law, the benefits of migration should not be seen only from the perspective

[1] S. CORNELOUP (2014), *Can Private International Law Contribute to Global Migration Governance?*, in H. MUIR WATT, D.P. FERNÁNDEZ ARROYO (eds.), *Private International Law and Global Governance*, Oxford-New York, 301 ff.

[2] R. HANSEN, J. KOEHLER (2010), *The Future of Migration Governance and Regional Consultative Processes*, Background Paper WMR, International Organization for Migration (IOM), Geneva, available online.

of what migrants can bring to the destination country in a very short time. The relationship between migration and development is much more complex: the political, social and economic processes of potential destination countries will also determine the impact and added value that migration can effectively bring.[3] If migration is poorly governed, it can also negatively impact the development and therefore, the global governance.[4] In fact, the 2030 Agenda includes migration in the global development framework for the first time[5] and recognizes that migration is a powerful driver of sustainable development for migrants and destination communities. It brings significant benefits in the form of skills, strengthening the labour force, investment and cultural diversity, and also contributes to improving the lives of communities in their countries of origin through the transfer of skills and financial resources.[6]

Concerning migration's global governance, the latest soft law instrument is the Global Compact for Safe, Orderly and Regular Migration (Global Compact), adopted by 164 United Nations (UN) Member States in December 2018. "The Global Compact aims at providing a comprehensive vision of international migration and acknowledges that a holistic approach is needed to optimize the overall benefits of migration, while addressing the risks and challenges for individuals and communities in the countries of origin, transit and destination".[7]

Considering that no country is a single player in the migration dynamics, a relevant cooperation between national authorities is required for an effective governance, especially across those geographical regions

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[3] INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM), *Migration, Sustainable Development and the 2030 Agenda*, available online.

[4] "According to Craig Murphy, the term 'global governance' was coined by the independent self-named "Global Governance Commission" supported by the United Nations Secretary General, which reported in 1995 (C.N. MURPHY (2014), *The Emergence of Global Governance*, in T.G. WEISS, R. WILKINSON, *International Organization and Global Governance*, London, 23 ff.)"; quoted by H. VAN LOON (2019), *The Present and Prospective Contribution of Global Private International Law Unification to Global Legal Ordering*, in F. FERRARI, P.D. FERNANDEZ ARROYO (eds.), *Private International Law (Contemporary Challenges and Continuing Relevance)*, Cheltenham-Northampton, 214 ff.

[5] H. VAN LOON (2019), *The Present and Prospective Contribution*, cit., 229.

[6] INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM), *Migration, Sustainable Development and the 2030 Agenda*, cit.

[7] United Nations Global Compact for Safe, Orderly and Regular Migration, final draft, 11 July 2018, available online.

with more possibilities to integrate and align benefits and synergies, such as the Americas. International cooperation is the key facilitator that enables the materialization of a combination of measures put forward in migration soft law instruments.

At a global level, promotion of humane and orderly migration by means of a whole-of-government and whole-of-society approach to migration governance, striving to ensure that migration and migrants' needs are considered across all policy areas, is entrusted to the International Organization for Migration (IOM) [8] an inter-governmental organization part of the UN system. The promotion of these values is also part of global governance.

Concerning regional governance, Latin American and Caribbean countries share a long history of cooperation around migration and protection. Therefore, several mobility agreements that allow people to move within specific subregions (including Mercosur, the Andean Community, CARICOM, and a group of Central America countries) are in force. [9] In spite of that, until now, there had not been, binding agreements, nor soft-law instruments valid across the Americas, as the recently signed Los Angeles Declaration.

In fact, the Los Angeles Declaration was signed on 10 June 2022 by 20 countries of the American continent, including Mexico, Canada and the United States, currently commercial partners by the recent free trade agreement UMSCA (United States, Mexico and Canada Agreement, previously NAFTA) that entered in force July 2020.

The above-mentioned declaration intends to commit governments of the Americas to expand legal migration pathways, support immigrant integration, invest in migration management, and coordinate responses to mass migration movements and displacement crises. Since the agree-

[8] IOM is part of the United Nations System as the leading inter-governmental organization promoting since 1951 humane and orderly migration for the benefit of all, with 175 member states and a presence in over 100 countries. IOM works to help ensure the orderly and humane management of migration to promote international cooperation on migration issues, to assist in the search for practical solutions to migration problems and to provide humanitarian assistance to migrants in need, including refugees and internally displaced people. The IOM Constitution recognizes the link between migration and economic, social and cultural development, as well as to the right of freedom of movement.

[9] A. SELEE (2022), *The Los Angeles Declaration Could Represent a Big Step for Real Migration Cooperation Across the Americas*, available online.

ment is a soft law instrument, more specifically, a governance through cooperation agreement tool,[10] it is not binding. However, it may somehow enhance the creation of a common language and a coherent set of ideas for more cooperatively managing migration movements across the Americas. Additionally, it is remarkable, that, after decades of few operative rules concerning migration between the United States (USA) and Mexico (the Latin American transit country par excellence), it was USA to propose the signature of the Los Angeles Declaration, even if traditionally, it has been the most reluctant country to discuss international cooperation around immigration management and policies. The latter, is somehow, a recognition of the increasingly hemispheric and truly regional nature and scale of migration movements that can no longer be managed in isolation, even by the hemisphere's largest country. And the commitments put forward in the Los Angeles Declaration echo sensible ideas that have been on the table in other regional forums for years.[11]

It is now evident that regional migration governance is a key issue in the Americas agenda. For the first time in modern history, almost all the countries in the hemisphere are now host countries for a significant number of migrant and refugee populations. Just a few years ago, the United States and Canada were the primary destinations for most migrants from Latin America and the Caribbean, while most other countries in the region had significant numbers of emigrants. The latter is a consequence, among other reasons, of a recrudescence of climate changing. For instance, extreme floods and droughts affect migration processes and these natural phenomena are currently occurring across the Americas with no exception.[12]

Northern Central Americans have been leaving in large numbers, heading mostly to the United States, but with several hundred thousand settling down in Costa Rica and Mexico too. In fact, there are few countries in the region that have not received large numbers of migrants and displaced people, and many have also become countries of transit for those heading elsewhere. Even though, it still remains a false paradigm, consisting in the fact that most of the migrants trying to access the United States are Mexican. In fact, a very high percentage of migrants come

[10] *Ivi*, 2.

[11] *Ivi*, 9.

[12] *Ibidem*.

from central America since Mexico is only a transit country, and frequently a return one.

2. Contents of the Los Angeles Declaration

The core of this declaration is as follows:

"We[13] intend to cooperate closely to facilitate safe, orderly, humane, and regular migration and, as appropriate, promote safe and dignified returns, consistent with national legislation, the principle of non-refoulement, and our respective obligations under international law".

"We[14] reaffirm our shared commitment to supporting host communities; strengthening and expanding regular pathways and access to international protection; fostering opportunities for decent work; facilitating regularization and access to basic services; and promoting principles of safe, orderly, humane, and regular migration".[15]

The first pillar of the Declaration is the most feasible to boost eventual USA-Mexico migration programs in the future since it concerns legal migration with a positive return for the host country:

Promoting Regular Pathways for Migration and International Protection:

"We[16] affirm that regular pathways, including circular and seasonal labor migration opportunities, family reunification, temporary migration mechanisms, and regularization programs promote safer and more orderly migration. We intend to strengthen fair labor migration opportunities in the region, integrating robust safeguards to ensure ethical recruitment and employment free of exploitation, violence, and discrimination, consistent with respect for human rights and with a gender perspective. We intend to promote, in accordance with national legislation,

[13] Argentine Republic, Barbados, Belize, the Federative Republic of Brazil, Canada, the Republic of Chile, the Republic of Colombia, the Republic of Costa Rica, the Republic of Ecuador, the Republic of El Salvador, the Republic of Guatemala, Co-operative Republic of Guyana, the Republic of Haiti, the Republic of Honduras, Jamaica, the United Mexican States, the Republic of Panama, the Republic of Paraguay, the Republic of Peru, the United States of America, and the Oriental Republic of Uruguay.

[14] *Ibidem*.

[15] The White House, *Los Angeles Declaration on Migration and Protection*, available online.

[16] See note 13.

the recognition of qualifications and the portability of social benefits".[17] Indeed, all these aims could be the contents of future bilateral migration programs.

According to Andrew Selee,[18] the countries agreed to expand legal pathways as an alternative to irregular migration, since legal pathways may help deter irregular migration by channeling those who want to migrate into safer and more sustainable options; something that deterrence-only strategies have failed to accomplish.[19] While each country will have to decide if and how to harmonize its national legislation and based on its own priorities, the commitment to expanding lawful options for mobility at a time of significant irregular migration and displacement in the hemisphere, is a good direction to pursue. At the Summit, the U.S. government announced important ways of expanding labour pathways for Central Americans and this initiative could/should be part of a Mexico-USA mutually agreed migration program.

At the present, it is not easy to predict if and how the Los Angeles Declaration will be implemented. Like in many other cases of international soft law instruments, there is no institutional authority which controls the implementation, and States do not always adopt the domestic legislation required to comply with the international agreements. Finally, the Declaration creates a set of shared proposals that governments agree they would like to pursue but leaves the actual details to later negotiations. Therefore, after the Los Angeles Declaration has been signed, it would be a politically right moment to repropose migration key arguments to be solved by International Private Law rules in the USA-Mexico agenda by means of a mutual agreement.

3. Are binding USA-Mexico migration programs feasible to be signed and implemented?

Historically, USA has preferred flexible cooperation forums rather than formal binding agreements.[20] So far, some American immigration

[17] The White House, *Los Angeles Declaration on Migration and Protection*, cit.

[18] *Ivi*, 9.

[19] An example of deterrence-only strategy are the Migrant Protection Protocol (MPP) "Stay in Mexico" and the Operation Streamline.

[20] A. SELEE (2022), *The Los Angeles Declaration*, cit., 9.

initiatives have entered in force, most of them of a deterrent nature rather than cooperative one, for instance, 'Operation Streamline'[21] and the Migrant Protection Protocol, more commonly named "Stay in Mexico".

Operation Streamline (OS) was an initiative of the Department of Homeland Security and the Department of Justice launched in 2005 under a "zero-tolerance" policy to prosecute unauthorized immigrants as criminals. Streamline courts were created to deliver *en masse* fast-track criminal court proceedings. Streamline began in Del Rio, Texas, on December 16, 2005 and expanded to every border district except California. In 2018 new Trump administration zero-tolerance prosecution policies resulted in a new Streamline court in San Diego.[22] An important remark must be done: staying in the USA without proper documentation is a violation of immigration law, therefore, an administrative fault, not a criminal offence. Therefore, OS, dramatically modified the status of illegal cross-borders.

Paradoxically, at present, there is no evidence that criminal prosecution deters migration.[23]

The Migrant Protection Protocol (MPP1)[24] was implemented in 2019 by President Donald Trump in order to curb illegal immigration and respond to asylum requests from non-Mexican migrants.

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[21] In March 2009, the author participated in an academic/diplomatic tour across Arizona/Mexico border. The activity was organized by the American Embassy in Mexico that made up a think tank of 10 Mexican internationalists coming across from the diplomacy, academia and public sector. We had the opportunity to witness a *en masse*-hearing for more than 100 unlawful border crossers in the context of "Operation Streamline". Offenders appear in the courtroom in a long row chained to each other at the ankles and wrists. Public defenders of these border-crossers advised them to declare themselves guilty in order to be expelled from the USA and avoid a real criminal prosecution.

[22] END STREAMLINE, *What is Operation Streamline?*, available online.

[23] During the same academic/diplomatic tour, the author interviewed at least 15 cross-borders at Sinaloa. Although it is a very low number, they all, expressed that would try to renter the USA to find a job and be reunited with their families, even if the risk of criminal prosecution was real (M. CORRADINI, J.A. KRINGEN, L. SIMICH, K. BERBERICH, M. EMIGH (2018), *Operation Streamline: No Evidence that Criminal Prosecution Deters Migration*, New York, available online.

[24] American Immigration Council (2022), *The "Migrant Protection Protocols"*, Fact Sheet, available online.

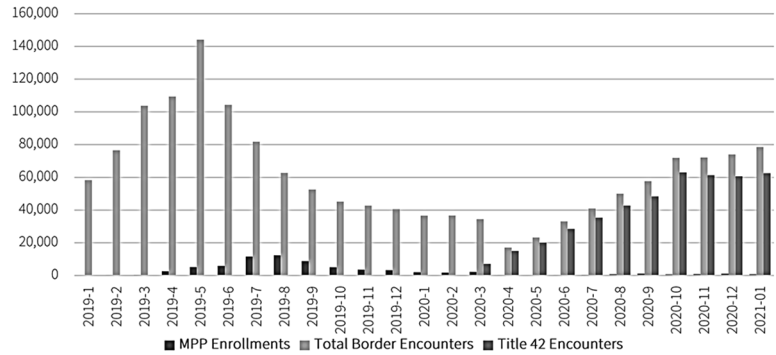
It consisted of migrants being returned to the Mexican border to await the response to their asylum request, however, human rights organizations warned that asylum seekers returned to Mexico were at risk of being subjected to crimes frequently committed at transborder areas.

The MPP sent more than 70,000 migrants to Mexico to await the resolution of their asylum cases in U.S. courts. In addition, many asylum applications were rejected for the following reasons:

- Migrants did not receive the "Notice to Appear (NTA) in time to attend court and the judge terminated the case;
- Migrants received the NTA minutes before the trial and were many miles away from the court, which prevented them from complying with the summons and lost their cases;
- Many NTAs did not reach the migrants because many do not have a stable address in Mexico;
- A high percentage lost their cases because they did not have legal representation;
- Migrants received their Notice to Appear in English and did not understand the instructions;
- Migrants who lost their cases did not know they had 30 days to appeal the judge's decision;
- Migrants did not have evidence to corroborate their stories;
- Migrants did not have cause to seek asylum at the time they filed their petition;
- Some had been previously deported;
- Many abandoned their processes because of the insecurity and poverty in which they live at the border.
- Some died or became ill during the wait.

President Joe Biden amended the protocol and implemented MPP2, that was concluded in 2022, after a legal battle with the Texas and Missouri governments in which the U.S. Supreme Court upheld his decision.

Figure 1. Enrollments in MPP compared to expulsions under Title 42, from January 2019 to January 2021



Source: U.S. Customs and Border Protection data. [25]

This brief overview of the past USA initiatives shows that until now, a deterrent approach has been selected to tackle migration. The reason why more cooperative mechanisms between Mexican and American authorities dealing with migration have not been defined, nor yet implemented, is that in case of irregular migration, policy makers tend to believe that the country of destination bears all the costs and receives little benefits, unless the type of irregular migration meets the domestic labour markets. Hence, the question is: what can the country benefiting from migration offer in exchange? [26] And which of the countries can be deemed as the benefited country? Let's take in consideration that migration flow is a phenomenon with diverse externalities both, positives and negatives for all the stakeholders involved. In order to determine a reciprocity of benefits, a socio-economic analysis of externalities should be made, and only afterwards it would be suitable to sign and implement a mutually agreed migration agreement.

So far, few bilateral migration governance rules have been issued and only in the context of the trade agreements signed by USA, Mexico and Canada. This means that migration is a topic analyzed and assessed only in the context of a commercial agenda between Mexico and USA while

[25] U.S. Customs and Border Protection, U.S. Department of Homeland Security, *Migrant Protection Protocols FY 2021*, available online.

[26] S. CORNELOUP (2014), *Can Private International Law Contribute to Global Migration Governance?*, cit., 307.

American internal policy making uses a deterrent, rather than a cooperative approach. [27]

Another significant feature of Mexican migration is that new patterns have emerged during the last 20 years. Before 2000 Mexicans migrated to the USA for two reasons: a) to work mainly in the agricultural sector or; b) to study at prestigious universities and then, came back to occupy leadership positions in Mexico. Instead, during the 2000-2022 period, different migration patterns evolved. New types of visas were granted under NAFTA provisions. [28] The two visas most frequently requested were: entrepreneur visa and student visa. The latter one granted special benefits, for instance, the Optional Practical Training (OPT), a temporary employment directly related to an F-1 student's major area of study. Eligible students can apply to receive up to 12 months of OPT employment authorization before completing their academic studies (pre-completion) and/or after completing their academic studies (post-completion). [29] This kind of benefit grants students the opportunity to enter the labour market and thus social integration is more easily achieved. During this period, also a higher number of Mexican high-skilled workers were hired in USA, while Mexico suffered from brain-drain.

These new migration patterns may challenge previous conceptions of migration and integration for two reasons. First, because migration processes are less often resulting in permanent settlement, especially for those groups that have the opportunity to move back and forth between the origin and receiving country, [30] like high-skilled workers. Secondly, these new migration patterns may challenge the predictions that migration processes ultimately lead to host country integration or even assimilation. For sure, these concepts are fuzzy themselves. [31]

Therefore, in order to determine the contents of an eventual mutual-

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[27] Interview held to the first and only Mexican "Migrant Deputy", Raúl Torres Guerrero on 17 February 2023.

[28] *Ibidem.*

[29] U.S. Citizenship and Immigration Services, *Optional Practical Training (OPT) for F-1 Students*, available online.

[30] A. FAVELL (2008), *Eurostars and Eurocities: Free Movement and Mobility in an Integrating Europe*, Malden, quoted by F. SPANNER, C. DIEHL (2023), *Settlers, Target-Earners, Young Professionals. Distinct Migrant Types, Distinct Integration Trajectories?*, in *IM*, 105 ff.

[31] C. DIEHL, *Settlers, Target-Earners, Young Professionals*, cit.

ly agreed program between Mexico and USA, some issues should be properly evaluated:

1. The benefits for all the stakeholders must be properly identified and assessed under a triple approach: economic, social and environmental;
2. During the assessment, all the stakeholders must be mapped and listened: USA and Mexico as States, the American communities hosting the migrants, national authorities implementing the agreement, NGO's, Information technologies experts;
3. Negotiation should be done balancing both a human rights-based and a State-centered approach.

4. Migration issues feasible to be tackled by mutually agreed programs between USA and Mexico

Hans Van Loon identified three areas of temporary or circular migration that would benefit from some form of direct institutional cooperation based on a multilateral framework (the same reasoning applies to bilateral frameworks): (1) institutionalizing the implementation of migration programs mutually agreed by States of origin and receiving States; (2) combating trafficking and smuggling through the creation of a licensing and monitoring system for intermediaries; and (3) facilitating the easy, cheap and safe transfer of remittances. [32]

With regard to the latter, given that the generation of wealth is the main incentive for Mexican migrants willing to enter the labour market, and considering that, there are sufficient quantitative and qualitative studies to determine the reciprocal benefits that could be generated for both sending and receiving States, our hypothesis is that the first mutually agreed program suitable to be negotiated and implemented, might be the sending of remittances.

4.1. Remittances in the context of Mexican migration to the United States

In order to adequately describe the context and situation of remittances received by Mexico, we will use the data contained in a serious study published by the Mexican Central Bank (Banxico), the National Insti-

[32] H. VAN LOON (2019), *The Present and Prospective Contribution*, cit., 230.

tute of Statistics, Geography and Informatics (INEGI) and the Interactive Museum of Economics (MIDO).[33]

The main destination of Mexican emigration has always been the USA, where 97.3% of the total number of Mexican emigrants resided in 2019. The American Community Survey and the U.S. census data show that the Mexican migratory flow was very intense from 1990 to 2007. Afterwards, in 2007, when the US border surveillance with Mexico was strengthened, the Mexican migratory flow stopped abruptly, and it turned negative during the period 2007-2019.

Among the different migratory groups with a presence in the USA, Mexicans are one of those with the highest share of undocumented or unregularized immigration statuses. The latest US Department of Homeland Security statistics of 2015 indicate that the number of undocumented Mexican immigrants was 56.5%. In contrast, in 2017, the Pew Research Center estimated that the percentage of undocumented Mexican immigrants was decreased to 43.9%.

The immigration status of immigrant workers has a significant impact on their income levels. According to the Current Population Survey, the income earned by Mexican immigrant workers with citizenship significantly exceeds those without citizenship. In this frame of reference, there would be significant productivity gains for the American economy if the migratory status of more workers were regularized. Data such as the above, which refer to the quality of life of immigrants, should be the object of an accurate analysis, since identifying and quantifying the benefits that the receiving country would obtain, vis a vis those that the sending country would get in return, would provide useful conclusions to adequately negotiate an eventual bilateral migration program.

Another interesting quantitative fact is that Mexico is the third largest remittance recipient economy in the world and the first one in Latin America and the Caribbean. The amount of remittances received by Mexico is very large in absolute terms. However, it is relatively small compared to the size of the Mexican economy. In 2019, remittances were equivalent to 2.9% of Gross Domestic Product.

"Remittances sent home by international migrants are often vital to their families and even to the community, and critical as a major source of income for many countries of origin. There is a role for States here to

[33] J.A. CERVANTES GONZÁLEZ (2021), *El ingreso por remesas y la migración mexicana*, in J.E. HEATH CONSTABLE (ed.), *Lecturas en lo que indican los indicadores. Cómo utilizar la información estadística para entender la realidad económica de México*, Mexico City, available online, 215 ff.

ensure that these money transfers are cheap, fast and safe; hence Goal 10, target 10.c of the 2030 Agenda: 'By 2030, reduce to less than 3 per cent the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5 per cent". [34]

The actual problem is that, costs of remittances from USA to Mexico range from 35% (Citi, same day) to 4.5% (Western Union, next day) which means an average cost of 19.8%. [35] Considering that no other tool to transfer money internationally is available for irregular migrants, since they cannot open a bank account without a residence permit, the market forces tend to preserve very high remittance costs. Some alternatives have been proposed, but even if they are politically attractive, they are not legally feasible. One of them, consists in incentivizing irregular migrants to open a bank account in a representative office of a Mexican bank in USA. [36] This is contrary to chapter 17 of UMSCA that explicitly provides that "acceptance of deposits and other repayable funds from the public is a financial service" [37] and requires several authorizations that a representative office cannot process.

The scope of SDG 10 "Reduce inequality within and among countries" is a very large one, but defining targets and corresponding indicators helps to measure to what extent States are achieving said goal and targets. According to target 10.c. in order to reduce this inequality among countries, remittance corridors with costs higher than 5 per cent should be eliminated. This means that theoretically talking, within 2030, if remittances costs do not decrease, Citi, Wells Fargo, Money Gram and Western Union, among others, should disappear from the USA-Mexico corridor. How could that happen in countries where prices are governed by the law of supply and demand?

USA and Mexico are commercial partners to UMSCA and cannot lower remittance costs by decree or by an executive order. The State's intervention on prices regulation is not accepted in liberalist economies. Top-down policy making in this matter would be not welcomed.

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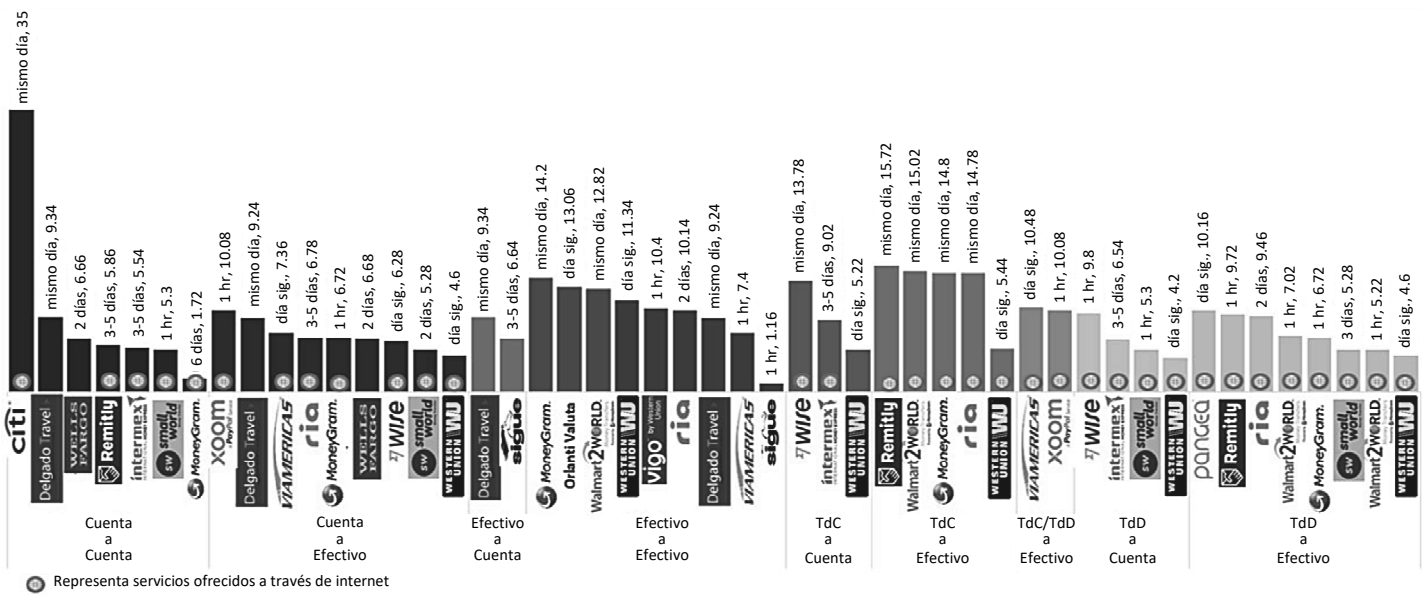
[34] H. VAN LOON (2019), *The Present and Prospective Contribution*, cit., 231.

[35] Banco de Mexico, *Información sobre comisiones cobradas por envío de remesas desde Estados Unidos de América*, available online.

[36] Mexican Remittance Plan 2021, submitted before G20.

[37] USMCA (United States-Mexico-Canada Agreement), drafted on 30 September 2018, entered into force on 1 July 2002, Chapter 17, available online.

Figure 2. Time and total cost for every 200 dollars sent to Mexico. Information updated to second trimester 2022 by the Mexican Central Bank



Costo Total = Comisión más el diferencial del tipo de cambio aplicado con respecto al tipo de cambio de referencia en el periodo.
Tipo de Cambio Referencia promedio = 19.68 mxp/dólar

Source: Banco de México, *Información sobre comisiones por remesas enviadas desde Estados Unidos de América*, available online.

In 2014, G20 Leaders (including Mexico and USA) adhered to the G20 Plan to Facilitate Remittance Flows[38] through which they committed to implement National Remittance Plans (NRPs) supporting effective remittance flows and reducing remittance transfer costs. The G20 NRPs were finalized under Turkey's Presidency in 2015 and updated in 2021. Since NRPs develop plans to implement measures appropriate to each member's circumstances, reading the American Plan, or the Mexican one, it's evident that coordination between national regulatory authorities is somehow missing and national actions do not converge.[39]

Therefore, we propose a short list of actions to be discussed in a dialogue among national authorities (Ministries of Foreign Affairs, central banks) of both States in order to draft and implement a mutual migration agreement on remittances. From our point of view, a minimum set of binding provisions should be issued in a parallel agreement to USMCA applicable to USA and Mexico:

- Creation of a USA-Mexico commission that quantifies, evaluates and assesses migration benefits for both the sending and receiving country under a triple approach: economic, social and environmental;
- Drafting of a mandatory annual report concerning a) the above-mentioned benefits; b) recommendations for the money transfer operators (MTO's) regarding a better allocation of their economic and human resources that allows them to decrease remittances costs and c) recommendations to the national authorities in charge of creating incentives for financial services providers;
- Identification of the national authorities that should make up the above-mentioned commission and the profile of the public servant(s) joining the Commission;
- Further national authorities and units thereof that will be involved in the program;
- Determination of the legal nature, extent and applicable law of the resolutions adopted by the Commission.

[38] Led by the Global Partnership for Financial Inclusion (see: G20 National Remittance Plans, available online).

[39] See the American Plan and the Mexican Plan, both available online.

5. Conclusions

Breaking some paradigms such as the one that supposes that only the receiving State bears all the costs while receives no benefits, would be a good starting point that could foster a new diplomatic phase between Mexico and USA. Since migration issues have been historically discussed and partially addressed while negotiating economic topics in the bilateral agenda, we may hypothesize that a migration cooperation program could arise from a parallel agreement annexed to UMSCA. Environment and labour have been two topics previously tackled under this approach by NAFTA in 1994 and the same logic could be followed for migration and remittances thereof. Considering that remittances have historically been the most relevant link between migrants and their families in Mexico and that sending remittances is so expensive (up to 35% of the remittance), we can conclude that Mexican labour force is producing welfare also for the American providers of money transfers and their ecosystems thereof.

Special features of Mexican new patterns of migrants, deserve an adequate analysis and assessment in order to identify a list of benefits arising from migration flow. Our hypothesis is that benefits arising, for instance, from high-skilled workers and from the remittance high costs, compensate other economic costs arising from irregular migration. The first important step is obtaining reliable economic and social data thereof, so that Mexico and USA are able to understand if a mutually agreed migration program containing a minimum set of mandatory rules is suitable or not to be sign and implement.

To be effectively implemented, institutional cooperation would need some binding rules in order to create the institutional infrastructure, but would only support temporary or circular migration programs mutually agreed by States of origin and receiving States. [40]

Since, as previously explained, Mexico and USA cannot intervene in remittance prices regulation, we think that the binational Commission should draft an annual report issuing recommendations for the MTO's. Even if it's pretty difficult to hypothesize suitable and effective recommendations before a commission conducts quantitative and qualitative studies that provides benefits for both countries, we could certainly affirm that recommendations could be a call to action based on environ-

[40] H. VAN LOON (2019), *The Present and Prospective Contribution*, cit., 231.

mental-social-governance criteria. Few and concrete actions should be put in place internally by money transfer operators capable to creating a win-win mechanism in which prices of remittances tend to decrease for the benefit of the final consumer. On the other hand, the report should also contain recommendations for both governments and incentives feasible to be offered to remittances operators.

The USA-Mexico parallel agreement on remittances could also ensure that the country of origin facilitates access to the financial markets and their transparency; and the country of destination could ensure that families, in particular in remote areas, have access to financial services and receive their money. By means of joint programs arising from the parallel agreement it would be possible to provide assistance to counsel migrants, recipients and communities in the countries of origin to make effective use of remittances.[41] Such cooperation, in particular, would advance Objective 20 of the Global Compact for the Safe, Orderly and Regular Migration: 'Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants".

[41] *Ibidem*.

Part II

MIGRANT RIGHTS AND SITUATIONS OF VULNERABILITY

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Chapter 4

ON THE SOCIAL RIGHTS OF IRREGULAR MIGRANTS

Giovanni Cellamare

ABSTRACT: *The Return Directive contains provisions on certain social rights of non-removable irregular migrants. The Directive refrains from addressing the general problem of access to those rights by all irregular migrants. However, while the European Social Charter does not expressly refer to irregular migrants, arguments connected to respecting human dignity may well lead to applying the Charter to them. The problem in question must be addressed in light of the Charter of Fundamental Rights as well as the international conventions on human rights to which the EU Member States are parties. Accounts should be taken of the indications of the ECHR and the CESCR.*

1. Human dignity and the recognition of social rights to irregular migrants in the EU

As is widely known, the discipline of irregular migration plays a pivotal role in the EU's activity on migration.[1] In this respect, it is worth recalling the importance recognised by the Commission to the conclusion of agreements and "other arrangements" for the readmission of irregu-

[1] See G. CELLAMARE (2021), *La disciplina dell'immigrazione irregolare nell'Unione europea*, Torino, 29 ff.

lar migrants.[2] This has encouraged Member States to enter into informal readmission agreements. Moreover, the report accompanying the proposal to recast the return directive shows that the legislation in force has not produced the expected results, and that the number of returnees is significantly lower than the return decisions.[3] Since repatriation policy does not work, a problem arises with treating people who cannot be repatriated. On the other hand, Art. 9 of the same directive provides for cases in which the States must (in order to guarantee non-*refoulement*) or can (because of the third country national's physical or mental conditions, for technical reasons of transport or lack of identification) postpone removal. There are, therefore, situations in which it is not possible to repatriate irregular migrants, nor is it possible to issue a residence permit to them, as a result of the directive.[4]

Despite its constitutional dimension, the treatment of individuals does not seem to play a key role in the New Pact on Migration and Asy-

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[2] Communication, *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 (recast)*, 12.9.2018, COM(2018) 634 final; COMMISSION SERVICE, *Non-Paper on a Strategic Approach on Readmission Agreements and Arrangements*, 29.4.2022, available online; the *Report on Migration and Asylum*, 6.10.2022, COM(2022) 740 final. A problem arises with the treatment of people, the "arrangements" referred to in the text are not subject to the "parliamentary scrutiny and democratic and judicial oversight that according to the Treaties, the conclusion of formal readmission agreements would warrant parliamentary scrutiny and democratic oversight" (EUROPEAN PARLIAMENT, *Draft Report 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 (recast)*, 21.2.2020, *sub* Amendment 41, available online). See also Art. 7 of the Proposal for a Regulation of the European Parliament and of the Council, *on asylum and migration management and amending Council Directive (EC) 2003/109* and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] – General approach of 6 June 2023, n. 10084/23).

[3] See nt. 2; https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/ddn-20221003-1; EUROPEAN COMMISSION, *Statistics on migration to Europe*, update on 1st January 2021, available online; EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Migration: Key Fundamental Rights Concerns, Quarterly Bulletin*, available online; P. STUTZ, F. TRAUNER, *The EU's 'return rate' with third countries: Why EU Readmission Agreements Do Not Make Much Difference*, in *IM*, 2021, 60, 155 ff.

[4] ECJ, Grand Chamber, judgment 22.11.2022, *X* v. *Staatssecretaris van Justitie en Veiligheid*, case C-69/21.

lum;[5] nor is the current version of the abovementioned proposal innovative with respect to the directive's scant provisions on non-removable irregular migrants, despite what is hoped within the European Parliament and the indications of well-known human rights treaty bodies.[6]

These provisions can thus be summarised as follows. Reiterating what is stated in the Preamble (para. 24) – which refers to the European Charter of Fundamental Rights (EU Charter) –, Art. 1 affirms the directive's functioning in respect of individual rights as derived from the general principles "of Community law and international law". On such premises, the following indications are provided for treating non-repatriable persons under Art. 9, whereas in general the Member States have the competence to regulate that treatment in their respective legal systems (Preamble, para. 12). The States must take into due consideration the child's best interests, family life and health conditions (Art. 5); furthermore, Art. 9 recalls the need to protect the health of people awaiting removal. Above all, Art. 14 draws the States' attention to consider, as much as possible, some principles for the treatment of third-country nationals awaiting voluntary return and during the periods for which removal has been postponed under Art. 9. Those principles concern family unity, access to emergency health services and essential treatment of diseases; minors' access to the education system, considering the duration of stay. Attention is also paid to the special needs of vulnerable people.

The latter indication and the importance of people's health conditions are reiterated for the treatment of people detained for the purpose of removal (Art. 16).

The situations mentioned above differ from those presupposed by

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[5] See Communication, *A New Pact on Migration and Asylum*, 23.9.2020, COM(2020) 609 final.

[6] Communication, *Proposal for a Directive*, cit.; EUROPEAN PARLIAMENT, *Draft report*, cit.; for the position of the European Council, see the *Partial general approach 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 (recast)*, 13.6.2019, available online; see also EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (2019), *The Recast Return Directive and its Fundamental Rights Implications: Opinion of the European Union Agency for Fundamental Rights*, Vienna; K. EISELE, E. MUIR, C. MOLINARI, M. FERNANDES, A. GALEA (2019), *The Proposed Return Directive (recast): Substitute Impact Assessment*, Brussels (European Parliamentary Research Service), available online.

Art. 79(1) TFEU: in line with Art. 72(1), that provision foresees a common migration policy including the fair treatment of foreigners "of third-country nationals residing legally in Member States", together with "enhanced measures to combat illegal immigration".

However, since it is not possible to envisage an even minimal common regulation of the diverse situations considered by the directive, the discrepancy remains between the Member States' legislations in the *subiecta materia*. Moreover, this encourages possible secondary movements of people (from one of those States to another) in search of the most favourable treatment. This consideration was unsuccessfully taken into account by the Commission in support of the reform of the scant regulation just referred to.[7] Indeed, it is an aspect of irregular stay affecting the "common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows" (Art. 79(1) TFEU).

As mentioned above, Art. 14 of the directive draws Member States' attention to the need for individual protection in situations in which the principles indicated by the directive may come into play. These are situations in which rights referred to by those principles and considered fundamental for treating irregular non-removable migrants or those awaiting voluntary return are likely to work.

In this regard, it is legitimate to argue that Art. 14 contains indications that can be extended to all irregular migrants. Furthermore, this is in consideration of the effectiveness of the rights in question, which operate regardless of the irregular condition of the person concerned.

Art. 14 implicitly but unequivocally recalls some social rights provided for by Arts. 14(1)(f) ("Everyone has the right to education and to have access to vocational and continuing training. This right includes the possibility to receive free compulsory education") and 35 ("Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities") of the EU Charter. The two provisions of the Charter guarantee those rights to "everyone". However, Art. 34 limits the right to social security and social benefits only to individuals residing or moving legally within the EU.

In the sense indicated, the need to protect individual positions emerges incisively from the conclusions of the Advocate General Bot in

[7] Art. 8, Communication, *Proposal for a Directive*, cit., 7.

the *Abdida* case. Here, we read that "The purpose of the directive is to establish an effective removal and repatriation policy, […] in a humane manner and with full respect for their fundamental rights and dignity. […] To have one's most basic needs catered for is […] an essential right which cannot depend on the legal status of the person concerned". Hence, although "the extent of the provision for basic needs must be determined by each of the Member States, given the discretion conferred on them by Directive 2008/115 […] such provision must be sufficient to ensure the subsistence needs of the person concerned are catered for as well as a decent standard of living adequate for that person's health, by enabling him, inter alia, to secure accommodation and by taking into account any special needs that he may have". [8]

Regardless of the migrants' *status*, the focus is here on the individual worthy of a "decent standard of living". Human dignity is recognised as essential in directing State behaviour and recognising individual rights suitable for satisfying "basic needs" in pertinent situations. Indeed, there may be rights instrumental to others to guarantee a dignified life: their identification is possible thanks to relationships of autonomy, cross-reference and reciprocal presupposition between the essential functions of the rights coming into play in each situation. [9]

In this vein, it is worth recalling the observations made by the Court of Justice of the European Union (ECJ) in the *Haqbin* case. [10] The Grand Chamber ruled that even a temporary withdrawal of the benefit of the applicant's material reception conditions for international protection conflicts with the obligation to guarantee the individual a decent standard of living. The considerations were based on Art. 1 of the EU Charter on the inviolability of human dignity, which "must be respected

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[8] Opinion of Advocate General Y. BOT, delivered on 4.9.2014, in the case C-562/13, *Abdida*, para. 156 ff.

[9] See A. RUGGERI (2011), *Rapporti tra Corte Costituzionale e Corti europee, bilanciamenti interordinamentali e «controlimiti» mobili a garanzia dei diritti fondamentali*, in *Rivista AIC*, 1.

[10] ECJ, Grand Chamber, judgment 12.11.2019, *Haqbin*, case C-233/18, para. 57. See also the conclusions of Advocate General N. EMILIOU, delivered on 4.5.2023, in the case C-294/22, *Nacionalinis visuomenės sveikatos centras prie Sveikatos apsaugos ministerijos v Valstybinė duomenų apsaugos inspekcija, joined parties: 'IT sprendimai sėkmei' UAB, Lietuvos Respublikos sveikatos apsaugos ministerija*.

and protected" and represents one of the values on which the EU is founded" (Art. 2 TEU). [11]

Similarly, some rulings of the European Court of Human Rights (ECHtR) are worthy of note, [12] and the European Committee of Social Rights (ECS) followed the same approach. As is known, irregular migrants do not fall within the scope of the European Social Charter; however, this did not prevent the Committee from establishing that, in some situations, human dignity entails the recognition of certain rights in favour of irregular migrants. [13]

From the perspective of the Italian legal system (the analysis of which goes beyond the scope of this paper), it is opportune to recall the following point. In judgment n. 187 of 2010, the Constitutional Court established the complete equivalence between the immigrant and the citizen, where the benefit envisaged in favour of the citizen is "a remedy designed to allow the concrete satisfaction of 'primary needs' inherent in the sphere of protection of the human person, which is the duty of the Republic to promote and safeguard". In fact, human dignity is present in the relevant sentences of the Constitutional Court, whereby po-

[11] C. DUPRÉ (2014), *Article 1 Human Dignity*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford-Portland, 3 ff.; see also the Preamble of the Universal Declaration of Human Rights; the Preamble and Art. 26 of the European Social Charter; the Preamble and Art. 1 of the Convention on Human Rights and Biomedicine.

[12] For the developments preceding the inclusion of the "human dignity" concept in the Convention system made by Protocol no. 13, see ECHR, judgment 7.12.1992, application no. 25803/94, *Selmouni v. France*; judgment 22.11.1995, application no. 20166/92, *SW. v. The United Kingdom*; judgment 11.7.2002, application no. 28957/95, *Goodwin v. The United Kingdom*, para. 9: "the very essence of the Convention is respect for human dignity and human freedom"; judgment 3.10.2019, application no. 34215/16, *Kaak and others v. Greece*, para. 63. For more indications see G. CELLAMARE (2020), *Osservazioni sulla politica dell'UE in materia di rimpatri*, in A. DI STASI, L.S. ROSSI (eds.), *Lo spazio di libertà sicurezza e giustizia a vent'anni dal Consiglio europeo di Tampere*, Napoli, 426 ff.; G. LE MOLI (2021), *Human Dignity in International Law*, Cambridge, 216 ff.; the article by A. DI STASI in this volume.

[13] ECSR, decision 20.10.2009, *DCI v. Netherlands*; decision 5.12.2007, *FEANTSA v. France*; decision 23.10.2012, *DCI v. Belgium*, para. 36; decision 1.7.2014, *CEC v. Netherands*, para. 142 ff. See also decision 8.9.2004, *Conclusions 2005 on article 11 of the Charter*; decision 24.1.2018, *International Federation of Human Rights League (FIDH) v. France*.

sitions that are likely to negatively affect "the inviolable sphere" of human dignity are discarded. [14]

2. Criticising the opinion according to which the recognition of social rights to irregular migrants encourages irregularity

Other well-known human rights treaty bodies that monitor implementation of international human rights treaties to which the EU Member States are parties have also provided useful indications on the access of irregular migrants to social rights. This is not without significance, given that, as is known, the ECJ affirmed the principle of respect for fundamental rights, stating that these are anchored in the general principles of Community law protected by the Court; [15] that they draw on the common constitutional traditions of the Member States and on international treaties for the protection of human rights to which the Member States "have collaborated or of which they are signatories". [16] Among these, in addition to the ECHR referred to in Art. 6 TEU, the two well-known 1966 UN Covenants and the UN Convention on the Rights of the Child, mentioned in para. 22 of the preamble of the return directive.

The qualification reaffirmed by Art. 1 of the directive of individual rights as principles of the EU legal system entails its prevalence over the rules contained in the EU secondary legislation and orients the content and the solution of concrete problems by safeguarding fundamental rights. [17]

The international obligations in question, on the one hand, direct the interpretation of the return directive by protecting the individual rights envisaged by them; on the other, they affect the prerogatives of the Member States, parties to the relevant conventions, in regulating the treatment of migrants, in the absence of different indications, and regardless of their *status*. [18]

Despite the cases law of the human rights treaty bodies, also during the debates on the recast of the return directive, in the opposite direc-

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[14] Judgment no. 269, 7.7.2010; See also judgment no. 252, 17.7.2001.

[15] CJEC, judgment 12.11.1969, *Stauder*, case 29-69.

[16] CJEC, judgment 14.5.1974, *Nold*, case 4-73.

[17] G. GAJA (2016), *Lo statuto della ECHR dei diritti dell'uomo nel diritto dell'Unione*, in *Riv. dir. int.*, (3), 677 ff.

[18] EUROPEAN PARLIAMENT, *Draft report*, cit., 99.

tion to the recognition of rights of a social nature to irregular migrants, it has been generally alleged that this recognition encourages irregular migration. [19]

The fact that EU Member States recognise these rights to those migrants does not affect the sovereign powers of control over migratory movements by these States, nor does that acknowledgment regularise the condition of the persons concerned. [20]

In this regard, the approach followed by ECSR, which has just been mentioned, is noteworthy, recognising certain rights in favour of irregular migrants, even if they do not fall within the scope of application of the Social Charter. In that approach, the treatment of people deriving from the operation of human dignity is independent of the person's *status* (whether regular or irregular). The same approach would be scarcely congruent with the Social Charter, if it favoured the irregular migration excluded from the Charters' scope of application. However, this is implausible.

In this regard, it is worth mentioning Art. 35 of the 1990 UN Convention on the rights of all migrant workers and members of their families. In that provision, it is stated that the recognition of the rights listed in the third part of the Convention in favour of persons in an irregular condition "shall [not] be interpreted as implying the regularization of the situation […], or any right to such regularization of their situation […]". This provision is incompatible with the idea that the recognition of rights to irregular migrants takes place in a direction favourable to irregular migration.

3. The existence of "minimum core obligations" for the States parties to the Covenant on Economic, Social and Cultural Rights (ICESCR)

Since it was adopted within the framework of the UN, that Convention has represented a manifestation of the international organisation's inter-

[19] S. DA LOMBA, *The ECHR and the Protection of Irregular Migrants in the Social Sphere*, in *IJMGR*, 2015, 22, 39. On the reform of the return directive see nt. 2.

[20] I. MAJCHER (2020), *The European Union Return Directive and Its Compatibility with International Human Rights Law. Analyses of Return Decision, Entry Ban, Detention, and Removal*, Leiden-Boston, 227 ff.; G. CELLAMARE (2021), *La disciplina*, cit., 87.

est in treating third-country nationals without residence permits. This interest also results from the activities of the Council of Europe and the ILO.[21] Furthermore, given the place of its adoption, the 1990 Convention is indicative of fundamental rights to be recognised, as such, to all migrants. The immigration States of the EU and other geographical areas are not parties to that Convention. Moreover, among those rights (Arts. 28-30) are also those referred to by the principles indicated by the return directive. On the other hand, in favour of foreign workers in an irregular condition, the UN Convention provides rights already recognised by the ICESCR to all individuals subject to the jurisdiction of the relevant State, regardless of their *status*. Art. 2(2) provides that States parties to the Covenant are committed to ensuring that the rights set forth therein are exercised without discrimination "of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The last reference includes discrimination based on the migrant's (irregular) *status*. The Committee on Economic, Social and Cultural Rights (CESCR) has specified that the nationality of the persons concerned can not preclude access to the rights provided for by the Covenant; they are also open to non-citizens, regardless of their legal *status*. This implies, for instance, the recognition of the right to access medical care for every migrant,[22] resulting into relationships of interdependence between the right to health and other rights.[23]

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[21] Recommendation, *sur la protection des droits des femmes et des filles migrantes, réfugiées et demandeuses d'asile, adoptée par le Comité des Ministres le 20 mai 2022*, 20.5.2022, CM/Rec(2022)17; ILO Constitution; ILO Convention no. 143 concerning *Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*. C. O'CINNEIDE (2020), *The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism*, in S. SPENCER, A. TRIANDAFYLLIDOU (eds.), *Migrants with Irregular Status in Europe: Evolving Conceptual and Policy Challenges*, available online, 51 ff.

[22] CESCR, General Comment no. 19, 4.2.2008, *The Right to Social Security (art. 9)*, E/C.12/GC/19, para. 37; CESCR, General Comment no. 14, 11.8.2000, *The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4, paras. 18, 19, 39; CMW, Joint General Comment no. 3 (2017) and no. 22 (2017), 16.11.2007, *of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, CMW/C/GC/3, paras. 5, 18, 21 and 32.

[23] R. PISILLO MAZZESCHI (2020), *Diritto internazionale dei diritti umani*, Torino, 255 ff.

More generally, based on its own experience, the Committee has established that the Covenant contains a "minimum core obligation" without which the Covenant would otherwise have no "raison d'être". Of course, this does not exclude considering the availability of resources of the host State for the fulfilment of the international obligations assumed, with the consequent recognition of a certain margin of discretion in fulfilling the same obligations. In other words, there are immediate minimum obligations, which vary from State to State, in consideration of their economic situation,[24] resulting in different standards of protection. The Covenant's obligations are complied with if the State demonstrates that it has made every effort to use the available resources and satisfy those "minimum obligations".[25] Ultimately, the condition of irregularity cannot be considered a factor diluting the universal scope of some rights: in the tension between the exercise of the power to control migration and the applicability of some rights in the social sphere, the coherence between the State's choices and the fulfilment of the international obligations assumed in the exercise of its sovereignty comes into play.

In this approach, the non-discriminatory clause is central in configuring an inalienable nucleus of rights. The role played by the non-discrimination clause is consolidated by the direct applicability of the clause and its incompatibility with unjustified regressive measures. In other words, such measures must also be justified in light of the non-discrimination principle.

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[24] R. CHOLEWINSKI (2005), *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, available online; ID. (2009), *Irregular Migrants, Access to Minimum Social Rights. On the obligations with immediate effect, and the relationship between available resources and discrimination*; CESCR, Statement 13.3.2017, *Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2017/1.

[25] See CESCR, General Comment no. 3, 14.12.1990, *The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)*, E/1991/23; CESCR, General Comment no. 20, 2.7.2009, *Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, para. 30: "The Covenant rights apply to everyone including non-nationals, […] regardless of legal status and documentation". See also R. CHOLEWINSKI, (2005), *Study*, cit. On the concepts of "core rights", "core content" and "core obligations" see R. PISILLO MAZZESCHI (2020), *Diritto*, cit., 191 ff.

4. The application limits of the so-called social dimension of the ECHR in favour of irregular migrants: the reasonableness and objectivity of the non-discrimination clause and the role of the margin of appreciation in the application of the Convention

Some observations of the ECtHR are in line with those of the CESCR referred to above.[26] Unlike the Covenant, the ECHR – with rare exceptions, such as access to education – does not provide for social rights. This has not prevented the Court from recognising certain social rights to individuals, precisely because of the non-discrimination clause or the protection *par ricochet*. A social dimension of the ECHR emerges,[27] which also works in favour of third-country nationals.

The Court has repeatedly stated that "Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter". Furthermore, "[t]he prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It also applies to those additional rights, falling within the general scope of any Article of the Convention or its Protocols, which the State has voluntarily decided to provide". The ruling includes any social rights[28] which can also work in favour of irregular migrants.

As in the case of the CESCR, the European Court has repeatedly clarified the limits within which discrimination is admissible in the en-

[26] See ECHR, judgment 27.12.2011, application no. 56328/07, *Bah v. the United Kingdom*, para. 45 ff.

[27] See ECHR, judgment 23.5.1996, application no. 39/1995/545/631, *Gaygusuz v. Austria*. In general, see S. DA LOMBA, *The ECHR*, cit.; I. LEIJTEN (2017), *Core Socio-Economic Rights and the European Court of Human Rights*, Cambridge; A. RUGGERI (2018), *I diritti sociali al tempo delle migrazioni*, in *Oss. AIC*, 2; on the integrated approach to the recognition of rights of different natures and their indivisibility see International Commission of Jurists (2021), *Accesso alla Giustizia per la tutela dei diritti economici, sociali e culturali. Materiale di formazione sull'accesso alla giustizia per i migranti*, available online.

[28] ECHR, judgment 9.10.1979, application no. 6289/73, *Airey c. Irlanda*, para. 26 (on free legal aid *ex* Art. 6(1) ECHR).

joyment of the rights guaranteed by it: this is possible for the fulfilment of legitimate aims through measures proportionate to that purpose.

There is discrimination if, in "relevantly similar situations", there are different treatments without objective and reasonable reasons; that is, if the discrimination does not pursue any legitimate aims and the means used are not proportionate to the aim to be achieved. Indeed, States have a margin of appreciation "in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary based on the circumstances and context of the pending case. Of course, this "margin of appreciation" is wide "when it comes to general measures of economic or social strategy", but only "very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention". [29]

Investigating the relationship between the non-discriminatory clause and the margin of appreciation, the European Court has had the occasion to observe that, unlike what happens for migrants, the *status* of refugees is not due to a choice; however, differences in the treatment of those people must still be objectively and reasonably justifiable. [30] Therefore, in the presence of irregular migration, the voluntary element underlying it favours greater flexibility in terms of the justifications that the State provides in differentiating the treatment of migrants from refugees.

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[29] ECHR, judgment 28.11.2011, application no. 5335/05, *Ponomaryovi v. Bulgaria*, paras. 48-53; the same concept was already present in: judgment 18.2.2009, application no. 55707/00, *Andrejeva v. Latvia*. It seems to us, however, that the Court's observations must be understood in light of the case to which they pertain in similar situations. "No objective and reasonable justification" means that the distinction at issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realized […]. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment […]. The scope of this margin will vary according to the circumstances, the subject matter and its background […]; indeed, in certain circumstances, a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article".

[30] ECHR, *Bah*, cit., paras. 42-45 ("while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality"); ECHR, judgment 6.2.2013, application no. 22341/09, *Hode and Abdi v. the United Kingdom*, para. 46 ff.

It has been observed that the Court's reference to the voluntary element weakens the operativity of the non-discrimination clause, and that even religious and political convictions are the result of choice; therefore, the approach followed by the Court could extend to discrimination on religious and political grounds. This being implausible, the unreasonableness of that approach is thus shown. [31]

The Court's observations must be understood in light of the case to which they pertain. As stated by the Court, the pending case concerned the provision of housing to the needy; therefore, it was predominantly socio-economic in nature, with the consequent attribution to the government of a relatively wide margin of discretion in the allocation of accommodation. In that case, the applicant was a migrant and not a refugee who could not return to his own country; the applicant's condition thus justified a difference in treatment between the migrants themselves, based on their conditions, given the accommodation assignment. [32] Hence, the Court did not exclude but rather confirmed the modalities of action for the non-discrimination clause, based on the reasonableness and objectivity of discrimination causes. [33]

It should be noted that the Court has distinguished between people (refugees) who have not chosen to emigrate, and others who desire to emigrate. This differentiation leads to the exclusion that, in recognition of social rights, distinctions could be made between irregular migrants that can be expelled and those that cannot be removed, for example, applying the return directive. Indeed, in both cases, we are dealing with people who have chosen to emigrate (and to violate the migration laws of the host State). However, this does not exclude the possibility of a distinction between irregular migrants in consideration of the specific vulnerability of the person concerned.

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[31] N. CAICEDO CAMACHO (2021), *Social Rights and Migrants before the European Court of Human Rights*, in D. MOYA, G. MILIOS (eds.), *Aliens before the European Court of Human Rights. Ensuring Minimum Standards of Human Rights Protection*, Leiden-Boston, 208.

[32] ECHR, *Bah*, cit., para. 46 ff. "the fact that immigration status is a status conferred by law, rather than one which is inherent to the individual, does not preclude it from amounting to an 'other status' for the purposes of Article 14 […]"; "a wide range of legal and other effects flow from a person's immigration status". However, "Given the element of choice involved in migration status, therefore, while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality".

[33] See *amplius* ECHR, *Ponomaryovi*, cit., para. 48 ff.

5. The components of the margin of appreciation and their functioning in the access of irregular migrants to some social rights

The Court has admitted that reasons related to the State budget could constitute objective and reasonable justifications for a distinction between regular and irregular migrants in accessing social services, given that the latter do not contribute to State finances.[34] Indeed, "a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal migrants, who, as a rule, do not contribute to their funding.[35]

The latitude of the margin of appreciation must be understood in light of the elements determining its functioning:[36] the convergence extent of State practices and legislation in the regulation of the pending case; the circumstance that the State concerned is in the best position to make assessments and choices of a social nature; in particular, the provision in the European Convention of the alleged right at stake in the pending case. In other words, it is not indifferent whether the Convention provides for that right and, where foreseen, whether it is absolute.[37]

In this sense, the case law concerning access to education and medical care for irregular migrants is worthy of note.

"Unlike some other public services", such as health, "education is a right that enjoys direct protection under the Convention". It implies a "stricter scrutiny by the Court of the proportionality of the measure af-

[34] ECHR, judgment 8.4.2014, application no. 17120/09, *Dhabbi v. Italy*, para. 52.

[35] ECHR, *Ponomaryovi*, cit., para. 54: "the Court starts by observing that a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. In certain circumstances, it may justifiably differentiate between different categories of aliens residing in its territory".

[36] See F. IPPOLITO, C. PÉREZ CONZALÉS, (2021), *"Handle with Care" in Starsbourg: The Effective Access of Vulnerable Undocumented Migrants to Minimum Socio-economic Rights*, in B. ÇALI, L. BIANKU, I. MOTOC (eds.), *Migration and the European Convention on Human Rights*, Oxford, 251 ff.; V. ZAGREBELSKY, R. CHENAL, L. TOMASI, (2022), *Manuale dei diritti fondamentali in Europa*, III ed., Bologna, 40 ff.

[37] ECHR, *Ponomaryovi*, cit., paras. 56 and 58.

fecting the applicants".[38] Regarding access to education, the Court considered, together with its provisions in the conventional system, economic-financial profiles also present in the observations of the CESCR (*i.e.*, the impact that the State's capacity to address the costs of education may have). On these bases, the scope of the State's margin of appreciation is proportional to the level of education: the same is broad in the indication of expenses for access to university studies but narrows considerably when it comes to access to primary education.[39] In fact, compulsory education is widely provided, even if it varies over time, in many States; it is recognised as having a fundamental social role in the development of people and is functional to the exercise of other rights.[40]

In this regard, it is worth recalling that the Convention on the Rights of the Child, referred to in the return directive, provides for the objective of making primary education compulsory and free (Art. 28(1)). More incisively, the Charter of Fundamental Rights establishes the right of access of every individual to that level of education. On these bases, following Art. 13(1) of the Covenant on civil and political rights, access to education is to be considered in relation to human dignity, the inviolability of which is established by the Charter itself (Art. 1).[41]

Art. 14 of the directive, as we know, draws the attention also to the access to education. The previous observations are relevant not only from the point of view of the interpretation of that Article, but also for the indications it provides beyond its scope of application.

As for access to medical care, unlike the ICESR,[42] which contains a broad definition of the right to health, the ECHR does not provide for

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[38] ECHR, *Ponomaryovi*, cit., paras. 55, 58 and 60.

[39] There, para. 57; for more indications, see R. PISILLO MAZZESCHI (2020), *Diritto*, cit., 328 ff. For comparative views within the praxis of European States, see EUROPEAN COMMISSION, *The structure of the European education systems. Schematic diagrams Eurydice – Facts and Figures*, available online.

[40] ECHR, *Ponomaryovi*, cit., para. 55 ff. Between these two extremes is secondary education, at stake in the pending process, which is increasingly recognised as having a central role in personal development. In the Italian legal system, see Art. 33 of the Constitution and art. 37 f. of "Testo unico sull'immigrazione" (decreto legislativo no. 286, 18 August 1998).

[41] See CESCR, General Comment no. 13, cit., para. 57.

[42] CESCR, General Comment no. 14, 11.8.2000, *The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4; see also General Comment no. 19, cit. In the Italian legal system see Art. 32 of the Constitution and Arts. 19, para. 4 and 35 of "Testo unico sull'immigrazione", cit.

that right; this does not exclude that it may operate indirectly for the application of other rights provided for by the Convention.[43] In other words, the Court ascertained the violation *par ricochet* of the Convention due to decisions or behaviours of the Member States harmful to the mental and physical well-being of people.[44]

This is a sector marked by the diversity of practices and legislation between the EU Member States to which that directive refers drawing their attention to access to medical care. In the absence of convergence between the Member States on implementing the right in question, the margin of appreciation allowed to them in that sector is high. In fact, we are dealing with a sector in which, as in others, "such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation".[45] Therefore, national authorities enjoy "a wide margin of appreciation" in implementing the relevant policy choices.

This breadth of the margin of appreciation corresponds to the exceptional nature of the situations in which the Court has found a violation of the conventional rules in the absence of access to medical care.

In this regard, the applicants have invoked health protection needs as limits to expulsion, alleging the violation of Arts. 2, 3 and 8 of the ECHR, often combined with Art. 14. The Court's approach in deciding applications submitted to it limited the protection of the applicants' health to exceptional circumstances as a result of the indirect application of the European Convention. This is a careful approach to avoid the ECHR taking the form of an international act that protects rights of a socio-economic nature, which the Convention does not contain.

Such an approach also characterises cases in which the alleged violation, *par ricochet*, of the absolute right guaranteed by Art. 3 of the Convention comes into play. Art. 3 operates as a limit to expulsion where

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[43] See R. PISILLO MAZZESCHI (2020), *Diritto*, cit., 255 ff.

[44] ECHR, judgment 9.6.1988, application no. 23413/94, *LCB v. The United Kingdom*, paras. 35 ff. and 218 ff.; ECHR, judgment 28.6.2011, application no. 8319/07, *Sufi and Elmi v. The United Kingdom*. See below for the exceptional nature of the approach referred to in the text.

[45] ECHR, Plenary, judgment 19.12.1989, applications no. 10522/83; 11011/84; 11070/84, *Mellacher and Others v. Austria*, para. 45 ff.

"the humanitarian grounds against the removal are compelling".[46] In order for the exceptional circumstances to arise which allow the application of Art. 3, in addition to the seriousness of the clinical picture, the Court initially took into consideration the real risks to which the applicant would have been exposed in the absence of medical treatment in the country of expulsion; in particular, the availability in that country of medical care and assistance provided by the applicant's family members and friends to the applicant. Of course, given the different degrees of medical assistance between those States parties to the ECHR and those of origin of the applicants, Art. 3 could not entail the obligation of the former to reduce these differences, allowing access to medical care to people without the right to stay. Arguing to the contrary "would place too great a burden on the Contracting States".

This is an approach that overlooks the specific vulnerability of the individuals concerned.[47]

However, a less restrictive approach can be deduced from the *Paposhvili* case. In that case, given the possible removal of the applicant, the Court took into consideration its pathology, the existence of a real risk, even if not immediate, of loss of life because of the transfer, the real risk of irreparable deterioration of health conditions, the possible suffering that the person concerned would have faced or the reduction in life expectancy. In addition to being formulated in alternative terms, this condition is not accompanied by the reference, considered in the previous case law, to the presence in the country of destination of family assistance or friends.[48] This results in a reduction of the (exceptional)

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[46] ECHR, Grand Chamber, judgment 27.5.2008, application no. 26565/05, *N. v. the United Kingdom*, para. 42. For critical comments see F. IPPOLITO, C. PÉREZ GONZÁLES (2021), *'Handle with Care'*, cit., 150 ff.

[47] See the joint dissenting opinion of Judges Tulkens, Bonello and Spielmann in *N.*, cit.; the dissenting opinion of Judge Lemmens in ECHR, judgment 4.4.2005, application no. 65692/12, *Tatar v. Switzerland*; the partly concurring opinion of Judges Tulkens, Jočienė, Popović, Karkaş, Raimondi, and Pinto De Albuquerque (para. 5 ff.), in *Mwanje v. Belgium* (ECHR, judgment 20.12.2011, application no. 10486/10, *Mwanje v. Belgium*).

[48] ECHR, Grand Chamber, judgment 13.12.2016, application no. 41738/10, *Paposhvili v. Belgium*, para. 189 ff. In particular, "The Court considers that the 'other very exceptional cases' within the meaning of the judgment in *N. v. the United Kingdom* (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, alt-

conditions that must exist for it to be possible to have access to medical care, albeit indirectly.

Furthermore, in the same judgment, the European Court ruled that the competent State authorities had not conducted an appropriate investigation into the applicant's condition and needs, and that those authorities had not acquired adequate information on the receiving State's situation. In this way, the effectiveness of conventional protection was enhanced considering the applicant's vulnerable situation. This approach recalls the one already followed in the *M.S.S.* case, in which emphasis was placed on people's extreme poverty and dependence on State care and, therefore, the need for social protection of the interested parties. A similar approach can be deduced from the *Tarakhel* case.[49] Of course, unlike the Inter-American Court Human Rights,[50] the European Court has not established a correlation between the condition of irregularity of the migrant and its vulnerability. Moreover, this did not prevent the latter Court from taking into consideration the condition of the extreme vulnerability of the individuals concerned to recognise their social rights.[51]

It follows that considering vulnerability affects the vague nature of the concept of exceptional circumstances, with its three components mentioned above.

Taking that situation into consideration is consistent with checking the reasonableness and proportionality of State activities,[52] and has the

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hough not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness" (para. 183).

[49] ECHR, Grand Chamber, judgment 4.11.2014, application no. 29217/12, *Tarakhel v. Swizerland*; see also ECJ, judgment 24.6.2015, *H.T.*, case C-373/13 ("access to means of subsistence in situations where a refugee's residence permit is revoked").

[50] Judgment 23.11.2010, *Vélez Loor v. Panamá*. See also the *Report* in E/CN.4/2005/85/Add.1, available online; Resolution 1506, 27.6.2006 of the Parliamentary Assembly of The Council of Europe.

[51] ECHR, Plenary, judgment 13.6.1979, application no. 6833/74, *Marckx v. Belgium*; and nt. 52.

[52] See V. ZAGREBELSKY, R. CHENAL, L. TOMMASI (2022), *Manuale*, cit., 50 ff.; the dissenting opinion of judge Lemmens, cit., nt. 50.

effect of mitigating the operation of the margin of appreciation tendentially granted to States in this subject matter.

This may favourably affect the recognition of rights whose scope is above the minimum level of protection that emerges from the operating margin of appreciation in the system of ECHR. On this point, it must be considered that the approach consisting in granting the margin of appreciation, on the one hand, can be subject to critical evaluation as it limits access to some rights considered fundamental; on the other hand, it favours the standardisation of the results following the application of the margin of appreciation as regards the right at stake; through this, it favours the configuration of the human rights' minimum level of protection, as widely provided for in the internal legal systems of the States parties to the ECHR.[53] The case law of other international human rights treaty bodies contributes to this, as well as the dialogue that is established in the matter in question between the European Court and the EU Court of Justice. This is not indifferent from the point of view of the operation of the return directive.

6. The dialogue between ECtHR and ECJ on access to medical care for irregular migrants. Some concluding remarks

The *Paposhvili* judgment, more in line with the individual's personal needs, evokes the approach followed by the Court of Justice, placing the condition of the migrant in the background. That judgment helped to reduce the gap between the previous position taken by the European Court and the one which, in the material sector under consideration, emerges from the judgment of the Court of Justice in the *Abdida* case. In this case, the Court of Justice ruled out the immediate implementation of a decision ordering a third-country national to leave the territory of a Member State, where there is a severe risk of serious and irreversible deterioration of his state of health. Furthermore, the Court established the taking charge, as far as possible, of the primary needs of third-country nationals to guarantee the effectiveness of the care and essential treatment of the disease pending the appeal brought by the same person against the expulsion decision.

Above all, in the dialogue between the two Courts, the judgment in the *X* v. *Staatssecretaris van JustitieenVeiligheid* case is worthy of note.[54]

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[53] See V. ZAGREBELSKY (2019), *Nove anni come giudice italiano a Strasburgo*, in *Quest. giust.*

[54] ECJ, Grand Chamber, judgment 22.11.2022, *Staatssecretaris van Justitie*

Here, the Court of Justice extensively referred to the *Paposhvili* ruling to interpret the scope of Art. 4 of the Charter of Fundamental Rights. The Court of Justice recalled that Art. 3 of the ECHR includes pain resulting from a disease due to natural causes. In light of Art. 52(3) of the Charter, the return decision is likely to violate Art. 4 of the Charter itself, where that decision risks increasing pain. On these bases, the legislative provision of time limits for assessing pain does not exclude that the authorities concretely examine the situation of the person concerned. Furthermore, the Court recalled that Art. 7 of the Charter has the same meaning as Art. 8 of the ECHR and that the medical care a citizen enjoys in the territory of a Member State forms part of his private life, resulting in a possible violation of the corresponding right where there is no access to that treatment. Moreover, unlike Art. 3, Art. 8 has no absolute value, so the right provided by it must be balanced with the general interest in implementing the expulsion or removal decision.

What has been observed in the preceding pages is not indifferent from the point of view of applying Art. 14 of the return directive. In addition to limiting the States' discretion in regulating the situations implicitly but unequivocally referred to, the latter attracts – pedagogically – their attention in general to the need to consider, pending removal, the areas of protection considered. These find their discipline in EU and international law mandatory for the Member States and concisely referred to in Art. 1 of the directive.

Furthermore, regardless of the scope of the application of Art. 14, for the reasons previously stated, those rights must be recognised for all irregular migrants, not only those who cannot be repatriated because of the application of the directive. In effect, the directive concerns third-country nationals irregularly staying on the territory of a Member State, keeping them implicitly but unequivocally distinct from regular ones without identifying and regulating an intermediate *tertium genus*, even though particular attention must be paid to the "special needs" of vulnerable people.

Finally, regarding those individuals, that same provision, read in light of Art. 1 of the EU Charter, allows for an opening to situations of vulnerability in general, even if Art. 3(9) of the directive provides an exhaustive list of "vulnerable persons".

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en Veiligheid, case C-69/21. See also the conclusions of Advocate General N. EMILIOU, cit., *supra*, nt. 10 "étroitement lié au respect de la dignité humaine".

Chapter 5

THE PROTECTION OF REFUGEE WOMEN HEALTH UNDER INTERNATIONAL LAW

Pia Acconci

ABSTRACT: *This chapter illustrates and assesses international legal protection of refugee women health, by looking at health as a human right. Since the seventies of the last century, international cooperation through international organizations has focused on women special needs of health protection in relation to different time spans of their lives and their specific biological characteristics. International organizations have considered sexual, reproductive and maternal health the main aspects of women health and have stressed how the effective access to health care services, education and information are important targets in this connection. International organizations have further integrated a gender-based perspective into the human rights-based traditional one, in order to enhance and expand the protection of women health. Migration intensifies the need of special health care for refugee women. Many States have committed to the observance of international rules, mostly non-binding, through implementation at their domestic law levels. In principle, national measures would include the protection of refugee women health. However, the exceptional circumstances typical of migration, financial and technical resource shortages do not contribute to the satisfactory and effective realization of this objective.*

1. Introductory remarks

This chapter is about the protection of refugee women health from the perspective of health as a human right under international law.

Four preliminary points can be made.

First, the relevant international rules are multilateral and regional. The first group of international rules includes Art. 12 on the right to

health of 1966 UN Covenant on Economic, Social and Cultural Rights; its 2000 General Comment adopted by the UN Committee which is competent to monitor the observance and implementation of such a Covenant;[1] Arts. 12 and 14 of the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women. The second group of international rules includes in particular the articles on the right to health provided in the 1969 American Convention on human rights and in the 1981 African Charter on Human and Peoples' Rights. Second, in light of these rules, the effective level of protection of women health as a human right depends on the specific economic and political context, as well as on different interests at stake. That is the main reason why 'positive' actions are needed at the domestic level of States. These actions are even more important when we talk about health protection of refugee women, whether asylum seekers or not. Third, international organizations have addressed the need of 'positive' actions by adopting special reports and recommendations, as well as by designing assistance programs in relation to specific issues. Fourth, this chapter does not deal with actions of the European Union, because the EU Common Migration Policy is the subject of considerable discussion in other chapters and the regulatory intensity of health protection is stronger at an international level than at an EU level. The European Union lacks a specific competence to act on health, according to Art. 168 of the Treaty on the Functioning of the European Union.[2]

Such a background will be assessed in order to propose a few reflections on what kind of responses States and international organizations, whether multilateral or regional, have given, what trends can be detected and what approach has been used in relation to the protection of refugee women health.

This chapter is based on an international law perspective. Hence, it does not assess domestic policy and regulatory responses by single States, neither from a domestic perspective nor from a comparative one.

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[1] General Comment of the UN Committee on Social, Economic and Cultural Rights, *The Right to the highest attainable standard of health (Art. 12)*, 11.8.2000, E/C.12/2000/4.

[2] In short, the European Union can (only) support and complement national policies of its Member States, encourage cooperation among them and react to unexpected events, such as epidemics.

2. The protection of women health at an international law level: a human rights perspective

The protection of women health has become relevant at an international law level when the international protection of human rights became a specific field of international law between late sixteen and mid-seventies of the last century, that is when a number of specific international treaties were concluded on initiative of the United Nations for the protection of human rights as political and civil rights, on the one hand, and economic, social and cultural rights, on the other. These treaties aim at ensuring and developing the level of protection recommended by the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948. The collective memory of gross violations of human rights – occurred during the second World War – facilitated the negotiation and conclusion of such treaties. The 1979 UN Convention on the Elimination of All Forms of Discrimination against Women was one of them.

Art. 25 of the 1948 Universal Declaration of Human Rights refers to the specificity of international protection of women health, with regard to the need of protection of infant and maternal health, in terms of "special care and assistance".[3] Such an approach to the right to women health impacted on the 1979 Convention on the Elimination of All Forms of Discrimination against Women within the UN. Its Art. 12 refers to the access to health care services as a basic requirement for the effectivity of the right to health of women. Art. 14 of the same Convention provides for the right to health of women living in rural areas under a similar perspective.

Several UN acts and programs have focused on the connection between the need of protection of infant and maternal health and the availability of, and prompt access to, public services for women sexual and reproductive health. International organizations, within and outside the United Nations system like the Council of Europe, have contributed to the identification and design of special programs and action plans concerning women health, by publishing reports, studies, epidemiological data and statistics, as well as recommendations to Member States. Human-rights oriented international organizations have also attempted to influence technical and financial assistance to facilitate the access by women both to primary health services and to drinkable water, educa-

[3] According to Art. 25, para. 2, "[m]otherhood and childhood are entitled to special care and assistance".

tion and information services, with the ultimate objective of promoting personal care and awareness of their biological specificity since childhood, as well as of countering social exclusion and discrimination because of such a specificity.[4]

The emphasis on access shows how the economic, social and political context at the national level is paramount for the effective enjoyment of the right to health by women, as it is for the effective protection of any economic, social and cultural human right. This has been the main reason why the recognition of these rights at an international law level has increased since the end of the decolonization process between late sixteen and mid-seventies of the last century. International organizations of the United Nations system have adopted a large number of non-binding resolutions and programs dealing with development gaps also from a social standpoint, since then. At that time, newly independent States born from the decolonization process promoted and influenced the adoption of specific non-binding resolutions by the UN General Assembly with the aim of enhancing equity and social justice within international relations, in light of sharp substantial differences among States due to their economic and policy heterogeneity and variety of interests.

In addition, international organizations have adopted acts and programs dealing with women special needs of health protection in relation to different time spans of their lives, that is birth, childhood, youth, childbearing age and menopause, by encouraging Member States to take appropriate domestic legal and policy implementing measures. Special action plans to promote and implement family planning, especially in developing countries in Latin America, Africa and Asia, have further been designed on account of the importance of family planning for women sexual and reproductive health though birth control.

Health protection had specific importance within the fourth world conference on women organized by the United Nations in Beijing in 1995.[5] The 'Beijing Declaration and the Platform for Action' focus on 'gender equality' for the broader objective of women's empowerment

[4] Cf. M. SEPÚLVEDA CARMONA, K. DONALD, *The Promise and Pitfalls of the Sustainable Development Goals*, in D. AKANDE *et al.* (eds.) (2020), *Human Rights & 21st Century Challenges*, Oxford, 266 ff., especially 282-283.

[5] The first special UN world conference on women took place in Mexico City in 1975. Before the conference in Beijing, other two conferences were held respectively in Copenhagen in 1980 and Nairobi in 1985.

from both the economic and political perspective. 'Women and Health' are one of the twelve 'critical areas of concern'. In this connection, the main reference points are the access to "appropriate, affordable and quality health care", the control and prevention of "sexually transmitted diseases", as well as of "sexual and reproductive health issues". The 'Beijing' action plan further underlines the negative impact of structural adjustment programs on women health in least developed countries whenever the decrease in public health spending and the privatization of health-care services result from the implementation of such programs.

The 2000 General Comment on the Right to Health related to Art. 12 of the UN Covenant on Economic, Social and Cultural Rights acknowledges such an approach, by focusing on "sexual and reproductive health services" in relation to "women and the right to health".[6] This aspect is considered under a broad perspective connected, among others, with "access to health services, education and information".

In addition, the predominance of "sexual and reproductive health issues" can be inferred from the international actions towards sustainable development. One specific target of the 2015 Sustainable Development Goal No. 3 related to 'Good health and well-being' aims at ensur[ing] "[b]y 2030, […] universal access to sexual and reproductive health-care services, including for family planning, information and education, and the integration of reproductive health into national strategies and programs". The Sustainable Development Goal No. 3 refers not only to women reproductive and sexual health, but also to the decrease of infant and maternal mortality, as a specific targets.[7]

The connection between the protection of women and child is also at the root of Art. 18 of the African Charter on Human and Peoples' Rights. This article is about family which is considered "the natural unit and basis of society". Its Para. 3 specifies that "[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in

[6] General Comment of the UN Committee on Social, Economic and Cultural Rights, *The Right to the highest attainable standard of health (Art. 12)*, cit., specifically para. 21.

[7] Specific targets of Sustainable Development Goal no. 3 are, among others, "[b]y 2030, reduce the global maternal mortality ratio to less than 70 per 100,000 live births" and "[b]y 2030, end preventable deaths of newborns and children under 5 years of age, with all countries aiming to reduce neonatal mortality to at least as low as 12 per 1,000 live births and under-5 mortality to at least as low as 25 per 1,000 live births".

international declarations and conventions". At any rate, the African Commission and the Court on Human and Peoples' Rights have dealt with a small number of specific cases concerning women health. [8]

3. A gendered-based perspective

Chronic diseases due to women biological characteristics, like breast and/or ovarian cancers, have turned out as a specific matter of concern within the international law and policy frameworks, besides consistent attention to the protection of infant and maternal health through the safeguard of sexual and reproductive health and family planning.

In effect, a feminist perspective has become relevant as an integration of the traditional 'man-based sex-gender' approach. Women empowerment would contribute to a qualitative kind of development both from an economic and social perspective. Principle 20 of the Final Declaration adopted at the end of the first UN Conference on Sustainable Development held in Rio de Janeiro in 1992 (the '1992 Rio Declaration') already highlights this point where it clarifies that "women have a fundamental role in environmental management and development. Therefore, their full participation is essential to achieve sustainable development". This assumption empowers women as relevant contributors to the establishment of a 'healthy environment', on account of the direct detrimental connection among environmental degradation, climate change, vulnerability and diseases. [9] In this regard, it is remarkable

[8] As a case-study by the African Commission, see *Egyptian Initiative for Personal Rights and Interights v. Egypt*, report of 12.10.2013, as to the damaging impact of rape on women health. For a general overview of relevant cases regarding the protection of the right to health by such a Commission and the African Court, see G. PASCALE, *The Human Right to Health under the African Charter on Human and Peoples' Rights: An Evaluation of Its Effectiveness*, in *Federalismi.it*, no. 22/2016.

[9] See S. BORRÀS-PENTINAT (2022), *Gender Climate Justice in a Context of Intersectional Vulnerabilties*, in M. CAMPINS ERITJA, R. BENTIROU MATHLOUTHI (eds.), *Understanding Vulnerability in the Context of Climate Change*, Los Angeles, 103 ff. The author's perspective is that "[t]he vulnerability has a clear connection between women and the environment as common victims of the capitalist-patriarchal system in which our world currently operates. Within this hierarchical system, both women and the environment are discarded to be used and controlled by the patriarchy" (104). This would be the main reason why "women are disproportionately affected by the climate crisis and are posi-

that several climate refugees are women and girls.[10] The 2000 UN General Comment also recommends the resort to a gender standpoint.[11] The Inter-American Commission and the Inter-American Court of Human Rights have highlighted the need of a gender-based approach to women health as a human right, particularly as regards the voluntary interruption of pregnancy as a relevant aspect of the effective protection of health, both physical and mental, of women, girls and adolescents, in terms of reproductive rights.[12] A gender-based assessment of the Covid-19 pandemic illustrates how women have been affected because of gaps in responses. This research highlights that the different gendered implications of a health crisis are not commonly taken into a great account, although "pandemics have been shown to result in decreased economic security, elevated health risks, and increased care burdens for women".[13]

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tioned to solve it" (*ibidem*). In other words, gender discrimination would increase vulnerability to climate change. In the author's view, this "stems from a number of social, economic and cultural factors" (105). The author underlines how general recommendation no. 37 – adopted in 2018 within the framework of the 1979 Convention on the Elimination of All Forms of Discrimination against Women – recognized such a vulnerability.

[10] Various documents and special reports of the International Organization for Migration (IOM), UN High Commissioner on Refugee (UNHCR) and the UN Intergovernmental Panel on Climate Change (IPCC) are relevant as to environmental migration. See, for instance, the 2022 "Gender, Displacement and Climate Change" from UHCR; the 2023 Sixth Assessment Report from IPCC as to the desirability of "mitigation and adaptation options that mainstream health into food, infrastructure, social protection, and water policies".

[11] General Comment of the UN Committee on Social, Economic and Cultural Rights, *The Right to the highest attainable standard of health (Art. 12)*, cit., paras. 12 (c), 20.

[12] See Press Release by the Inter-American Commission on Human Rights, 31.1.2023. As to the criminalization of abortion as a breach of the rights to life, health and personal integrity, see the report of the Commission on the *Beatriz Y Otros v. El Salvador* case, that is pending before the Inter-American Commission of Human Rights.

[13] See J. SMITH (2022), *Covid-19. Exposing the Gender Gaps in Global Health*, in P. BOURBEAU, J.-M. MARCOUX, B.A. ACKERLY (eds.), *A Multidisciplinary Approach to Pandemics*, Oxford, 173 ff., especially 185. The author's research line of reasoning is that "pandemics are more than health crises; they are also gender equality crises" (174). For instance, during pandemics maternal and neonatal mortality increase, because of quarantine measures, especially in developing countries as the 2014 Ebola emergency had already shown (177,

Another aspect of women specific need of protection has gained attention as a common problem that needs common responses at an international law level. That is health issues connected with violence against women and harmful cultural and traditional practices on women, especially in Africa. This can be inferred from the UN conceptualization of "violence against women" which refers to "physical, sexual, or mental harm", [14] the 1999 optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and from several related documents of the World Health Organization. [15] The 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (the 'Convention of Belém do Pará') and the 2011 Convention on preventing and combating violence against women and domestic violence of the Council of Europe (the 'Istanbul Convention') provide for a similar concept.

Female genital mutilation has become a specific matter of concern. [16] The 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('Maputo Protocol') also refers to "harmful practices" in connection with women health in the preamble and to the right to health in terms of "sexual and reproductive health" at Art. XIV, as well as to a development perspective of women

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where the author refers to a 2020 prediction from the UN Population Fund about 'a Covid-19 calamitous impact on women's health' and to the detrimental impact of restrictions concerning access to contraceptive and family planning services, as well as to contraception and safe abortion services). Cf. S. SEKALALA (2017), *Soft Law and Global Health Problems*, Cambridge, especially 6-8, as to the specific impact of AIDS, malaria and tuberculosis on women.

[14] According to the 1993 UN Declaration on the Elimination of Violence against Women, violence against women is "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life". See also the general recommendation No. 19 by the UN Committee on the Elimination of Discrimination against Women which looks at violence against women as a form of discrimination.

[15] See, among others, WHO, *Global Status Report on Violence Prevention 2014*, Geneva, 2014, which assesses "national efforts to address interpersonal violence, namely child maltreatment, youth violence, intimate partner and sexual violence, and elder abuse".

[16] Cf. J.M. MBAKU (2021), *International Human Rights Law and the Tyranny of Harmful Customary and Traditional Practices on Women in Africa*, in *CWILJ*, 1 ff.

health at Art. XVIII where provides for the "right to a healthy and sustainable environment". According to a report from the African Union Commission and the United Nations High Commissioner for Human Rights, key issues at the root of the sexual and reproductive health are "safe and healthy pregnancy", "access to safe abortion", "forced sterilization of women living with HIV" and "sexual and gender-based violence". [17] This report includes "child marriage" and "female genital mutilation" within "harmful practices" which can affect women health. The Member States of the African Union are expected to cooperate and adopt institutional, legislative and policy domestic measures to effectively implement the 'Maputo Protocol', with particular regard to the impact of marriage and family issues on women health. [18] The 2004 Arab Charter on Human Rights provides for the right to health and imposes the "suppression of traditional practices which are harmful to the health of the individual" upon Member States, at Art. 39(2)(c). However, the Charter does not include a specific reference to women in this regard. Following its publication, the UN High Commissioner for Human Rights Louise Arbour and a few scholars underlined that women health, both physical and mental, could be affected in several Contracting States of the Charter, that are often origin States of many immigrants, because of low consideration for women specific needs of protection. [19]

Because of legal and policy diversification, specific academic literature on how international and domestic laws deal with violence against women and its impact on women health has expanded, especially as to sexual violence in time of an armed conflict and/or other emergency situations like migration. [20]

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[17] See African Union Commission, UN Office of the High Commissioner for Human Rights, *Women's Rights in Africa*, 2017.

[18] Cf. M. SSENYONJO (2007), *Culture and the Human Rights of Women in Africa: Between Light and Shadow*, in *J. Afr. L.*, 39 ff.

[19] See the statement by Louise Arbour on 30.1.2008, available online. Cf. E. SALEHI *et al.* (2020), *An Analysis of Gender and Health in Islam*, in *Ann Mil Health Sci Res.*, September, 18(3). On the contrary, the *1992 Declaration on the Protection of Refugees and Displaced Persons in the Arab World*, at Art. 10, "[e]mphasizes the need to provide special protection to women and children, as the largest category of refugees and displaced persons, and the most to suffer, as well as the importance of efforts to reunite the families of refugees and displaced persons".

[20] Cf., among others, A. BYRNES, E. BATH (2008), *Violence against Women,*

4. Special safeguards for refugee women health

This section looks at what I said above about international legal protection of women health from a migration perspective. At first, international legal and policy responses to migration issues did not deal with women health as a specific issue and were not based on a gender perspective. The 1951 UN Convention on the Status of Refugee and its 1967 Protocol are important examples, as they do not even acknowledge health and a gender-based perspective. Art. 1 of the Convention concerning the "definition of the term refugee" refers to "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".[21] Art. 3 of the same Convention provides for "non-discrimination" in accordance with "race, religion or country of origin". Its Art. 33 on the "Prohibition of

the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women-Recent Developments, in *HRLR*, 517 ff.; See R. ADANU, T. JOHNSON (2009), *Migration and Women's Health*, available online, as to the reproductive health needs of women in refugee camps; S.E. DAVIES *et al.* (eds.) (2013), *Responsibility to Protect and Women, Peace and Security*, Leiden; H. CHARLESWORTH, C. CHINKIN (2019), *Between the Margins and the Mainstream*, in B. FASSBENDER, K. TRAISBACH (eds.), *The Limits of Human Rights*, 205 ff., especially 213-219 as to the UN 'Women, Peace and Security' (WPS) agenda; S. DE VIDO (2020), *Violence against Women's Health in International Law*, Manchester; C. QUAGLIARELLO (2021), *Women, Migration and Health: An Inquiry into Gender-Based Violence and the Limits of Maternity Care Services in Southern Europe's Borderlands*, in L. FERRERO, C. QUAGLIARIELLO, A. CRISTINA VARGAS (eds.), *Embodying Borders: A Migrant's Right to Health*, New York, Oxford, 102 ff. The decrease of violence against women during armed conflicts has become a matter of international security, in particular in light of the use of rape as a weapon of war. See, among others, A.K. KREFT (2019), *Responding to Sexual Violence: Women's Mobilization in War*, in *J. Peace Research*, 220 ff.; J. TRUE (2021), *Violence against Women. What Everyone Needs to Know*, Oxford; J.N. CLARK (2023), *Resilience, Conflict-related Sexual Violence and Transitional Justice*, Abington.

[21] According to Art. 1, "the term refugee shall apply to any person who […] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".

Expulsion or Return ('Refoulement')" reflects the same approach.[22] The 1954 UN Convention related to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness, the 1969 Convention of the Organization of African Unity governing the specific aspects of refugee problems in Africa and the Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held in Cartagena de Indias, Colombia, from 19 to 22 November 1984, also do not deal with women health as a relevant reference point.

Since then, specialized international organizations, like the UN Committee on the Elimination of Discrimination against Women and the UN High Commissioner on Refugee (UNHCR), have issued non-binding acts dealing with refugee women and girls because of their specific needs of protection due to their likelihood to be victims of, or at least vulnerable to, gender discrimination, ill-treatment, harassment, oppression and violence. A gender perspective has been associated with that based on human rights.[23]

As stated by the UNHCR Executive Committee of in its 1985 'Conclusion No. 39 (XXXVI)', refugee women and girl are "the majority of the refugee population and many of them are exposed to special problems in the field of international protection", as to "violence or threats to their physical safety or exposure to sexual abuse or harassment". UNHCR adopted an 'internal instruction' providing for guidelines aimed at enhancing the protection of refugee women in 1987. Health is one of the areas of concern in these guidelines, as it is in other related documents, such as the 1990 Resolution 34/2 of the UN Economic and Social Council.

In 2014 the UN Committee on the Elimination of Discrimination against Women adopted Recommendation 39 on 'the gender-related dimensions of refugee status, asylum, nationality and statelessness of women' with the specific objective of "ensur[ing] that States parties apply a gender perspective when interpreting all five grounds, use gender

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[22] Art. 33 concerning the "Prohibition of Expulsion or Return ('Refoulement')" provides that "1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.".

[23] Cf. D.E. ANKER (2002), *Refugee Law, Gender, and the Human Rights Paradigm*, in *Harvard HRJ*, 133 ff.

as a factor in recognizing membership of a particular social group for purposes of granting refugee status under the 1951 Convention and further introduce other grounds of persecution, namely sex and/or gender, into national legislation and policies relating to refugees and asylum seekers". "All five grounds" – mentioned by such a Recommendation – are those provided in Art. 1 of the 1951 Convention, that is "race, religion, nationality, membership of a particular social group or political opinion". The Committee justifies the desirability of "a gender perspective" because of "gender-related persecution and other serious human rights violations that affect women compounds" and "other forms of exploitation concomitant with displacement, such as trafficking for purposes of sexual or labour exploitation, slavery and servitude".[24] This Recommendation also takes into consideration that women claim for asylum might not be properly assessed because of the lack of a gender perspective by the authorities of the receiving State[25] and invite States to resort to a *pro*-gender implementation of the principle of 'non refoulement'.[26]

In effect, there have been several claims before the European Court of Human Rights from women for the denial of their asylum requests. These claims have been based on Art. 3 of the 1950 European Convention of Human Rights for 'arbitrary refoulement' arising mostly from

[24] See recommendation No. 39, 5 November 2014, para. 14. See also para. 15 for an open-ended list of forms of persecution. As to the resort to a "gender-sensitive" assessment and acceptance of requests for 'international protection' in accordance with the 'Common European Asylum System', see the EU Directive on the 'Recast Asylum Procedure'. Directive 2013/32/EU of the European Parliament and of the Council, *on common procedures for granting and withdrawing international protection (recast)*, 26.6.2013, OJ L 180, 29.6.2013, 60 ff., preamble, points 29, 32; Art. 11, para. 3; Art. 15, para. 3 (a). Victims of human trafficking, forced migration and/or female genital mutilation might be examples of applicants with special reception needs under such a perspective. Cf. M.L. PIGA (2021), *Sopravvivere alle migrazioni forzate in un quadro di difficile accesso ai servizi del welfare: la salute delle donne vittime di tratta*, Milano.

[25] Para. 16 of the Recommendation 39 specifies that "[f]or example, asylum authorities may interview only the male "head of household", may not provide same-sex interviewers and interpreters to allow women to present their claims in a safe and gender-sensitive environment or may interview women asylum seekers in the presence of their husbands or male family members who may in fact be the source or sources of their complaints". See also paras. 25-26 and 37-50 of the recommendation.

[26] See paras. 17-23 of the Recommendation 39.

gendered ill-treatment, such as rape from partners[27] or other family members.[28] The case-law of the Court has been inconsistent in this regard.[29] For the sake of clarity, the Court, as the EU Court of Justice, cannot uphold their jurisdiction over the 1951 Refugee Convention. They can deal with matters related to asylum requests incidentally and indirectly only. The EU Member States are all Contracting States of such a Convention and are still the primary responsible for its effective implementation.

The international legal perspective focuses on social 'norms' and gender roles, by acknowledging that many women are confined to predefined roles, like motherhood, and jobs, such as health-care workers and/or caregivers, and that the exceptional circumstances typical of migration intensify the relevance of both social norms and gendered roles.

Traditional cultural and religious stumbling blocks, both in economic advanced and developing countries, can in effect hamper the capacity of refugee women to cope with and react to adversarial situations, in order to properly look after themselves and their health, in terms of body control and related freedom of choice.[30] To value refugee women as an enhancement within the design of the legal and policy framework on migration, a few bodies operating within the UN system focus on the

[27] As to a case-study, see ECHR, Section III, judgment on the merits 20.7.2010, application no. 23505/09, *N. v. Sweden*. The Court upheld the claim, by establishing unanimously that Art. 3 had been breached.

[28] See, for instance, ECHR, Grand Chamber, judgment on the merits and just satisfaction 19.1.2016, application no. 27081/13, *Sow v. Belgium*. The Court rejected the claim, by denying unanimously that Art. 3 had been breached.

[29] For a detailed assessment of the case-law of the European Court of Human Rights as to refugee women, see L. PERONI (2018), *The Protection of Women Asylum Seekers under the European Convention on Human Rights: Unearthing the Gendered Roots of Harm*, *HRLR*, 347 ff., who however does not deal with health issues as such. For a general overview of the relevance of Art. 3 of the European Convention of Human Rights in relation to the expulsion of irregular migrants, cf. L. PANELLA (2022), *L'espulsione dei migrant irregolari viola l'art. 3 della CEDU? Il contraddittorio atteggiamento della Corte europea dei diritti dell'uomo*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (ed. by), *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli, 737 ff.

[30] Cf. F. STAIANO (2017), *The Human Rights of Migrant Women in International and European Law*, Eleven International Publishing/Torino. For an assessment of gender-based violence against refugee women and girls, also after migration, see Editorial (2018), *Protecting Migrant Women*, in *The Lancet Pub. H.*, available online.

well-being of female refugees as a tool for promoting their return and successful reintegration in post-conflict situations, where economic, political and social circumstances are usually changed and women might experience difficulties in gaining a satisfactory 'space', especially a political one, because of discrimination, as well as sexual violence and/or infections during migration.[31] On the other hand, international rules on migration enhance the importance of women in the relationships based on family and motherhood, by assuming sexual and reproductive health as the main reference point for policy and regulatory attempts aimed at safeguarding women enhanced-by-migration vulnerability and exposure to risks, as well as interpersonal relationships, connections and reunions as a tool for integration of migrants in third States.[32] The access to healthcare services and drugs, especially essential ones, are further recurrent issues of concern.[33]

Several UN reports, data and statistics show how refugee women would benefit from special education and empowerment programs aimed at effective equality, as well as equity. Specifically, the resort to a broad gender standpoint within migration laws and policies is recommended by Principles 8 and 14 of the 'Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking' adopted by the Inter-American Commission on Human Rights in 2019.[34] However, financial and technical shortages,

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[31] Cf. H. CHARLESWORTH, C. CHINKIN (2019), *Between the Margins and the Mainstream*, in B. FASSBENDER, K. TRAISBACH (eds.), *The Limits of Human Rights*, Oxford, 205 ff., especially 217. For a specific study, see C. SKRAN (2022), *UNHCR's Gender Policy for Refugees and Returnees in Sierra Leone: Health, Well-Being and Political Agency*, in J. BEKOU-BETTS, F.A. M'CORMACK-HALE, *War, Women and Post-conflict Empowerment*, London, 161 ff.

[32] As to the importance of contextualizing transfer agreements of asylum-seekers, see T. KRITZMAN-AMIR (2022), *Asylum-Seekers Are Not Bananas Either: Limitations of Transferring Asylum-Seekers to Third Countries*, in *Michigan JIL*, 699 ff. The author points out how transfer agreements are influenced by "sovereign interests of destination countries and third countries", rather than by human rights consideration (702 ff.). Cf. ALICIA LLA'CER *et al.* (2017), *The contribution of a gender perspective to the understanding of migrants' health*, in *JECH*, 61, (Suppl II): ii4-ii10).

[33] See, for instance, the '*International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*' adopted by General Assembly Resolution 45/158 of 18.12.1990.

[34] See Resolution 04/19 approved by the Commission on 7 December 2019,

like the lack of gender and sex disaggregated data, besides a weak political will by States, can undermine the effectivity of international responses to the need of special care for refugee women health.

Developments in international law-making on health protection might be expected in relation to a broad conceptualization of migration-related gender issues, on account of recent data and reports.[35]

5. Concluding remarks

Five points can be made to conclude.

First, international law ensures the safeguard of refugee women health within the boundaries and limits of its developments in relation to the protection of women health. International actions and documents focus on women exposure to certain special diseases, on account of their biological characteristics, as well as of the social and cultural context where they live. The legal prevention of and reaction to health issues due to violence against women has also become relevant at an international law level from a migration standpoint.

Second, these developments have concerned women in a strictly defined role, that is mainly as a mother and/or a victim of violence, under a binary, as well as hierarchical approach to gender issues arising from the common relationship between men and women. Scholars underline how a Western perspective of this issue, particularly that of European writers on international law at the time of colonialism, has influenced international law-making in this connection by rendering such an approach dominant.[36] This approach has impacted on attempts made by

under the auspices of its Rapporteurship on the Rights of Migrants and pursuant to Art. 41.b of the American Convention on Human Rights.

[35] See, among others, V. CASTRO *et al.* (2022), *A Scoping Review of Health Outcomes Among Transgender Migrants*, in *JTH*, available online; L. WANDSCHNEIDER *et al.* (2020), *Representation of Gender in Migrant Health Studies – A Systematic Review of the Social Epidemiological Literature*, in *Int. Journal for Equi. Health*, 181 ff., available online.

[36] Cf. D. EICHERT (2022), *Decolonising the Corpus: a Queer Decolonial Re-examination of Gender in International Law's Origins*, in *Michigan JIL*, 557 ff. His assessment of the issue under consideration starts from the definition of "gender" in the 1998 Rome Statute of the International Criminal Court to show how the perspective over gender issues typical of colonial times has become predominant within international law. Art. 7, para. 3, of this Statute re-

international organizations to design and promote special protection of refugee women health at the domestic level of their Member States.

Third, multilateral responses based on international law-making are mostly non-binding and related to specific aspects, particularly maternal mortality, reproductive and sexual health, harmful effects of violence and family planning.

Fourth, unilateralism prevails from a hard law standpoint, as the majority of States, especially many receiving States, might be reluctant to cooperate at an international level to design and implement common regulatory solutions to problems arising from migration. Difficulties in designing common responses to the current complexity of migration worsen the exposure of refugee women to diseases and other health issues. The implementation and enforcement of international rules through the domestic laws of the Contracting States have been, and are still, the best options to ensure the effectivity of human rights protection, as already said. Whatever is the level of development from a macroeconomic, social and cultural perspective, the effectiveness of international responses depends on appropriate regulatory, administrative and judicial measures adopted by States within their national legal systems. An intensified feminist approach to international law-making, beyond the human rights-based perspective, is therefore desirable for adequate and effective protection of refugee women health, in accordance with their specific biological characteristics, as well as heterogeneous undermining social, economic and cultural conditions. A good result in terms of enhanced protection would arise from the use by States of such an approach in the implementation of international relevant rules at the domestic level. The language of international migration law is not clear-cut, as it includes open-ended definitions and safeguard clauses. Interpreters and national official enjoy discretionary powers that can exercise to "*deny* rights to some groups of people" or "to *protect* rights".[37] For instance, the expression "a particular social group" included in Art. 1 of the Convention on the Status of Refugee might be interpreted as allowing a special favourable treatment for women who have been raped and/or subjected to female genital mutilation.

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fers to gender as "the two sexes, male and female, within the context of society" (especially 557-558).

[37] Cf. T. BLOOM (2019), *When Migration Policy Isn't about Migration: Considerations for Implementation of the Global Compact for Migration*, in *E. & Int. Aff.*, 481 ff., especially 484.

Fifth, with time the original human rights-based perspective has been combined with a *pro*-development-based approach. This might contribute to the enhancement of the level of protection of refugee women health. Home and receiving States might accept the enhancement of multilateralism in this field because they need technical and/or financial assistance from international organizations, in terms of resources, data and knowledge. This would occur if international organizations would resort to conditionality for the benefit of refugee protection, particularly refugee women health as far as the topic of this chapter is concerned. The combination between the human rights-based approach and the *pro*-development one would lead beneficiary States to properly act against diseases that can affect women and, to some extent, the 'good governance' of their domestic societies.

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Chapter 6

ECONOMIC MIGRANTS AND EXTRA-EUROPEAN PRACTICES: CONSIDERATIONS ABOUT THE MINIMUM GUARANTEES OF TREATMENT

Aldo Amirante

ABSTRACT: *The economic migrant does not see in his favour a system of protection that can be compared to that recognized for refugees and asylum seekers. This is not a superficial question given the current difficulty in drawing a clear separation between the reasons that push certain people to leave their land. The resulting classification of migrants in the group of refugees pushes to seek a legal regime with less specific regulations and bilateral reception agreements. While the European model shows a consolidated picture at a regional level, the situation in the rest of the world is quite different, also considering the position of the main immigration countries, such as the USA or Russia, and the Asian reception models. Two kinds of problems appear in the analysis of legal framework: the discretion of the country's legislation in deciding who has the right to enter and the immediate subsequent treatment of migrants once they have reached their destination. Often people find it difficult to provide essential services or suffer discrimination, in addition to situations at home that cannot consent to return, albeit requirements asked by international law for the return. The contribution aims to examine the existing rules of a minimum regime of international law for migrants.*

1. Introduction

The essay intends to deepen a particular aspect of the migratory phenomenon or what legally remains outside the refugee status, as defined

by international law. The reference is in general to the notion of "migrant" to those types of the same which, for various reasons, do not fall within the requirements established for the protection of refugees and asylum seekers. Compared to the refugee as framed by the relative Geneva Convention of 1951 (and its 1967 Protocol), the figure of the migrant, substantially lacks the "justified fear of being persecuted for his race, religion, citizenship, his membership of a particular social group or his political views".[1] This condition refers both to the citizen of a State which cannot guarantee adequate protection in the situations and to the stateless person about the State where he habitually lived.[2] In cases where a person cannot be recognized as a refugee but is still at risk of persecution or torture in the country of origin, he can access other types of protection in particular cases. The requirements established by Art. 1 of the Convention must all be present at the same time.[3] The condition of the migrant, on the other hand, does not have similar protections, starting from the *ius migrandi* itself, which does not find international or internal recognition,[4] unless you want to associate it with the freedom of movement of the EU. Instead, there is a right to emigrate, to leave one's State, without the specular right to a reception. Indeed, there are cases in which irregular entry or stay in the territory of another State is sanctioned in various forms, including detention and forced repatriation.[5] Indeed, even today, one does not leave one's country of birth, study, relationships and family only for fear of persecution, but also to seek a better job and economic opportunities or even for 'climatic' reasons, such as in cases of drought, extreme temperatures and natural disasters.[6] The multiplication of these figures therefore,

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[1] *Convention on the Status of Refugees*, Geneva, 28 July 1951. See Art. 1 lett. a).

[2] Italian Ministry of the Interior, *Guida pratica per i richiedenti protezione internazionale in Italia*, available online, 26-27.

[3] I. PAPANICOLOPULU, G. BAJ (2020), *Controllo delle frontiere statali e respingimenti nel diritto internazionale e nel diritto del mare*, in *Dir., Imm. e Cittad.*, 2020, 33.

[4] I. RUGGIU (2019), *Migrazioni per cause climatiche e impatti sulla sicurezza a livello locale*, in F. ASTONE, R. CAVALLO PERIN, A. ROMEO, S. MARIO (eds.), *Immigrazione e diritti fondamentali,* Turin, 401.

[5] I. RUGGIU (2019), *cit*., 401-402.

[6] According to reports by Legambiente, Italian NGO in environmental matters, the variability of environmental crises prevents a correct estimate of po-

from the economic migrant to the climate migrant, just to give an example, has raised the problem of their possible classification in international law, given the broad discretion of individual States on an issue whose conflictual aspects gradually increase that the burden of protecting the individual on the part of the State increases, and therefore the obligations to care for immigrants increase.

There is no shortage of efforts advocated by the UN aimed at underlining that, despite the conceptually existing difference between refugees and migrants and the specific protection system for the former, it is necessary to develop a protection regime that is shared as much as possible, and which preserves the well-being of seconds beyond human rights-based protection.[7] International law, in fact, in regulating the matter, finds a historical limit in the sovereign power of the States. In a nutshell, the norms of the international community recognize the right of a person to leave the country of origin but, at the same time, they 'stop' before entering the borders of the State, which is free to determine, as it deems best, the conditions for the entry, stay and expulsion of aliens on its territory.

To date, the legal distinction between migrations is between migrations for economic reasons and migrations for situations of vulnerability. Today this subdivision appears to be incomplete, as migrations are finding ever greater drives due to causes of an environmental nature, more and more often linked to climate change.[8] That new type of migration

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tential climate migrants by 2050 that could be even a billion. See LEGAMBIENTE (2021), *I migranti ambientali. L'altra faccia della crisi climatica*, available online, 19.

[7] The International Convention on the Protection of the Rights of Migrant Workers and Members of their Families, adopted on 18 December 1990, is in this category, albeit indirectly, the Additional Protocol to the United Nations Convention against Transnational Organised Crime to Combat Trafficking in Migrants by Land, Sea and Air, adopted in Palermo on 15 December 2000, and the Additional Protocol to the UN Convention against Transnational Organised Crime to Prevent, Suppress and Punish Trafficking in Persons of the Same Date; and the UNGA Resolution, Measures to ensure the human rights of all migrant workers, of 9 December 1975. More recently, the UNGA New York Declaration for Refugees and Migrants, UN Doc. A/RES/71/1 of 3 October 2016, followed by the Global compact on refugees of 26 June 2018 and Global Compact for Safe, Orderly And Regular Migration of 13 July 2018.

[8] I. RUGGIU (2019), *Migrazioni per cause climatiche*, cit., 401. See also E. PIGUET, A. PÉCOUD, P. DE GUCHTENEIRE (eds.) (2011), *Migration and Climate Change*, Cambridge.

forces to reflect on the *ius migrandi* as understood today, since it does not find any protection, leaving the treatment of those who are not among those who flee from violence and persecutions only to the State Law. [9]

2. Defining migrants, economic migrants and migrant worker

In essence, migrants can be divided into two broad categories: voluntary and forced. Among the most discussed and known cases of forced migration there are certainly the so-called "climatemigrants", that is people who emigrate to other territories fleeing environmental disasters, floods, droughts or other disasters related to climate change. Note that since there is no legal basis for this notion, the UNHCR itself states that this is an improper definition and that one should speak at most of "people displaced in the context of disasters and climate change". [10] UNHCR also stresses – and rightly so – that the areas of the world at the highest climate risk are those of the developing world, and that therefore the risk of wars based on racial or political persecution is greater. Factors such as political and economic instability, widespread poverty, marginalisation and scarcity of resources can exacerbate climate-sensitive geopolitical situations. Just think of the huge influx of people into another part of the State or the territory of a neighboring country: such human pressure can result in an open armed conflict. Therefore, the boundary between voluntarism and compulsion in extreme environmental situations is very thin. [11]

As the Word Migration Report 2022 points out, there is no universally accepted definition of migrant given the increasingly wide range of reasons that push people around the world to move from one place to another. [12] The United Nations Agency for Migrants (IOM), has been publishing a glossary on migration for years. The Glossary 2022 defines as migrant a person who leaves the place where he usually lives to move (within the same State or outside) temporarily or permanently for a "variety of reasons". [13] The glossary also notes that, due to the lack of

[9] I. RUGGIU (2019), *Migrazioni per cause climatiche*, cit., 401.

[10] A. LANNI (2019), *Esistono i "rifugiati climatici"?*, in *UNHCR Italia*, available online.

[11] A. LANNI (2019), *Esistono i "rifugiati climatici"?*, cit.

[12] IOM (2022), *World Migraton Report 2022*, cit., 22.

[13] See A. SIRONI, C. BAULOZ, M. EMMANUEL (2022), *Glossary on Migration*,

uniqueness of an "umbrella" term, there are different approaches to the issue: use migrant as a concept containing multiple forms of movement or reserve it for those who do not escape war and persecutions. [14]

The same IOM Glossary 2022 says that the term economic migrants is sometimes used to refer to any person who is moving or has moved across an international border or within a State, solely or primarily motivated by economic opportunities., but it is not a category in international law. The Glossary notes that the term economic migrants should be used with caution particularly when describing mixed migration flows. The term "migrant worker", as defined in the IOM 1990 International Convention on the Rights of all Migrant Workers and Members of Their Families, Art. 2.1, "is a more neutral term and should be preferred". [15] That Convention defines the Migrant Worker as "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".

Other examples of proposed definitions are those developed in the context of the United Nations Department of Economic and Social Affairs Recommendations on International Migration Statistics, developed in 1998. [16] The current Recommendations, which are being updated, define "international migrant" as any person who leaves the place where they have habitually lived and makes a distinction between "short" and "long" term migrants depending on the duration of the distance (in the first case at least three months, but less than a year; in the second for at least a year). Of course, since this proposal is not binding, it is limited by the freedom of the States to use different and further criteria such as minimum durations of residence other than those just indicated. [17]

3. International human rights standards

The impact of international human rights norms on the condition of migrants has eroded the division between citizens and non-citizens, as

IOM Publication, 132: "At the international level, no universally accepted definition for "migrant" exists. The present definition was developed by IOM for its own purposes and it is not meant to imply or create any new legal category".

[14] *Ivi*, 133.

[15] *Ivi*, 61-62.

[16] IOM (2022), *World Migraton Report* 2022, cit., 22.

[17] *Ivi*, 23.

these are norms relating to human dignity, regardless of where it comes from. The principle of the protection of human dignity is then reinforced by the principle of non-discrimination, enshrined in all human rights agreements. [18]

When it comes to human rights, the State is very constrained since the migrant must be protected as a human and not based on his legal status. Protection belongs to the State which has jurisdiction over the territory in which the person is located, even if irregular. However, State law may provide for provisions which differentiate the treatment of the citizen from that of the migrant (e.g. security, public order, morals, etc.), but always within the limits of a concept of the legitimate purpose of the measure. Therefore, the author distinguishes between rights that do not admit limits or differences (fundamental human rights) between citizens and foreigners and others that instead can be subject to differentiation as long as they have all the necessary limits (reasonableness, proportionality, necessity, etc.). Some rights can then be reserved only for citizens (those of citizenship, in fact).

Despite all this, migrants often end up victims of abuse and do not claim their rights for fear of reprisals, even from the authorities. This creates a perennial climate of violence and poverty around irregular migrants, even in the private market. Even in the latter case, there is the responsibility of the State which fails to prepare adequate legislative and control measures to prevent it. [19]

The preamble to the Universal Declaration of Human Rights states that "the recognition of the inherent dignity of all members of the human family and of their equal and inalienable rights constitutes the foundation of freedom, justice and peace in the world". Again the American Convention on Human Rights states "essential human rights do not depend on the belonging of an individual to a certain State, but are based on the attributes of the human person, and that this justifies their protection at international level, to be achieved through a Convention that strengthens and is complementary to the protection provided by the internal laws of the American States". [20]

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[18] V. CHETAIL (2013), *Human Rights of Migrants in General International Law*, in *Georgetown Immigration Law Journal*, 28, 245.

[19] S. THARAKAN (2002) *Protecting Migrant Workers*, in *Economic and Political Weekly*, 37, 5081.

[20] Adopted in San José de Costa Rica 22 November 1969. Entered into force after nine years 18 July 1978.

This principle is validated by the principle of non-discrimination as stated in art. 2 c. 1 of the International Covenant on Civil and Political Rights "each of the States Parties to this Covenant undertakes to respect and guarantee to all individuals within its territory and subject to its jurisdiction the rights recognised in this Covenant, without distinction, whether based on race, color, sex, language, religion, political opinion or any other opinion, national or social origin, economic status, birth or any other condition", which especially supports migrant workers and their families.

The fundamental rights listed therein do not apply only to foreigners; in fact, most of them are generally considered part of customary international law. However, a limit to the safeguards afforded to the person enjoying the legal status of a migrant is the fact that legal guarantees are offered only in the case of a "legal" presence in the host territory, hence the need to legitimise and bring out the presence of migrants, in order to prevent abuse, violence and exploitation. Still in the International Covenant on economic, social and cultural rights art. 2 paragraph 2 reads that "the States Parties to this Covenant undertake to ensure that the rights set out therein will be exercised without any discrimination, whether based on race, colour, sex, language, religion, political opinion or any other opinion, national or social origin, economic status, birth or any other condition", indicating, however, a limit to the principle of non-discrimination in references to paragraph 3 of Art. 2 of the Covenant which states that "Developing countries, with due regard for human rights and their national economies, may determine to what extent they will grant to individuals who are not nationals the economic rights recognised in this Covenant".

4. The ILO Conventions on migrant workers

The minimum standards that have gradually emerged specifically with regard to migrant workers are mainly the result of the work of the International Labour Organization (ILO), work that has developed over time.[21] In principle, all international labour standards, unless otherwise

[21] See C. VITTIN-BALIMA (2012), *Migrant workers: The ILO standards,* in *Labour Education*, (4), 129, note 6. For the sake of completeness, it should be noted that in 1926 the Conference adopted the Inspection of Emigrants Convention (no. 21) and the Migration (Protection of Females at Sea) Recommen-

stated, are applicable to migrant workers.[22] The most relevant policies are laid down in the 1949[23] International Labour Convention and the Convention on Migrant Workers (supplementary provisions) of 1975[24] and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990,[25] and the most recent Convention concerning Decent Work for Domestic Workers of 2011, entered into force in 2013. The protection accorded to the above-mentioned Conventions was immediately seriously undermined by the failure of the high-income countries to ratify or implement these agreements.[26] The reasons for the latter deficit are many and range from the high concentration of foreign workers within many rich countries to the political and social impact that the presence of these people can have compared to national citizens. In addition to the low consideration of these countries towards the mentioned instruments there is the additional difficulty linked to the monitoring of the world of migrant work-

dation (no. 26); in 1939, the Migration for Employment Convention (no. 66) and Recommendation (no. 61), and the Migration for Employment (Co-operation between States) Recommendation (no. 62); and in 1947, the Social Policy (Non-Metropolitan Territories) Convention (no. 82). Convention No. 66 never entered into force due to lack of ratifications and it was accordingly decided to revise it in 1949, when the Migration for Employment Convention (Revised) (no. 97) and Recommendation (Revised) (no. 86) were adopted. In 1955, the Conference adopted the Protection of Migrant Workers (Underdeveloped Countries) Recommendation (no. 100); in 1958, the Plantations Convention (no. 110), and Recommendation (no. 110); and in 1962, the Social Policy (Basic Aims and Standards) Convention (no. 117). Finally, in 1975, the Conference supplemented the 1949 instruments by adopting the Migrant Workers (Supplementary Provisions) Convention (no. 143) and the Migrant Workers Recommendation (no. 151).

[22] ILO (2023), *International labour standards on labour migration*, available online.

[23] *Convention on Migrant Workers* (Revised), 1949 (no. 97).

[24] *Convention on illegal migration and the promotion of equal opportunities and treatment of migrant workers* (revised), 1975 (no. 143).

[25] For an overview of the international conventions on migrant workers from 1919 to 1975 see M. HASENAU (1991), *ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and Their Genesis*, in *The International Migration Review*, 25, 687-697.

[26] See M. RUHS (2017), *Rethinking international legal standards for the protection of migrant workers: the case for a "core rights" approach*, in *AJIL Unbound*, 111, 175.

ers, many of whom do not 'emerge' in statistics (and the case especially of irregulars). To this aim, the continuous data collection and processing provided by both the IOM and the ILO is indispensable.

The ILO Convention on Migration and Employment of 1949, which has been very poorly ratified, includes at least a few high-income Western countries such as Belgium, Italy, Norway, Spain and the United Kingdom (the latter are not covered by Annexes I and III).[27] This draft represents a successful re-edition of the principles contained in a previous convention of 1939 that never entered into force since it was not ratified by any country.

Even fewer countries have taken part in the Migrant Workers (Supplementary Provisions) ILO Convention, 1975 (no. 143),[28] which also provides for a large catalogue of obligations.[29] This too begins by referring to fundamental rights and to international, multilateral and bilateral instruments or agreements, that is to say, to national legislation (Art. 2). One of the aims of the convention, as in the previous ones, is to combat illegal migration and illegal occupation. Art. Amendment No 8, for example, guarantees equal treatment with national citizens in the event of irregularities or illegality resulting from the loss of employment, provided that they have been legally resident in the territory until then.

The 1990 Convention refers to the Universal Declaration of Human Rights and other instruments on human rights, and to the two other conventions mentioned. To date, it has only 58 States among its members, mostly Latin American and Northwest Africa, countries more affected by emigration than by immigration. Moreover, among these members are many countries not particularly engaged in respect of human rights such as Egypt, Turkey and Venezuela.[30] It should be noted

[27] 53 ratifications to date.

[28] Only 29 ratifications. Here too, there are very few wealthy countries such as Italy, Portugal and Sweden.

[29] A particular burden might be thought of as art. 10 of Convention: "Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory".

[30] Countries which, like many others, have made reservations about the Convention.

that it does not include any European Union country or any other European State, such as Switzerland or United Kingdom. The Convention is based on the principle of equal treatment between migrants and citizens, rather than on the notion of minimum standards,[31] and links the rights of migrant workers to the wider area of human rights.

An important principle in this text (Art. 2.1) is the definition of migrant worker as one who 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". It is important to emphasize that for two reasons: often the basis of the cracks in international law with regard to migrants is precisely the lack of general consensus even on the definition of the term "migrant"; the Convention also applies to more specific workers such as cross-border workers, seasonal workers, seafarers, itinerants and other similar cases (Art. 2). The Convention aims to protect not only migrant workers but also their families, recognising the importance of the dignity of work in a broader social and human sense. Art. 1 states that the principles of the text are applicable to all migrant workers and members of their families without any distinction of sex, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic status, property, marital status, birth or other legal status. The same Article protects the migrant and his family members throughout the migration process, from preparation, to transit, to stay in the State of destination and up to withdrawal of the land of origin or habitual residence. Perhaps the most daring datum of this convention is the recognition of the rights of irregular migrants (Art. 5.). The rationale of protection is that these workers are often the most vulnerable, invisible in the hands of exploiters or situations of extreme distress. Despite the difficulties of application on a large scale, this convention has the great worth to consider the migrant worker first of all as a human being.[32]

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[31] J. LONNROTH (1991), *The International Convention of the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*, 25 *Int. Migr. Rev.* 710, cited in M. RUHS (2017), *Rethinking international legal standards*, cit., 173.

[32] A.R. COVELLA (2020), *Dopo trent'anni la "Convenzione internazionale sulla protezione dei diritti dei lavoratori migranti e dei membri delle loro famiglie" attende ancora di essere ratificata dai Paesi dell'UE*, in *diritto.it*, available online.

Finally, Part VII of the text provides for the establishment of a Committee for the Protection of the Rights of All Migrant Workers and Members of their Families, with the task of monitoring the application of the provisions contained therein. The Member States may grant the Committee competence for individual and interstate communication procedures. However, this mechanism has never entered into force, less than ten States have so far done so.

Latter is the Convention concerning Decent Work for Domestic Workers, setting labour standards for domestic workers. It is the 189th ILO convention and was adopted during the 100th session of the Organization in 16 June 2011. It entered into force on 5 September 2013. To date 36 states ratified the Convention.

The main rights given to domestic workers as decent work are daily and weekly (at least 24 h) rest hours, entitlement to minimum wage and to choose the place where they live and spend their leave. Ratifying States parties should also take protective measures against violence and should enforce a minimum age which is consistent with the minimum age at other types of employment. Workers furthermore have a right to a clear communication of employment conditions which should in case of international recruitment be communicated prior to immigration. They are furthermore not required to reside at the house where they work, or to stay at the house during their leave.

The lack of success of these conventions in high-income countries has been attributed in doctrine to the series of commitments which they would impose on them in terms of the protection of foreign workers and their social impact.[33] As described in many dossiers of the UN and specialised agencies, labour migration involves an enrichment of the destination country, but such a result must be supported by concrete actions. The rather limited global progress on labour mobility, despite the intense globalization of this millennium, shows that high-income countries prefer to put obstacles rather than build bridges.[34] There is the need for a different approach, based precisely on a catalogue of fundamental rights in the global governance of international labour migration, which should complement the provisions of the conventions

[33] Among these, the obligation to submit every five years a report on the situation in the country to the Commission on migrant workers. See A.R. COVELLA (2020), *Dopo trent'anni*, cit.

[34] P. WICKRAMASEKARA (2008), *Globalisation, International Labour Migration and the Rights of Migrant Workers*, in *TWQ*, 29, 1261.

(and not replace them). In this way, it is considered that a restricted list of fundamental rights, rather than a solemn text, is more acceptable even in these countries with high labour immigration. [35]

5. New York Declaration and the Global Compacts: the UN initiatives

In recent years, the proliferation of non-binding regulatory systems has been instrumental in creating a routine of interstate dialogue and in establishing the UN as a leading actor after a long period of marginalization, and the related global governance is now firmly anchored in the system of United Nations, including through its specialized agencies and linked organizations. [36] After a long process, migration is now recognized as a public issue requiring global solutions at the multilateral level, [37] the most decisive contribution of which is provided by the New York Declaration for Refugees and Migrants, [38] the Global Compact for Safe, Orderly and Regular Migration [39] and the Global Compact on Refugees. [40]

Through the New York Declaration on Migrants and Refugees, unanimously adopted by the UN General Assembly on 19 September 2016, all Member States agreed that, despite the legal vacuum regarding refugee status, it is necessary to protect people who are fleeing under compulsion and to help those countries that welcome them. Briefly, the Declaration recognizes the multiplicity of causes underlying the migratory phenomena and highlights the urgency of regulating migration also as a form of contrast to organized crime. Topics ranging from non-discrimination to the protection of women, children and the disabled are addressed. The emphasis several times is placed on equal human dignity between refugees and migrants while understanding that both

[35] See M. RUHS (2017), *Rethinking international legal standards*, cit., 173.

[36] V. CHETAIL (2019), *International Migration Law*, Oxford, 370.

[37] *Ivi*, 370-371.

[38] United Nations, General Assembly, *New York Declaration for Refugees and Migrants*, UNGA Res 71/1, 19.11.2016.

[39] Global Compact for Safe, Orderly and Regular Migration, adopted on 13 July 2018, available online.

[40] United Nations, *Global Compact on Refugees* (hereafter GCR) (Report of the United Nations High Commissioner for Refugees – Part II, Global Compact on Refugees), 2018 UN Doc A/73/12.

cannot be guaranteed the same regulatory protections. The text ruefully acknowledges that about the powers of the State in border management, only a check on respect for human rights, recognized as a key tool for dealing with protracted refugee crises, can be applied.[41] Important is the principle according to which the international legal order should not be based on the concept of State sovereignty as a "privilege", but as a "duty" to use one's powers to protect the inviolable rights of people and the collective interests of the International Community.[42]

Based on these initiatives, UNHCR proposed a blueprint for a Global Compact on Migrants as part of its 2018 Annual Report for submission to the UN General Assembly.[43] The principles examined, therefore, were largely reaffirmed and carried forward by the Resolution 73/195 of the General Assembly which adopted, in December 2018 in Marrakech, the Global Compact for Safe, Orderly and Regular Migration (GCM), aimed at providing guidelines and recommendations on a migration governance model in all its dimensions. Actually GCM is the most comprehensive intergovernmental framework for cooperation on international migration and aims to partially fill the gaps regarding regular migration and address irregular migration. Starting from the principle according to which no State can deal with migration alone, as a transnational phenomenon, the objective of the act is enshrined precisely in guaranteeing safe, orderly and regular migration.[44] The Global Compact does not have a binding nature, to underline the limit that international law encounters in this field[45] and is based on the commitments agreed by the States that signed the 2016 New York Declaration. The text provides for the respect of sovereign power States to determine

[41] *Ivi*, 24.

[42] *Ivi*, 83.

[43] UNHCR, *New York Declaration spurs reforms to help refugees and their hosts as new framework is rolled-out*, 15 September 2017, available online.

[44] IOM (2022), *World Migraton Report 2022*, cit., 178.

[45] United Nations, *GCR*, cit., 4: "National sovereignty: The Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law. Within their sovereign jurisdiction, States may distinguish between regular and irregular migration status, including as they determine their legislative and policy measures for the implementation of the Global Compact, taking into account different national realities, policies, priorities and requirements for entry, residence and work, in accordance with international law".

their entry policies, but the broad consensus that accompanied the adoption of this framework represents a relevant point of arrival and departure.

The Preamble of the GCM incorporates the main international charters as sources of inspiration including the UN Charter, the Universal Declaration of Human Rights, the Rio and Paris Agreements, the ILO Conventions, the International Covenant on Civil and Political Rights and the Principles of the 2030 Agenda, and others[46] The Preamble itself, however, makes it clear in point 7 that the GCM is non-legally binding in nature and is based directly on the commitments agreed by the States in the New York Declaration.

Furthermore, the Global Compact would respond to the aims pursued by SDG 10.7 of the 2030 Agenda, according to which the Member States undertake to cooperate to facilitate safe, orderly and regular migration.[47] Due to its largely transversal nature, migration is also the object of other objectives directly related to it, such as in the case of human trafficking, remittances, international student mobility, etc. The approach proposed by the Global Compact is multidimensional and holistic. Engagement should span across society through broad multi-stakeholder partnerships including migrants themselves, local communities, academia and civil society, including the private sector, trade unions, national human rights institutions, the media and other stakeholders in migration governance.[48]

The GCM contains a list of 23 well-defined objectives conceived as commitments of the parties, all necessary to implement actions and best practices useful to promote a safe, orderly and regular migration.[49] These objectives include: minimising the causes and adverse structural factors that force people to leave their country of origin; ensuring that all migrants have proof of legal identity and adequate documentation; addressing and reducing migration vulnerabilities; strengthening the transnational response to migrant trafficking; managing borders in an integrated, secure and coordinated way; cooperating to facilitate safe

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[46] The Global Compact also consistently responds to the aims pursued by SDG 10.7 of Agenda 2030, according to which Member States undertake to cooperate to facilitate safe, orderly and regular migration.

[47] UN-IOM-OECD Paper, *SDG INDICATOR 10.7.2 Number of countries with migration policies to facilitate orderly, safe, regular and responsible migration and mobility of people*, 4, available online.

[48] IOM, *Global Compact on Refugees*, 5.

[49] See IOM, GCM *final draft*, 5-6.

and dignified return and readmission, as well as sustainable reintegration, and to strengthen international cooperation and global partnerships for safe, orderly and regular migration. The fragmentation in this area, oscillating between the protection of human rights and State sovereignty,[50] in the logic of this Pact, it should stimulate a wide-ranging reflection on the causes of the phenomenon of migration[51] and on the difficulties encountered by both destination and origin and transit countries.

Migration is valued by the GCM. It recognizes the growth that the movement of people and therefore of cultures and knowledge can bring to the destination countries. At the same time, the different types of migration are also classified, from those working to those so-called climatic.[52]

The GCM indirectly asserts that the right to migrate would be a fundamental right that concerns every person, thus also economic or climatic migrants. The guiding principles are represented by the human dimension, respect for State sovereignty, but also international cooperation, sustainable development, human rights, and protection of women and children. The Global Compact on Safe, Orderly and Regular Migration envisages twenty-three objectives, to be achieved through specific actions, indicated therein, to obtain safe, orderly and regular migratory flows.[53]

The GCM provides numerous prescriptions specifically concerning migrant workers. The GCM calls on States to improve legislation on public and private recruitment agencies in order to align them with international guidelines, and to prohibit employers from charging for recruitment costs or the costs associated with migrant workers, in order to prevent debt slavery, exploitation and forced labour. All the provisions of Objective 6 of the GCM are dedicated to migrant workers, all aimed

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[50] "For nations, migration affects the most rudimentary pillar of sovereignty (national borders), the core of democratic political systems (human rights), and atavistic social needs (national identity)". See P. SASNAL (2018), *Domesticating the Giant: The Global Governance of Migration*, in *Council on Foreign Relations*, available online.

[51] J. MCADAM (2019), *Introductory note to global compact for safe, orderly and regular migration*, in *ILM*, 58, 160.

[52] K. BOZORGMEHR, L. BIDDLE (2018), *New UN Compact for Migration Falls Short on Health*, in *British Medical Journal*, 363.

[53] G. CATALDI, A. DEL GUERCIO (2019), *I Global Compact su migranti e rifugiati. Il Soft Law delle Nazioni Unite tra spinte sovraniste e potenziali sviluppi*, in *Dir., Imm. e Cittad.*, 2, 197.

at facilitating fair and ethical recruitment and safeguarding the conditions that guarantee decent work, as well as Objective 22, on the portability of benefits from social security benefits to be included in the social security framework of countries, with the idea of identifying focal points to facilitate the movement of benefits. Social security in both the countries of origin and transit and destination. Work together for an inclusive labour market, and the full participation of migrant workers in the formal economy by facilitating access to decent work and employment for which they are most qualified.

Other provisions are scattered in the text such as that of empowering migrant women by removing discriminatory restrictions based on gender formal employment, ensuring the right to freedom of association and facilitating access to relevant basic services, as measures to promote their leadership and ensure their full participation, free and fair participation in society and the economy.

Other GCM commitments include capitalising the cultural and linguistic skills of migrants and receiving communities by developing and promoting peer-training exchanges to-peer, gender-sensitive professional and civic integration courses and workshops. Objective 18 calls on States to invest in the development of skills and to facilitate the mutual recognition of skills, qualifications and knowledge.

The Global Compact has received a lot of criticism. The idea of a global forum and wider initiatives on a theme that has now become a general emergency was timely but highlighted limitations, that fully reflect both the necessary non-binding character of the Global Compact and the difficulty of the UNHCR in supervising the phenomenon on its own.[54]

An aspect is the potential weakening of the protection of human rights resulting from the priorities of the Global Compact hides long-term dangers. The aim of this weakening should be to ease the pressure on the host countries. According to some, the objective should be reversed, that is, the strengthening of the protection system, with a path of dismantling the current regime of control and restriction of entry from developed nations.

Even though they are non-binding acts, and the perplexities that result, some States have already withdrawn from the Global Compact,

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[54] B.S. CHIMNI (2018), *Global Compact on Refugees: One Step Forward, Two Steps Back*, in *Int. J. Refug. Law*, 30, 630-634. For an overview of the main negative positions towards the GCM see the UN press release on the adoption of the GCM, online.

such as the United States, Hungary, Austria, Australia and Poland. The main fear was both the questioning of the sovereign power over the management of immigration, and the passing of migration itself as a fundamental right, with all the consequences of the case. [55]

The GCM fails to distinguish between legal and illegal migration and it promotes a 'one size fits all' approach to migration, which could encourage more irregular migration. Seeking to promote international cooperation and coordination on migration policy, GCM may also lead to a control over States immigration policy. GCM focuses mainly on the management of migration symptoms rather than on the root causes of migration. GCM does not adequately address the economic, social and political factors driving migration. States could abuse the GCM to justify repressive migration policies, such as detaining migrants or limiting their rights.

In summary, while the GCM has been praised by some for its efforts to address global migration challenges, it has also faced criticism for its lack of binding obligations, failure to distinguish between legal and illegal migration, potential threat to national sovereignty, failure to address root causes, and potential for abuse.

6. Brief examples of bilateral agreements

According to what has been examined so far, the UN and related agencies are deploying all their soft power to sensitize governments on the migration issue, providing guidelines, studies, databases and other valuable tools. But the decision on how to enter the State is still up to the State. Therefore, a large part of international law in this area rests essentially on domestic legislation and bilateral (sometimes multilateral) agreements between States. Focusing only on the latter, these agreements almost always concern neighbouring countries or regulate the influx of large masses of people crossing the borders from one territory to another for the most varied reasons from work to education, the exercise of certain freedoms for strictly economic reasons. The vast number of cases in existence only allows the analysis of some such agreements chosen as examples of the

[55] Note from the Parliamentary Group of Fratelli d'Italia, currently Party of Government in Italy. The Note also reports the position of Fratelli d'Italia who explicitly asks for the withdrawal of Italy from the Declaration of New York.

ability of States to agree -precisely- on migration issues affecting several countries affected by the same phenomenon.

Starting from the most recent, the United States and Mexico have agreed on a plan to allow thousands of Venezuelan migrants to reach by air and in a regular manner the first of the two countries provided that the candidates comply with strict requirements. The measure was necessary to counter the increase in irregular immigrants and to establish a certain type of legal entry into the country. Only a small number of Venezuelans who are still at home and have not already attempted to cross the border between Mexico and the United States will be admitted to the procedure. Venezuelans who attempt to enter illegally are expected to be expelled immediately to Mexico and unable to access the procedure in question.[56] In addition, these people will need to have a person or organization on US soil that can provide financial support. The reasons for the flow are due to the serious economic and political crisis that Venezuela has been facing for several years.

In 2007, Uzbekistan and Russia signed a series of agreements to normalize migrants and Uzbek workers moving towards the Federation, the second largest country in the world (after the United States, by the number of immigrants hosted). Since 2014, diplomatic and economic relations between the two countries have intensified until the discussion of a draft agreement on improving the working conditions of Uzbek migrants, present in Russia in several million. The purpose of this agreement is to find a definitive agreement aimed at protecting Uzbek migrants under the protection of both host and home countries.[57]

An example of 'peace and friendship' between neighboring States, at least on paper, is that of migrations between India and Nepal, which are regulated by an agreement dated 31 July 1950. The text allows the respective citizens to receive (Arts. 6 and 7) equal treatment and privileges in certain matters if they move from one country to another. These include, on a reciprocal basis, privileges on residence, property, trade and movement. Citizens of these countries do not need a passport or visa to move from one to another. However, this agreement still in force has seen, from 1950 to today, many of those changes in relations be-

[56] U.S. Homeland Security Paper, *DHS Announces New Migration Enforcement Process for Venezuelans,* 12 October 2022, available online.

[57] Z. ZHANALTAY (2015), *Russia-Uzbekistan Migration Agreement*, in *Eurasian Research Institute*, available online.

tween India and Nepal to lead the second to define it as unequal, exceeded and fallen into disuse.[58] The Nepalese authorities have asked on several occasions to revise the treaty and update it[59] and in 2014 an agreement was reached with India in this regard.[60]

A similar agreement in 2004 concerned the hot front[61] between the government of the Arab Republic of Egypt and the government of the Republic of Sudan with the so-called "Four Freedoms Agreement" on freedom of movement, residence, work and property.[62] The text provides that a visa is not required for nationals of one country to travel to the other and that there is mutual freedom to seek and work as well as to own and profit from land, property and movable property. Interesting are the provisions according to which the Agreement does not affect neither the commitments of the two States due to other international acts, nor the rights acquired under the Agreement itself if it expires for any reason. The Agreement takes precedence over any other legislative text in force in the two countries whose provisions conflict. It should be noted that in 2018 Egypt asked for the amendment of some provisions arousing the reaction of the Sudanese authorities who accused the other side of wanting only to delay the implementation of the Agreement.[63]

In conclusion, two kinds of problems emerge from the agreements examined: the discretion of the host country's legislation in deciding who is entitled to enter and the subsequent treatment of migrants once they have reached their destination. Often these people find it difficult to access essential services or suffer discrimination, in addition to situations at home that do not allow them to return, although always outside the requirements for refugee status.

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[58] S.P. SUBEDI (1994). *India-Nepal Security Relations and the 1950 Treaty: Time for New Perspectives*, in *Asian Survey*, 34, 281-282.

[59] See N. NAYAK (2010), *India-Nepal Peace and Friendship Treaty (1950): Does it Require Revision?*, in *Strategic Analysis*, 34, 579-593.

[60] N. BASU, *What the India-Nepal Peace treaty is, and why Nepal has problems with it*, in *The Print*, 24 January 2021, available online.

[61] To deepen the issue of borders between the two countries see. S. MOHYELDEEN (2020). *The Egypt-Sudan Border: A Story of Unfulfilled Promise.* Washington.

[62] A non-official translation in English of the agreement is available online.

[63] *Egypt, Sudan continue to disagree on visa-free travel deal*, in *MEMO Middle East Monitor*, 11 January 2018, available online.

7. Conclusions

Migration is only partly regulated by international rules, although migration is mainly a transnational process. The extent to which migration is regulated at international or national level depends on the political and economic interests of reception or movement. On the basis of these interests and the recognition of specific protection needs, the different categories of economic migrants are subject to multilateral rules, bilateral agreements, national laws and regulations, and the discrepancy between those rules and their application.[64] The precise international definition of refugee status and the unequivocal definition of migrant correspond respectively to a strong and weak point of international law. This gap, as well as normative, is also cultural and with many repercussions. However, despite the critical points noted, the initiatives described in the United Nations and those of some States on these issues provides at least material for the first global coordinates to cover migrants of all kinds, even if these initiatives are somewhat "small": not binding on those of the United Nations, binding only on the contracting parties those resulting from agreements. As in the case of the Global Compact, the effectiveness of these initiatives lies not in whether they are binding or not but in their credibility and consensus.

The power of the State to control entry into its territory, with the consequent power to reject those who try to cross the border without having had permission, is also indirectly confirmed by modern international instruments to protect human rights, which do not provide for a general right of entry for foreigners.[65]

International law can continue to seek an ever-wider consensus on a subject that has always concerned much of the world. If such a consensus does not exist, as in the countries that have withdrawn from the commitments of the New York Declaration, it is possible to push for interventions directly related to human rights.

The UN can use its many ramifications to exert its influence by monitoring respect for migrants' fundamental rights in general and that policies are not openly discriminatory or humiliating. As suggested by the

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[64] M. HASENEAU (1995), *Changing Features of Economic Migration and International Law*, in *Germ. YB Int. Law*, 38, 214.

[65] I. PAPANICOLOPULU, G. BAJ (2020), *Controllo delle frontiere statali*, cit., 27.

texts examined, many aspects related to the protection of the migrant worker are directly discriminating against protection against abuse of the person, prevention of forms of slavery, trafficking in human beings, and other rules on the exploitation of the person, which, in rich countries, are often already implemented.

Exemplary are the actions carried out on Qatar, the first country in the world for immigrant inhabitants *ratio*, which was subjected to diplomatic, judicial and economic pressure during the preparation for the FIFA 2022 World Cup, to obtain the country's accession to the main instruments of protection of migrant workers adopted within the ILO. [66]

Economic, labour and climate crises are often unpredictable and can affect any country with increasing numbers. The Global Compact for Migration stresses the need to support legal migration pathways, which are particularly necessary for people living in countries affected by these crises and underdevelopment and who often find themselves in unsafe irregular journeys. The UN objective examined in the work is to try to create, in the international legal framework, at least a shared basis of values and commitments for long-term governance of migration, taking into account the nature of a phenomenon that will grow in the coming years, putting even more in crisis host governments. The solution in the future seems to be only the one that emerges from the previous lines: encouraging the development of migratory laws that, first of all, protect the human rights of migrants and that, as in the case examined by Venezuelans in the United States, create safe and legal corridors. [67]

In the Russian-Uzbek case, beyond the current situation with the war in Ukraine, supporting a community of migrant workers and preventing them from neighboring countries promotes integration into the social fabric of the host State, reduce the room for manoeuvre of criminal organisations. Treaties of good neighbourliness and friendship between neighbouring peoples should also be encouraged in other parts of the world, where materially possible. On these coordinates, taking up

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[66] See I. CARACCIOLO (2022), *La lunga strada per un effettivo rispetto degli standard internazionali di protezione dei lavoratori migranti: il caso del Qatar in occasione dei mondiali di calcio del 2022*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.), *Migrazioni internazionali. Questioni giuridiche aperte*, Naples.

[67] L. THOMPSON (2013) *Protection of Migrants' Rights and State Sovereignty*, in *UN Chronicle*, no. 3, vol. L, *Migration*.

what has been said elsewhere, we can hope to make migration something constructive for those concerned. In conclusion, as the migrant is a figure of "compromise" with a thousand facets, but often the result of a single desperation, so in the institutional compromise there seems to be the only viable way. One that does not call into question the sovereignty of States, but that can guide them towards common solutions to a common problem.

Chapter 7

THE PROTECTION OF MIGRANTS' PERSONAL DATA

Francesco Buonomenna

ABSTRACT: *This chapter focuses on some specific aspects of the collection of migrants' personal data and the challenges that arise in their protecting. The sensitive nature of the data collected and the potential for misuse pose significant risks to the privacy and security of migrants. Therefore, robust measures must be put in place to ensure that the data are used only for their intended purpose and in compliance with data protection laws.*

1. The specificities of the protection of migrants' personal data

Advances in technology have led to an increase in the collection and processing of personal data, which has raised concerns about the protection of privacy. This is particularly relevant in the management of migratory flows,[1] where sensitive data, including biometric, are often collected. Ensuring the proper use and storage of these data is crucial to protect the privacy of migrants. Data processing also has the function of protecting public health and security, highlighting the importance of responsible and ethical data management practices.

The terrorist attacks since 11 September 2001 have affected many aspects of daily life, particularly the collection of data on individuals who for various reasons circulate between States.

In this regard, Resolution 1373 of 28 September 2001 of the United Nations Security Council restricted the movement of individuals sus-

[1] See M. FORTI (2020), *Flussi migratori e protezione dei dati personali: alla ricerca di un punto di equilibrio tra sicurezza pubblica e tutela della privacy dei migranti e dei rifugiati all'interno del territorio europeo*, in *Media Laws*, 2, 212 ff.

pected of being part of any associations with subversive purposes.[2]

Consequently, EU Member States have denied access to their borders to all asylum seekers who are in any way linked to such associations,[3] resulting in the intensified data collection activities of national border authorities.

Biometric data, including health conditions, information on country of origin, and any criminal records are stored in databases that can be consulted by the authorities in charge of controls.

Therefore, this chapter will analyse the notion of personal data and the rights of migrants in relation to data processing under Regulation (EU) 2016/679,[4] as well as the use of these databases and aspects relating to the so-called profiling that may lead to restrictions and discrimination.

2. Regulatory limits to the collection of personal data

Art. 4 of Regulation no. 2016/679 defines personal data in very broad terms, namely "any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".

The Regulation also includes three different categories of personal data not covered in previous legislation: genetic, health, and biometric.

The first relate to the hereditary and genetic characteristics of the in-

[2] For a framework of the relationship protection data and international terrorism see M. NINO (ed.) (2012), *Terrorismo internazionale, Privacy e Protezione dei dati personale*, Napoli.

[3] See B. HAYES (2017), *Migration and data protection: doing no harm in an age of mass displacement, mass surveillance and "big data"*, in *International Review of the Red Cross*, 99(1), 179 ff.

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). See, *ex multis* F. PIZZETTI (ed.) (2016), *Privacy e il diritto europeo alla protezione dei dati personali. Dalla Direttiva 95/46 al nuovo Regolamento europeo*, Torino.

dividual concerned and provide unambiguous information, also through the analysis of biological samples. Health data, on the other hand, provide information on the individual's physical condition and health status, including medical treatment received.

In relation to biometric data, Art. 4(1) of the Regulation refers to individual's characteristics that can be identified through specific automated processing, such as iris scanning or fingerprinting, and can be used for different purposes.

First, the registration of personal information in the Visa Information System and the comparison with data stored in electronic identification documents allow for free movement within the territory of the EU. They are also a valuable search tool used by law enforcement authorities in the fight against crime.

The multiplicity of purposes of use casts doubt on the effective respect of the rights of the individuals to whom the data relate,[5] since such data may be used without prior consent, raising questions on the dissemination of these data once the purposes that legitimised their collection have ceased to exist.

Art. 9 of the Regulation prohibits the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, or sexual orientation. The prohibition also extends to genetic, biometric, and health data.

However, Art. 9(2) lists a number of cases in which the prohibition does not apply, such as for reasons of public interest in accordance with EU and Member States' law.[6]

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[5] See J. KILPATRICK (2020), *L'identificazione dei cittadini africani in transito verso l'Unione Europea: funzionamento della raccolta dati e rispetto della privacy*, available online.

[6] Art. 9 Processing of special categories of personal data. "1. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited. 2. Paragraph 1 shall not apply if one of the following applies: (a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject; (b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law

However, the exceptional processing of such data must comply with data protection principles, including specific measures for the protection of the fundamental rights of the person concerned, and must be proportionate to the purposes pursued. At present, a clear-cut position has yet to emerge, as even the European Court of Human Rights' case law has considered the collection of "sensitive" data, such as biometric identifiers and their subsequent storage in databases that are complex and difficult for migrants to access, as legitimate for the purposes set out.[7] These measures must be balanced against the effective implemen-

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or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject; (c) processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent; (d) processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects; (e) processing relates to personal data which are manifestly made public by the data subject; (f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity; (g) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject; (h) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3; (i) processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy; (j) processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Art. 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject".

[7] See M. FORTI (2020), *Flussi migratori e protezione dei dati personali: alla ri-*

tation of the individual's right to be informed, have access to information concerning him or her, and the obligation to inform the individual of the purposes of the processing and the methods used. On this point, Art. 109 of the Convention implementing the Schengen Agreement stipulates that every individual has the right to request access to his or her data in accordance with the national legislation of each Member State. [8]

Nevertheless, this right may be limited in that the requested country may refuse to release the data in its possession when necessary to fulfil a legal obligation or for reasons of surveillance and crime prevention.

3. Data processing: the implications of the use of databases

Another relevant aspect concerns the processing of data by means of artificial intelligence [9] and the resulting profiling that may influence the decision-making process. Art. 22 of the Regulation states that the individual concerned has the right not to be subjected to a decision based solely on automated processing, since decisions against migrants based on profiling can lead to distorting effects.

However, no outright prohibition is imposed, as the same Article specifies that such decisions may be taken if EU law or the data controller's national law so permits. [10]

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cerca di un punto di equilibrio tra sicurezza pubblica e tutela della privacy dei migranti e dei rifugiati all'interno del territorio europeo, in *Media Laws*, 2, 218 ff.

[8] Art. 109 of the Convention implementing the Schengen Agreement: 1. The right of persons to have access to data entered in the Schengen Information System which relate to them shall be exercised in accordance with the law of the Contracting Party before which they invoke that right. If national law so provides, the national supervisory authority provided for in Art. 114(1) shall decide whether information shall be communicated and by what procedures. A Contracting Party which has not issued the alert may communicate information concerning such data only if it has previously given the Contracting Party issuing the alert an opportunity to state its position. 2. Communication of information to the data subject shall be refused if this is indispensable for the performance of a lawful task in connection with the alert or for the protection of the rights and freedoms of third parties. In any event, it shall be refused throughout the period of validity of an alert for the purpose of discreet surveillance.

[9] See F. PIZZETTI (ed.) (2018), *Intelligenza artificiale, dati personali e regolazione*, Torino.

[10] As stated in Art. 22 "1. The data subject shall have the right not to be

For profiling to be considered legitimate, certain conditions must be met: first, the data subject must be made aware of his or her rights; second, he or she must be given the possibility of a human review of the machine process.

Finally, from a procedural point of view, the possibility of appealing against the outcome of the decision must be ensured. Central to the issue regarding the collection and processing of migrants' data are the profiles derived from databases. [11]

In particular, the data collected may be stored in databases that serve different purposes. [12] As a general rule, the data should be disposed of once they have fulfilled the need for which they were collected. While security requirements legitimise the collection of data in databases, the unjustified use of these databases can lead to the so-called preventive profiling. Three main databases are relevant in this context. The first is the Schengen Information System (SIS), which collects data on persons seeking to enter Member States and plays an important role in enabling cooperation between the various national authorities [13] and exchanging information relating to the identity of specific persons or goods. According to the Convention implementing the Schengen Agreement, only data relating to certain categories of persons are taken into account: persons subject to an extradition order (Art. 95); persons arriving from third countries who have been refused entry to the EU territory (Art. 96); missing persons (Art. 97); persons wanted by the authorities as witnesses or accused in legal proceedings (Art. 98); persons suspected of planning criminal offences (Art. 99). The second database is

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subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her. 2. Paragraph 1 shall not apply if the decision: (a) is necessary for entering into, or performance of, a contract between the data subject and a data controller; (b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or (c) is based on the data subject's explicit consent".

[11] See R. MARVULLI (2022), *Flussi migratori e tecnologie di controllo: cosa succede alle frontiere dell'UE?*, triesteallnews.it.

[12] This topic is linked to data portability, see E. BATTELLI, G. D'IPPOLITO (2019), *Il diritto alla portabilità dei dati personali*, in E. TOSI (ed.), *Riservatezza e protezione dei dati tra GDPR e nuovo Codice Privacy*, Milano, 185 ff.

[13] See L. GALLETTA (2019), *Sistema informativo Schengen: origine e prospettive. Il S.I.S. e la lotta al crimine transnazionale*, altalex.com.

Eurodac, which is an integral part of the "Dublin system" and contains the fingerprints (i.e., biometric data) of asylum seekers and irregular migrants. The third is the database in which Member States participate in visa matters, the so-called VIS system. The difference between these databases lies in the criteria according to which information is recorded. Each database therefore fulfils a specific function. If data are accessed for a purpose other than the specific function of each database, there is a risk of creating information asymmetries that may lead to the inaccurate profiling of the individual concerned. [14]

4. Concluding remarks

Migration flows raise a number of data collection issues. As migrants often lack identity documents, information on their history and identity has to be collected to assess eligibility for international protection. The identification process of migrants is closely linked to their security profile. However, the collection of data on migrants and its legitimisation for security purposes raises several legal concerns, especially in a context where exceptions are prevalent. Moreover, the practice of storing data in databases for security purposes poses its own challenges. While the need for security justifies the collection of data, it also requires caution when querying the data. The use of artificial intelligence [15] in this process raises issues of profiling, which can undermine the free movement and equal treatment of individuals. Data collection and storage are important processes in today's digital age. However, it is crucial to ensure that these processes comply with legal and ethical standards.

[14] See M. BORGOBELLO (2021), *Migranti, rifugiati o richiedenti asilo vengono schedati con una tecnologia "riservata" a criminali e non c'è adeguato controllo indipendente sulla quantità dei dati raccolti. L'accusa del rapporto Tecnologie per il controllo delle frontiere in Italia dell'Hermes Center for Transparency and Digital Human Rights*, agendadigitale.eu.

[15] F. PIZZETTI (ed.) (2018), *Intelligenza artificiale, dati personali e regolazione*, Torino.

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Chapter 8

ILO AND THE PROTECTION OF FEMALE MIGRANT DOMESTIC WORKERS: ONGOING LIMITS AND RECENT DEVELOPMENTS

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ABSTRACT: *When it comes to considering the phenomenon of international migration, it is worth reminding that almost half of the total population of international migrants worldwide is represented by women. Once they arrive in a developed country as independent female workers, they usually find work in traditionally female-dominated occupations, such as domestic work. From the international legal perspective, it is necessary to understand how the category of female migrant domestic workers (FMDWs) can be subject to phenomena,* inter alia*, such as discrimination and the threaten to their social and security rights. This work aims at analysing the contribution of the International Labour Organization (ILO) to the formulation of international legal standards that take into account the protection of FMDWs and its most recent developments, through the establishment of ILO's capacity-building partnerships on this issue. After a brief reconstruction of the principles to legally frame the category of FMDWs, this chapter will investigate the ILO Convention concerning Decent Work for Domestic Workers No. 189 and the subsequent Recommendation no. 201 of 2011* vis-à-vis *FMDWs. Nonetheless, some legal limitations related to the effective protection of social and security rights for FMDWs still persist in the State practice of developed countries. Therefore, ILO's contribution to the creation of partnerships and capacity-building initiatives, both within the countries of departure and destination of FMSWs, is considered crucial to increase protection of FMDWs, at an international and regional level.*

1. Introduction

Female migrants account for nearly half of the world's international migrants.[1] Despite a slight decrease over the past few years, about 45 percent of international migration is composed of women.[2] However, this figure evolves significantly when considering that, according to the International Labour Organization's (ILO) most recent estimates, the 83% of female migrants find employment in domestic work:[3] from a legal perspective, it is possible to qualify this category under the notion of Female Migrant Domestic Workers (FMDWs).[4]

This paper aims at considering the contribution of the International Labour Organisation (ILO) not only to the creation of international legal standards aimed at strengthening the international protection of FMDWs, but also to investigate a very recent trend of the ILO to give concrete implementation to internationally applicable standards: i.e., the partnerships that the Organization displays both internationally and regionally, through its capacity-building initiatives.

Firstly, it is crucial to define FDMWs under international law. Because of the absence of a specific definition of FMDWs in international treaties, it is worth relating the notion of FMDWs to the sub-category of international migrants, bearing in mind the additional status of women and domestic workers. Secondly, the chapter intends to analyse the

[1] K. BEEGLE, E. RUBIANO-MATULEVICH (2018), *Women and Migration: Exploring the Data*, in *World Bank Blogs*, published on December 18, available online.

[2] *Ivi*: "Globally, women are on the move: they comprise slightly less than half of all international, global migrants. In fact, the share of women among global, international migrants has only fallen slightly during the last three decades, from 49 percent in 1990 to 47 percent in 2017".

[3] ILO (2015), *Labour Migration Highlights No. 3*, Geneva, 1, available online.

[4] A. ESCRIVÁ, E. SKINNER (2008), *Domestic Work and Transnational Care Chains in Spain*, in H. LUTZ (ed.), *Migration and Domestic Work. A European Perspective on a Global Theme*, Surrey, 113-126; N. CYRUS (2008), *Being Illegal in Europe: Strategies and Policies for Fairer Treatment of Migrant Domestic Workers*, in H. LUTZ (ed.), *Migration and Domestic Work. A European Perspective on a Global Theme*, cit., 177-194; A. D' SOUZA (2010), *Moving towards Decent work for Domestic Workers: An Overview of the ILO's work*, Working Document 2, Bureau for Gender Equality, International Labour Office, Geneva, available online; V. PAVLOU (2011), *The Case of Female Migrant Domestic Workers in Europe: Human Rights Violations and Forward Looking Strategies*, in *YHAHR*, 9, 67-84.

2011 ILO Convention No. 189 whose limits and difficult scope of application entail the risk of specific discrimination of these migrants in the country of employment. To this end, it is necessary to understand how such discrimination concerns both labour and social security measures, respectively due to FMDWs as migrant workers and as women. Finally, the chapter analyses ILO's ability to build partnerships, deployed at a regional level and through the Fair Recruitment Initiative that is currently carried out within ILO's agenda priorities in order to overcome the situations of vulnerability especially faced by FMDWs.

2. The definition of female domestic migrant workers under international law

FMDWs represent a category of particular social and legal interest. This is due to three main reasons: first, this migrant population made up of women faces a greater risk of being subject to mistreatment in the workplace or to a lack of protection of their social and security rights. Second, FMDWs are mainly international migrants. Third, FMDWs, once settled in a destination country, find employment especially in the domestic labour sector. It is due to these reasons that FMDWs may face stronger discrimination, are more vulnerable to mistreatment, and can experience double discrimination as both migrants and as women in their host country in comparison to male migrant workers.

In international law, there is no universally agreed definition of FMDWs. To reconstruct the notion of FMDWs, it is necessary to refer to the migrant worker definition, and then apply this notion *strictu senso* to the female component of this category. Art. 2, para. 1, of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families defines migrant workers as a "[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".[5] The

[5] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990, signed on December 18, 1990, entered into force on July 1, 2003, Art. 2, para. 1. Moreover, the scope of the Convention is the prohibition of any kind of discrimination between migrant workers and those who are nationals of the State where migrants work. It grants migrant workers several fundamental rights (*inter alia*, freedom of thought, conscience and religion, prohibition of torture and inhuman and degrading treatment, prohibition of forced labour, right to privacy). On the issue,

1990 Convention does not take into account the female component that characterises the international migrant worker population, nor does it distinguish between male and female migrant workers. Nonetheless, this distinction is relevant from a legal perspective. As noted by the International Organization for Migration (IOM), "[w]hile the proportion of migrants who are women has not changed greatly in recent decades, their role in migration has changed considerably. Women are now more likely to migrate independently, rather than as members of a household, and they are actively involved in employment".[6] Thus, not only the female component represents half of the migrant worker population globally,[7] but it is also subject to specific risks. It is the IOM itself which notes that "[…] the increase of women in migration has led to certain gender-specific vulnerable forms of migration, including the commercialized migration of domestic workers and caregivers, the migration and trafficking of women for the sex industry, and the organized migration of women for marriage. Because of the unregulated nature of some of this employment, women migrants are often at greater risk of exploitation".[8]

Another relevant definition is that of domestic worker, since it is largely represented by the female population. Domestic workers are defined by the IOM as "[t]hose workers who perform work in or for a private household or households. They provide direct and indirect care services, and as such are key members of the care economy".[9] Despite

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see F. PITTAU (1999), *La Convenzione dell'ONU sui lavoratori migranti dieci anni dopo*, in *Aff. soc. internaz.*, 3, 45 ff.; K. DOGAN YENISEY (2019), *Protéger les droits des travailleurs migrants: un défi pour le droit du travail ?*, in *RDCSS*, 3, 12-25; M. BORZAGA (2020), *Le migrazioni per motivi umanitari e per motivi economici nel quadro regolativo internazionale*, in W. CHIAROMONTE, M.D. FERRARA, M. RANIERI (eds.), *Migranti e lavoro*, Bologna, 34.

[6] IOM (2011), *Feminization of Migration*, in *Glossary on Migration*, 2nd ed., Geneva, 38.

[7] K. BEEGLE, E. RUBIANO-MATULEVICH (2018), *Women and Migration: Exploring the Data*, cit., *ibidem*.

[8] IOM (2011), *Feminization of Migration*, in *Glossary on Migration*, cit., 38.

[9] "Their work may include tasks such as cleaning the house, cooking, washing and ironing clothes, taking care of children, or elderly or sick members of a family, gardening, guarding the house, driving for the family, and even taking care of household pets. A domestic worker may work on full-time or part-time basis; may be employed by a single household or through or by a service provider; may be residing in the household of the employer (live-in worker) or may be living in his or her own residence (live-out). A domestic worker may be

the essential services they provide, domestic workers are rarely recipients of specific rights in practice. About 81% of domestic workers have no nationally registered employment contracts and earn about 56% of the national average monthly wages of other employees. [10] The situation is aggravated if taking into account that, given the large presence of female migrant domestic workers in the domestic work sector, these individuals are subject to particular forms of discrimination and violence concerning, *inter alia*, restrictions on freedom of movement, workplace abuse, wage disparity compared to male domestic workers, and neglected maternity parental leave, as well as other social security rights specifically applicable to FMDWs. [11]

In the light of the definition given above, FMDW can be defined as a female migrant worker who is engaged in domestic work within an employment relationship in the host country, typically an industrialised country, holding the position of cleaning lady or caregiver in her usual employment.

3. ILO's progressive interest in the issue of FMDWs: the soft-law beginnings

ILO has been concerned with the strengthening of women's labour protection standards since the Fourth World Conference on Women in Beijing in 1995. [12] The document focuses particularly on women of various social contexts relegated to domestic work, and for this reason at risk of discriminatory treatment that could result in acts of domestic violence. With regard to this facet, the Report does not distinguish between the discrimination faced by female domestic workers among developed and developing countries. Focusing on FMDWs in developed countries, it is worth considering that their main risk is that of finding employment in

working in a country of which she/he is not a national, thus referred to as a migrant domestic worker", ILO, *Who are domestic workers*, available online.

[10] *Ibidem*.

[11] On social issues, see R.S. PARREÑAS (2017), *The Indenture of Migrant Domestic Workers*, in *Women's Studies Quarterly*, 45, 113-127; ILO (2021), *Extending social security to domestic workers*, available online; while on health issues see ILO (2020), *Impact of the COVID-19 crisis on loss of jobs and hours among domestic workers*, available online.

[12] United Nations, *Report of the Fourth World Conference on Women*, A/CONF.177/20/Rev.1, Beijing, 4-15 September 1995.

domestic work that exposes female workers to various risks, including those related to the welfare and health dimension, social marginalisation and the absence of adequate standards of labour treatment. Concerning FMDWs, the 1995 Beijing Report states that "[w]omen migrant workers, including domestic workers, contribute to the economy of the sending country through their remittances and also to the economy of the receiving country through their participation in the labour force. However, in many receiving countries, migrant women experience higher levels of unemployment compared with both non-migrant workers and male migrant workers", [13] The reference to FMDWs is limited to considering the relationship between women and economies, with specific reference to the contribution of female migrant workers in industrialised countries where they operate through the remittance system.

The 1995 Beijing Conference focuses also on the enforcement of equality amongst women and men in many employment areas, such as on the conferral of specific social and economic rights including access to employment, appropriate working conditions and control over economic resources; women's equal access to resources, employment, markets and trade; business services, training and access to markets, information and technology; women's economic capacity and commercial networks; the elimination of occupational segregation and all forms of employment discrimination and, finally, harmonization of work and family responsibilities for women and men. [14]

Although still confined in a soft-law perspective, these findings were furtherly explored during the 98th session of the International Labour Conference (ILC) in 2009, on 'Gender equality at the heart of decent work'. Chapter 2 of the document investigates specifically the issue of domestic labour and women, stating that "since domestic work is often regarded as an extension of women's traditional unpaid household and family responsibilities, it is still mostly invisible, undervalued and unprotected. In many countries, domestic work is beyond the reach of labour law, either because it is expressly excluded or because monitoring compliance in the private sphere of the household is too difficult". [15] Therefore, the International Labour Conference con-

[13] UNITED NATIONS (1995), *Report of the Fourth World Conference on Women*, Beijing, pt. 154, 66.

[14] See ILO (2010), *Women in labour markets: Measuring progress and identifying challenges*, Geneva, IX.

[15] ILC (2009), *Gender equality at the heart of decent work*, Sixth item on the

siders the urgency of adopting an international agreement focused on the establishment of policies-guidance, programmes and activities to ensure a minimum benchmark to women engaged in domestic work. [16]

The document furtherly explores the issue of FMDWs from the perspective of young women who are part of this population. Indeed, "[d]omestic work is undertaken predominantly by girls, young women, adult women workers and older workers. It is one of the most invisible of the female-dominated occupations. Nine out of ten children doing such jobs are girls, usually working in other people's homes, sometimes those of relatives. Working away from home, girl domestic labourers are often isolated on the household premises, with little or no protection or social support. […]". [17] Thus, many legal gaps within ILO still remained to be filled, taking into account the tripartite legal nature of FMDWs as international migrants, as domestic workers and as women at risk of particular violence and abuse in their workplace.

4. The 2011 ILO Convention No. 189 (Domestic Workers Convention) *vis-à-vis* FMDWs

The 2011 ILO Convention No. 189, also known as the Domestic Workers Convention, was adopted on 16 June 2011, by the ILO International Labour Conference. Indeed, the adoption of the Convention dates back to 2006, when the Multilateral Framework on Labour Migration was adopted, aimed at implementing national and international policies on migrant workers. In particular, the Multilateral Framework on Labour Migration dwells on this issue considering the objective "to ensure that national labour legislation and social laws and regulations cover all male and female migrant workers including domestic workers and other vulnerable groups" [18] and to intensify "measures aimed at detecting and identifying abusive practices against migrant workers [...] particularly in those sectors [...] such as domestic work". [19] The Convention also con-

agenda, Report VI, Geneva, pt. 87, 36.

[16] *Ibidem*.

[17] *Ivi*, pt. 88, 36.

[18] ILO (2006), *ILO Multilateral Framework on Labour Migration*, *Non-binding principles and guidelines for a rights-based approach to labour migration aims to assist governments, social partners and stakeholders in their efforts to regulate labour migration and protect migrant workers*, Geneva, Principle 9.8, 18.

[19] *Ivi*, Principle 11.2, 21.

sists of Recommendation 201, of the same year, consisting of a set of labour policies that ILO recommended in the proper implementation of 2011 Convention No. 189.

Although the Convention does not apply exclusively to FMDWs, its Preamble explicitly mentions the strong female component that characterizes this category of migrants, recognizing "that domestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights [...]".[20] The Convention calls for universal standards of employment which include: the provision of a minimum age of employment (Art. 4); the deployment of provisions aimed at protecting this category of migrant workers against possible abuses (Art. 5); the recognition of the right to privacy for this category of workers (Art. 6); the formulation of a written contract in domestic work (Art. 7) and the implementation of fair working conditions, including a 24-hour day of rest for domestic migrant workers (Art. 10). It also provides for the fair, regular and appropriate remuneration of the work performed (Arts. 11-12), the right to work in a healthy environment (Art. 13), the provision of social security protection systems (Art.14) and the commitment by States to provide adequate legal protection in national courts (Arts. 16-17).

With particular regard to FMDWs, Art. 14, para. 1, states that "Each Member shall take appropriate measures, in accordance with national laws and regulations and with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including with respect to maternity",[21] thus making implicit reference to women's rights in connection to domestic migrant workers. In this case, maternity protection has its pivotal aim in the preservation of the special relationship of the mother and her newborn and to provide *ad hoc* measures of social security such as access to jobs for women of childbearing age, maintenance of

[20] Convention concerning decent work for domestic workers, no. 189, adopted on 16 June 2011, by the International Labour Conference of the International Labour Organization, Fourth point of the Preamble.

[21] *Ivi*, Art. 14, para. 1.

wages and benefits during maternity and prevention of dismissal.[22] Conversely, Art. 14 prohibits any form of social discrimination in access to training, skills development and employment, as also stated – in a rather generic way – within the 2004 Resolution of the International Labour Conference on gender equality, pay equity and maternity protection.[23]

The Convention also provides for some specific mobility rights for domestic migrant workers concerning the entitlement of migrant domestic workers to a valid work contract and repatriation (Art. 8) as well as freedom of movement in the form of residential flexibility and access to travel and identity documents (Art. 9).

Recommendation 201 seeks to implement, *inter alia*, the right of association for domestic migrant workers and their right to be heard in national trade unions and with government bodies in charge of managing labour issues at the national level (Art. 2); the right to health and the provision of specific health checks that must not affect the dignity of this category of migrant workers (Art. 3); and the provision of specific control, monitoring and assistance systems to protect domestic migrant workers from any situations of abuse, exploitation, discrimination or any other treatment that could cause physical or moral harm to the domestic migrant worker (Art. 7).

The 2011 Convention No. 189 and Recommendation 201 contain relevant provisions concerning FMDWs. However, some criticism can be addressed if the low number of ratifications is taken into account, considering that 2011 Convention no. 189 has to date been ratified by 36 States.[24] As for ILO Conventions, these few States are bound to report to ILO on the effective implementation measures that States have adopted domestically. Parties must then issue a report every two years indicating how they have strengthened legislative and administrative measures to concretely give effect to the Convention, but they must also

[22] ILC (2009), *Gender equality at the heart of decent work*, cit., pt. 103, 45.

[23] ILC (2004), *Resolution Concerning the Promotion of Gender Equality, Pay Equity and Maternity Protection*, 17 June, in part. Art. 1(a), letts. i-x.

[24] ILO, *Ratifications of C189 – Domestic Workers Convention, 2011 (No. 189)*, last seen on January 27, 2023, available online. These are: Antigua and Barbuda; Argentina; Belgium; Bolivia; Brazil; Chile; Colombia; Costa Rica; Dominican Republic; Ecuador; Finland; Germany; Grenada; Guinea; Guyana; Ireland; Italy; Jamaica; Madagascar; Malta; Mauritius; Mexico; Namibia; Nicaragua; Norway; Panama; Paraguay; Peru; Philippines; Portugal; Sierra Leone; South Africa; Sweden; Switzerland; Uruguay. The Convention has also been ratified by Spain on February 28, 2023, and will enter into force on February 29, 2024.

provide copies of their actions to trade associations, including trade unions and other workers' organizations.[25]

5. Limits of the 2011 ILO Convention No. 189 concerning the effective legal protection of FMDWs

The 2011 Convention No. 189 and the Recommendation 201 of 2011 have only partially filled the legal gaps concerning the protection of FMDWs, since many problems persist.

First, the 2011 Convention No. 189 did not solve the issue regarding the low number of States ratifying international conventions protecting domestic migrant workers. The geography of ratifying States reflects many of the countries of departure of migrant workers, yet with almost no ratification by industrialized countries, which represent most of the countries of arrival of domestic migrant workers.[26] The Convention has now been ratified by 36 countries worldwide, but most European countries have still not ratified it.[27] Only 9 European countries – Belgium, Finland, Germany, Ireland, Italy, Malta, Portugal, Switzerland and Sweden – have ratified it, while the Convention will enter into force for Spain on 29 February 2024.[28] In most of the developed countries, the protection of FMDWs remains a topical issue, since domestic migrant workers still lack proper access to labour rights concerning social and job security.[29] The lack of social and job security means that, in the ab-

[25] On this issue, see R. CHOLEWINSKI (2012), *International labour migration*, in B. OPESKIN, R. PERRUCHOUD, J. REDPATH-CROSS (eds.), *Foundations of International Migration Law*, Cambridge, 283-311; A. BLACKETT (2014), *The Decent Work for Domestic Workers Convention, 2011 (No. 189) and Recommendation (No. 201)*, in *ILM*, 53, 250-266; H. COLLINS (2019), *Globalisation and Labour Law*, in H. COLLINS, K. EWING, A MCCOLGAN (eds.), *Labour Law*, 2nd ed., Cambridge, 47-96.

[26] G. CATALDI, A. DEL GUERCIO (2019), *I Global Compact su migranti e rifugiati. Il soft law delle Nazioni Unite tra spinte sovraniste e potenziali sviluppi*, in *Dir., Imm. e Cittad.*, 2, 192.

[27] ILO, *Ratifications of C189 - Domestic Workers Convention, supra* at 24.

[28] *Ibidem*.

[29] This was proven during the COVID-19 pandemic, when thousands of domestic workers lost their jobs overnight and were left without income. Working conditions for many have not improved in a decade and have been worsened by the COVID-19 pandemic, according to the ILO. On the issue, see ILO (2021), *Making decent work a reality for domestic workers: Progress and*

sence of any legal instrument aimed at granting same treatment conditions to non-country nationals, social security rights acquired in one State are not legally guaranteed in a foreign country where the individual chooses to reside.[30] According to the ILO, the social security of migrant domestic workers should be dwelled on the following points: equality of treatment between nationals and non-nationals; maintenance of acquired rights; maintenance of rights in the course of acquisition and transportability of benefits.[31] Therefore, the ILO aims at urging State commitment not only to guarantee conditions of employment that are no less favourable than those accorded to their own nationals, but also social security benefits that can guarantee internationally recognized social rights, including invalidity, old-age and annuities paid as a result of employment accident or an occupational disease.[32] With regard to the long-term benefits that can be accumulated by FMDWs, the ILO suggests considering the set-up of a system for accumulating work experience in the States where the domestic migrant workers find employment. This is both to ensure the enjoyment of social security rights both to strengthen international cooperation in recognizing a common standard of protection with respect to domestic migrant workers.[33]

Second, the gender issue must be considered as a further weakness of the 2011 Convention No. 189. Despite the references to the large female component in domestic migrant workers, the rules directly applicable to FMDWs within the Convention are still unsatisfactory. Basically, FMDWs remain considered as family employees, with the female figure being approached as a member of the family, or even as an individual that informally participates in domestic work activities, without an *ad hoc* working contract.[34]

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prospects ten years after the adoption of the Domestic Workers Convention 2011 (No. 189), Geneva, xxi-xxv, available online.

[30] S. GHASEM ZAMANI, A. AZADD EVIN (2016), *The Right to Social Security Under International Law*, in *Mediterr. J. Soc. Sci.*, 7(5), 45-64; ILO (2019), *Building social protection systems: International standards and human rights instruments*, Geneva, available online, 1-19.

[31] ILO (2013), *Extension of social protection of migrant domestic workers in Europe*, Geneva, available online, 4.

[32] *Ibidem*.

[33] *Ibidem*.

[34] ILO (2013), *Extension of social protection of migrant domestic workers in Europe*, Geneva, available online, 7. On this issue, see also S. ARAT-KOC (1989),

Third, most of the protection instruments and rights recognized by the 2011 Convention No. 189 remain legally uncovered if it is considered that no national legislation of the ratifying countries specifically deals with the many issues regarding FMDWs. Indeed, FMDWs are covered only by sectorial laws or subordinate regulations, while a small minority are covered only by general labour codes.[35] Notwithstanding their inclusion in many labour law legislations at a national level, the effective applicability of this social and security coverage granted to FMDWs is still unsatisfactory. As also noted by the ILO, "[FMDWs] may be included in the general labour laws but excluded from specific provisions or afforded levels of protection that are insufficient to ensure decent work. Furthermore, labour laws that apply to domestic workers may still not be effective, meaning that workers cannot actually realize their rights and protection".[36] Indeed, if many ratifying countries in Latin America have recently improved their national legislations on the protection of domestic workers such as Argentina,[37] Chile,[38] Mexico,[39] and Peru,[40] the labour laws rarely attribute rights concerning FMDWs in order to limit phenomena of discrimination, domestic violence and to

In the Privacy of Our Own Homes: Foreign Domestic Workers as a Solution to the Crisis in the Domestic Sphere, in *Stud. Political Econ.*, 28, 33-58; C.B.N. CHIN (1997), *Walls of Silence and Late Twentieth Century Representations of the Foreign Female Domestic Worker: The Case of Filipina and Indonesian Female Servants in Malaysia*, in *Int. Migr. Rev.*, 31, 353-385; B. ANDERSON (2010), *Migration, immigration controls and the fashioning of precarious workers*, in *WES*, 24, 300-317; H. LUTZ, E. PALENGA-MÖLLENBECK (2012), *Care Workers, Care Drain, and Care Chains: Reflections on Care, Migration, and Citizenship*, in *Soc. Politics*, 19, 15-37; L. TRLIFAJOVÁ, L. FORMÁNKOVÁ (2022), *'Finally, We Are Well, Stable': Perception of Agency in the Biographies of Precarious Migrant Workers*, in *WES*, first published online.

[35] See ILO (2021), *Making decent work a reality for domestic workers: Progress and prospects ten years after the adoption of the Domestic Workers Convention 2011 (No. 189)*, cit., 61-67.

[36] *Ivi*, 58.

[37] For Argentina, see Law on Workers in Private Households (Act 26844, 2013) of 13 March 2013.

[38] For Chile, see Law no. 20786 of 27 October 2014.

[39] For Mexico, see Decree reforming, adding and repealing various provisions of the Federal Labour Act and the Social Security Act relating to domestic workers of 2 July 2019.

[40] For Peru, see Law no. 31047/2020 on Domestic Worker of 5 September 2020.

effectively apply the guarantees provided in the same Art. 14, para. 1, of the 2011 Convention no. 189 concerning maternity protection.[41] Similar considerations can be made for the European region, with the legislations of Belgium[42] and Finland,[43] where despite the recent efforts to improve working conditions for domestic workers, *ad hoc* normative measures towards FMDWs still lack. A specific reference to maternity leave is made in Appendix II, Section 23 of the Namibia's Labour Code,[44] even if no mention to discrimination or female domestic violence is made in the text. In the Asian context, the Philippines has legislated on domestic work in 2013,[45] even if no reference to FMDWs is made and as considered by the ILO, "domestic workers are excluded from working time provisions, and the minimum wage for domestic workers is the lowest of any group in the private sector".[46]

These structural weaknesses are mainly due to two legal limits: the principle of territoriality[47] and the principle of nationality.[48] These

[41] See *inter alia* ILO (2013), *Social Protection Platfom*, available online, 5.

[42] For Belgium, see 8 the Royal Decree of 13 July 2014, extending social security to domestic workers, equal to other workers, entered into force on 1 October 2014.

[43] For Finland, see the Finnish Act repealing the Domestic Worker Employment Act of 2014, entered into force on 1 January 2015.

[44] Government Gazette of the Republic of Namibia, no. 5638, 24 December 2014, Appendix II, Section 23: "After six (6) months' continuous service in employment, a female employee is entitled to not less than 12 weeks' maternity leave, with at least 4 weeks before confinement and 8 weeks after, as long as she provides a medical certificate of indicating the expected date of delivery before taking leave and a medical certificate of delivery upon return".

[45] See the Philippines Republic Act no. 10361, known as the 'Domestic Workers Act' or the 'Batas Kasambahay'.

[46] ILO (2021), *Making decent work a reality for domestic workers: Progress and prospects ten years after the adoption of the Domestic Workers Convention 2011 (No. 189)*, cit., 65.

[47] On the issue, see the case-law of the Permanent Court of International Justice (PCIJ), judgement 7.09.1927, *The Case of the S.S. "Lotus"*, no. 10, 20). See also C. RYNGAERT (2015), *The Territoriality Principle*, in ID., *Jurisdiction in International Law*, Oxford, 100. See also, A. MARIA, N. PUNZI (2000), *Funzioni e limiti del principio di territorialità*, in *Studi in onore di Francesco Finocchiaro*, Padua, 1517-1526; M. SAVINO (2017), *Lo straniero nella giurisprudenza costituzionale*, in *Quaderni cost.*, 37, 41-72.

[48] See ICJ, judgement 6.4.1955, *Nottebohm*, no. 18, 23: "[…] nationality is a legal bond having as its basis a social fact of attachment, a genuine connec-

principles determine both direct and indirect forms of discrimination towards FMDWs. Concerning direct discriminations, FMDWs still experience reduced hiring opportunities due to the lack of specific benefits granted to country nationals. The European and Asian practice proves wide discrimination based on job applications submitted by migrant domestic workers.[49] Concerning indirect discrimination, it is estimated that FMDWs have lower labour force participation rates attributed to reduced access to work-life balance arrangements and to childcare.[50] This is due to cultural and gender barriers which constitute a structural break to the hiring process of FMDWs in developed countries.[51]

However, ILO is particularly engaged in the enforcement of an additional perspective of protection of FMDWs, through partnerships and awareness-raising policies to be framed in the field of international development cooperation.

6. Latest developments in the protection of FMDWs: ILO's capacity-building partnerships

The legal limitations of the 2011 ILO Convention no. 189 to the effective protection of FMDWs find an interesting overcoming through the partnerships that the organization deploys internationally. These partnerships are mostly aimed at strengthening capacity-building with respect

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tion of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred […] is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis à vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him his national". See also R. CLERICI (2013), *Freedom of States to Regulate Nationality: European Versus International Court of Justice?*, in T. SCOVAZZI, N. BOSCHIERO, C. PITEA, C. RAGNI (eds.), *International Courts and the Development of International Law – Essays in Honour of Tullio Treves*, The Hague, 839 ff.; C. MCLACHLAN, L. SHORE, M. WEINIGER (2017), *International Investment Arbitration: Substantive Principles*, Part II, *Ambit of Protection*, Oxford, 162-163.

[49] EUROPEAN PARLIAMENT (2014), *Discrimination of migrant workers at the workplace*, Note for the EMPLCommittee, Brussels, 45-46.

[50] *Ivi*, 45.

[51] *Ibidem*.

to FMDWs who find employment as domestic workers. It is therefore necessary to consider the role of the ILO as a policy-contributor in the process of implementing protective instruments within national labour policies, both in countries of destinations (mostly developed countries) both in countries of departure of FMDWs (represented by developing countries).

6.1. The European region

As for the European region, it is worth mentioning the Project titled "Promoting Integration for Migrant Domestic Workers in Europe", financed under the European Fund for the Integration of Third Country Nationals from November 2011 to October 2013. The Project's aim was to expand the knowledge about integration and employment policies of FMDWs and to facilitate the process of social and economic integration within the country of destination. Additionally, the Project was devoted to increasing the level of protection of FMDWs since the overall objectives include addressing the specific needs of young migrants and women, and the improvement of local services to adjust to different target groups, such as women, children and youngsters.[52]

The Project has been developed by the European Commission with the propulsive role of the ILO International Training Centre (ITC).[53] Indeed, this Project involved both financial and technical assistance to the European countries. Concerning the financial issues, these were managed by the European Commission through the EC Integration Fund, while the technical issues were mostly carried out by ILO. Technical expertise was mostly focused on three areas of work:

a) Research and knowledge development, to investigate the ongoing gaps about domestic migrant workers in Europe and to support their integration considering the country case studies with the joining EU Member States;

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[52] ILO (2013), *Promoting Integration for Migrant Domestic Workers in Europe*, Project summary – For stakeholders, Geneva, available online, 1-2.

[53] Several regional partners have been working in the Projects, such as: the Forum Internazionale ed Europeo di ricerche sull'Immigrazione FIERI (Italy); the Fundación José Ortega y Gasset-Gregorio Marañon (Spain); the Institut National d'Etude Démographiques – INED (France); the Centrum voor Migratie en Interculturele Studies – CeMIS (Belgium); the European Trade Union Conferderation ETUC (Belgium).

b) Knowledge dissemination, awareness and advocacy, to increase socio-economic integration and to promote the direct exchange of information and knowledge among relevant actors involved in the employment system of migrant domestic workers;
c) Capacity-building and training for targeted stakeholders, with the purpose of institutionalizing the collection of the social findings into a specific training document to complement the capacity-building courses on migration management, non-discrimination, and labour inspection offered by ITC.

The conclusion of the Project resulted in the drafting of a booklet edited by ILO and entitled 'Extension of social protection of migrant domestic workers in Europe'.[54] The booklet investigates social security issues concerning FMDWs and provides guidance to EU Member States in order to identify good practices in the enlargement of social protection rights to migrant domestic workers in the European context.

6.2. The Asian and the African region

Taking into account some multilateral development cooperation plan in Asia, it is worth analysing ILO's partnership in the cooperation with the UK Department for International Development (DFID) entitled 'Work in Freedom: Preventing trafficking of women and girls in South Asia and the Middle East'.[55] The Project ran from 2013 to 2018 and was of a financial and technical nature. As for the economic component, it allocated £8.3 and reached at least 100,000 women and girls as direct beneficiaries. As for the technical component, the Project focused *prima facie* on women's empowerment policies and on the ability to properly educate female migrant workers about their rights and the need to obtain a protection system once arrived in the destination country. The Project was focused on the enhancement of the collaboration between policy makers, law enforcement authorities, employers, trade unions and the civil society to ensure proper integration into the labour and socio-economic fabric of FMDWs.[56] Moreover, the Project

[54] ILO (2013), *Extension of social protection of migrant domestic workers in Europe*, cit., *supra*.

[55] ILO (2013), *Work in Freedom: Preventing trafficking of women and girls in South Asia and the Middle East*, Geneva, available online, 1-4.

[56] *Ivi*, Partnerships, 4.

focused not only on the effective capacity-building instruments for FMDWs but also on the construction of a holistic perspective to promote education, fair recruitment, safe migration and decent work to prevent trafficking of women and girls between Asian countries. South Asian countries of origin (Bangladesh, India and Nepal) and selected destination countries (India, Jordan, Lebanon and the United Arab Emirates) were involved in the Project, with the further participation of the United Nations Office on Drugs and Crime, Regional Office for South Asia (UNODC- ROSA), the International Federation of Private Employment Agencies (CIETT), the International Organisation of Employers (IOE) and the International Trade Union Confederation (ITUC).

As for the African region, from 2013 to 2016 ILO joined, with the European Union, a Project entitled 'Development of a Tripartite Framework for the Support and Protection of Ethiopian women Domestic Migrant Workers to the Gulf Cooperation Countries Council (GCC) countries, Lebanon and Sudan'.[57] The Project aimed at considering enhanced labour protection standards for FMDWs coming from Ethiopia and the Somali region. Indeed, the protection of FMDWs focused on the covering of the entire migration process, from their departure from the territory of origin to their destination, as well as the employment policies as domestic workers in GCC countries and Sudan. This Project acquired a peculiar legal value since both GCC countries and Lebanon adopt the *Kafala* system, "that governs the employment relation of the domestic workers, giving full rights to the employer over the domestic worker".[58] Thus, the aim was to recognize similar standards of treatment towards Ethiopian FMDWs. The outcomes of the Project were even useful for the drafting by the Ethiopian Government of the Ethiopian Overseas Employment Proclamation 923/2016 concerning Ethiopian migrant workers, which provides, *inter alia*: protection against all forms of abuse, harassment and violation; protection from any harm that could affect Ethiopian migrant workers, physically or morally; right to communicate with their relatives at least once a

[57] ILO (2013), *Development of a Tripartite Framework for the Support and Protection of Ethiopian women Domestic Migrant Workers to the GCC States, Lebanon and Sudan*, Geneva, available online.

[58] B. GUTEMA (2019), *Report on Migration, Return and Remittances Of Ethiopian Domestic Workers From Lebanon*, Report, Agenzia Italiana per la Cooperazione allo sviluppo, available online, 5.

week; right to be granted an annual leave, weekly rest and other similar vacations; provision of insurance coverage for life or disability; right to not be obliged to perform works other than those agreed upon in the employment contract.[59]

Additionally, ILO's capacity-building and training skills were displayed trough the ILO Inter-Regional Knowledge Sharing Forum in Antananarivo (Madagascar), held on 5-7 May 2016. The Forum was entitled 'Realizing a fair migration agenda for migrant domestic workers in Africa, the Arab States and Asia'.[60] The aim of the Forum was to share good practices and lessons learned on promoting international cooperation and partnerships to realize a fair migration agenda for migrant domestic workers within the three regions involved. The Forum provided an opportunity to debate three FMDWs-related issues. First, cooperation policies between origin and destination countries to ensure the protection of migrant domestic workers in line the 2011 Convention No. 189.[61] Second, cooperation to promote fair recruitment practices in the domestic work employment, taking into account the legal employment framework with regard to migrant domestic workers.[62] Third, the return and reintegration programs work for migrant domestic workers and their relatives, including the recognition of their work skills during their stay abroad, socio-economic reintegration programs and the match-

[59] ILO (2017), *The Ethiopian Overseas Employment Proclamation No. 923/2016: A comprehensive analysis*, Addis Ababa, available online, 8-18. The Proclamation has been recently emended by the *Ethiopian's Overseas Employment (Amendment) Proclamation No. 1246-2021*, in *Federal Negarit Gazzette of the Federal Democratic Republic of Ethiopia*, 3 June 2021.

[60] ILO (2016), *First interregional knowledge sharing forum on migrant domestic workers*, available online.

[61] ILO (2016), *Good practices and lessons learned on promoting international cooperation and partnerships to realize a fair migration agenda for migrant domestic workers in Africa, the Arab States and Asia*, Report, available online, Antananarivo, 10-15.

[62] *Ivi*, 15-16: "The session [VI] explored the extent to which different recruitment arrangements are able to balance the competing demands of the market while maintaining their commitment to fair practices; matching employers' preferences, maximizing profit to the recruiters, facilitating labour market access to the workers and extending necessary protections to them. Further, this session explored innovative business models like the ability of labour recruiters to set up schemes that aim to avoid excessive fee charging practices to employers, and eliminate worker-paid fees".

making ability of national employment policies with cooperatives and small and medium-sized enterprises, as well as the provision of arrangements for the portability of social security benefits.[63]

6.3. The 2014 Fair Recruitment Initiative (FRI) and the 2021-2025 FRI Strategy

The Fair Recruitment Initiative (FRI) was launched in 2014 within the Fair Migration Agenda. After its first implementation strategy between 2014-2019, ILO has recently launched the 2021-2025 FRI Strategy (Phase II) focused on international labour standards (ILS), global guidance, and social dialogue between governance institutions and actors of the labour market. The strategy includes the whole migrant workers category, focusing on four basic pillars: enhancing, exchanging and disseminating global knowledge on national and international recruitment processes; improving laws, policies and enforcement to promote fair recruitment; promoting fair business practices; empowering and protecting workers.[64] The legal category of FMDWs is implicitly included within ILO's short-term recruitment strategy, recognizing the need for the increase of social dialogue among the different parties involved in the employment sector and the need to ensure gender equality in the recruitment practices.[65] Transparency, effective regulation, prevention of human trafficking and forced labour and inclusion for recovery and resilience are strategic FRI action areas that also affect FMDWs.

The Initiative thus aims at disseminating and sharing the best practices in migrant worker protection, strengthening capacity-building and social dialogue between migrant workers and the public and private entities that employ them, and finally enforcing partnerships at an international level. Regarding this last point, the programmatic dimension of the FRI moves on the joint implementation of three levels simultaneously: the strengthening of international cooperation through partnerships between the migrant's countries of departure and those of destination and employment;

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[63] *Ivi*, 16-17. See in particular the Ethiopian reintegration program, focused on "the provision of professional counseling and medical service for returnees, awareness raising and economic empowerment", 17.

[64] ILO (2021), *ILO Fair Recruitment Initiative Strategy 2021-2025*, Geneva, available online, 6-13.

[65] *Ivi*, 5.

cooperation with national employment and recruitment agencies; and finally, cooperation between public authorities and private entities, involved in the contracting regime for the employment of migrant workers.

7. Conclusions

International norms providing for appropriate protection to FMDWs are rather poorly recognised by international law. The lack of adequate social and job security systems and the absence of appropriate national contractual regimes defining their employment rights are some of the persistent legal gaps in the protection of FMDWs. ILO's attempt to focus on creating universal standards of treatment towards migrant workers, through the 2011 Convention No. 189 and Recommendation 201, have partially itemized the set of rights of domestic migrant workers. Explicit mention is made to the large female component in this legal category, with some areas of protection relating *ad hoc* to FMDWs. Nonetheless, some persistent limitations in this regard remain evident: the low number of ratifications – especially by industrialized States representing the countries of employment of FMDWs – constitute a structural limitation to the effective standards of treatment to these individuals.

Vis-à-vis these enduring limitations, which are primarily legal in nature, ILO has recently moved into a programmatic dimension. The Organization has advanced development cooperation programs both through partnership with the European Union, both through capacity-building and training programs for African and Asian countries. Lastly, the Fair Recruitment Initiative and the 2021-2025 FRI Strategy are also programmatic areas of action in which ILO is particularly engaged to set common standards of treatment towards migrant workers.

These action programs represent policy tools rather than legal constraints within the international framework for the protection of FMDWs to overcome the ongoing limits on the legal protection of FMDWs. The creation of programmatic policies aimed at strengthening knowledge, awareness, and policy tools, guarantee the interest to effectively increase protection of FMDWs, to promote their labour market integration in countries of destination and address the specific vulnerabilities that FMDWs could face prior to and during their migration experience. Although they are still at a recent and developing stage at the international level, partnerships through ILO demonstrate a clear interest in the topic of FMDWs and the strengthening of labour standards for female migrant workers.

Chapter 9

THE CENTRAL ROLE OF "*MIGRANTIS VOLUNTAS*" IN THE INTEGRATION POLICIES OF LEGAL IMMIGRANTS: THE STATE OF THE ART OF THIS PROTECTION IN INTERNATIONAL LAW

Luca Martelli

ABSTRACT: *What is "migrantis voluntas"? It is the reason that prompts immigrants to move from where they belong to another Country. It is the desire to live a better life and, in legal lexicon, it is the desire to affirm the right to a dignified life. Obviously, happiness and dignified life are not common jargon, but legally relevant words generally recognized by the highest charters of national and international legal systems.*
This article analyzes the greatest challenge of the current century: the challenge to reduce the gap between the ability of Countries to take the steps they consider appropriate to guarantee the rights of their citizens. A challenge that belongs to the latest notion of sustainable development. Since it is impossible to achieve this goal in the short term, this article will focus on the current state of the international protection of the right of legal immigrants to a dignified life.

1. The protection of migrants' rights seen as the protection of the human person

Reconstructing the protection of migrants' rights in international law is a complex task, taking into account the particular heterogeneity of the subject matter, as well as the short time span which characterizes the

attempt of international politics to attribute a comprehensive and generalized approach to such protection.

The first negotiated intergovernmental agreement was in fact only reached in 2018. It was achieved under the auspices of the United Nations and aimed at covering all dimensions of international migration in a holistic and comprehensive manner. This is to be considered the first major result, albeit non-binding, of an international and comprehensive approach to the migratory phenomenon which, launched in 2016, is expected to be a long and ambitious one. [1]

The road towards the protection of migrants' rights does however start from much further back, by looking at migrants as "people", as human beings, so as to entrench itself deeply within the international protection of human rights. In fact, although to date there are many examples of international treaties directly conferring rights on migrants, [2] it is customary rights and international human rights treaties and their additional protocols that guarantee them rights, [3] by virtue of their humanity.

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[1] The intergovernmental agreement negotiated is the UN General Assembly Resolution, UN Doc. no. A/RES/73/195 *Global Compact for Safe, Orderly and Regular Migration* dated 19 December, 2018. For further discussion, see *infra* section 4.

[2] Quoted, in chronological order, are the 1949 International Labor Organization (ILO) Convention no. 97, on Labor Migration; the Convention Relating to the Status of Refugees of 1951 and its 1967 Protocol; the 1954 Convention Relating to the Status of Stateless Persons; the 1961 Convention on the Reduction of Statelessness; the 1974 International Convention on the Safety of Life at Sea; the 1975 ILO Convention no. 143, concerning Migration in Abusive Conditions and the Promotion of the Equality of Opportunity and Treatment of Migrant Workers; the 1979 International Convention on Search and Rescue at Sea (SAR); the 1982 United Nations Convention on the Law of the Sea; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000; the Protocol against the Smuggling of Migrants by Land, Sea and Air of 2000; the Convention concerning Decent Work for Domestic Workers of 2011.

[3] In addition to the 1948 Universal Declaration of Human Rights, which is of a different nature, the Treaties mentioned are, in chronological order, the 1963 International Convention on the Elimination of All Forms of Racial Discrimination; the 1966 International Covenant on Economic, Social and Cultural Rights; the 1966 International Covenant on Civil and Political Rights; the 1965 International Convention on the Elimination of All Forms of Racial Dis-

Protecting the rights of a "person" means, according to private law, protecting a subject of law, an entity with rights and obligations, invested – at the same time – with legal capacity and legal status,[4] in order to be simultaneously the recipient of legal norms and the centre of attribution of both legally and socially relevant interests. It means, publicistically, to operate in the awareness that every legal norm always has as its object a human interest and, as its recipient, the individual, as the holder of active and passive legal situations, where the former are directed towards seeing his/her own interests protected and realized and the latter to making others' interests protected and realizable. And, in this sense, it is possible to state, as we shall see in the remainder of this investigation,[5] that for international law, the interest of the individual, understood as the primary recipient of the economic, legal, political and social commitment of States, is the human being's "right to a dignified life".

2. The role of the right to a dignified life in the protection of the human person

The definition and international protection of dignified life have, since 10 December, 1948, been entrusted to the Universal Declaration of Human Rights, in the preamble of which, first recital, the UN General

crimination; the 1979 Convention on the Elimination of All Forms of Discrimination against Women; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1989 Convention on the Rights of the Child; the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; the 2006 Convention on the Rights of Persons with Disabilities; the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

[4] For more details on the concepts of legal capacity and legal status, see T. MARTINES (ed.) (2005), *Diritto costituzionale*, Milano, 103 ff.; P. RESCIGNO (1958), *Capacità giuridica*, II ed., Torino; ID. (1966), *Persona e comunità*, Bologna; F. ALCARO (ed.) (1976), *Riflessioni critiche intorno alla soggettività giuridica. Significato di una evoluzione*, Milano; G. ALPA (ed.) (1993), *Status e capacità*, Bari; A. FALZEA (ed.) (1939), *Il soggetto nel sistema dei fenomeni giuridici*, Milano; F. FERRARA (ed.) (1941), *Diritto delle persone e di famiglia*, Napoli; P. PERLINGIERI (ed.) (1972), *La personalità umana nell'ordinamento giuridico*, Napoli; G. OPPO (2002), *Declino del soggetto e ascesa della persona*, in *Riv. dir. civ.*, I, 830 ff.; C.M. BIANCA (ed.) (1978), *Diritto civile, La norma giuridica, soggetti*, Milano; S. RODOTÀ (ed.)(2007), *Dal soggetto alla persona*, Napoli; H. KELSEN (ed.) (1966), *Dottrina pura del diritto, Italian translation*, Torino, 173.

[5] See, in particular, *infra* para. 3.

Assembly already proclaims that "the recognition of the inherent dignity of all members of the human family and of their rights, equal and inalienable, constitutes the foundation of freedom, justice and peace in the world". Immediately followed by Art. 1 which states "all human beings are born free and equal in dignity and rights".

The Declaration is, therefore, structured in such a way as to make it clear that dignity should be understood as the supreme human interest, to be guaranteed by means of the protection of all rights, enshrined as equal and inalienable, which together make life – a preordained state of being –, dignified. In this structure is highlighted the true value of the Declaration, which, albeit with a merely programmatic approach, recognizes the 'universality' of all the enshrined rights.

The Declaration, therefore, prides itself on not being limited to the recognition of the equality of every human being and traditional fundamental rights, but goes still further and also makes "social rights" universal, preordaining them to the attainment and subsequent preservation of the dignified life of every human being.[6] In this sense, fitting examples are Arts. 23(3) and 25 of the same Declaration, which, in conjunction, make the protection of the right to "equal pay" and "the right to a standard of living adequate for the health and well-being of oneself and one's family" the instruments for ensuring a dignified life, where "work", "health" and "well-being" – as the term that best renders the opposite of "poverty" – are corollaries. In this way, for the first time, "work", "health" and "well-being" are no longer cited as empty rights, but as human interests, corollaries of the supreme interest of a dignified life and belonging to the legal status of every individual, both as rights (active legal situation) and as duties (passive legal situation).[7]

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[6] With regard to what the recognized true value is in the 1948 Universal Declaration of Human Rights for having also made social rights universal, see T. MARTINES, *op. cit.*, 587 ff. On the importance of the universality of social rights see F. VIOLA (2006), *L'universalità dei diritti umani: un'analisi concettuale*, in F. BUTTURI, F. TOTARO (eds.), *Universalismo ed etica pubblica, Vita e Pensiero*, Milano, 155-187; D. BIFULCO (ed.) (2003), *L'inviolabilità dei diritti sociali*, Napoli; N. BOBBIO (ed.) (1990), *L'età dei diritti*, Torino, 14 ff.; For a critical reading of the universality of social rights see A. ALGOSTINO (ed.) (2005), *L'ambigua universalità dei diritti. Diritti occidentali o diritti della persona umana?*, Napoli.

[7] For a more accurate doctrinal reconstruction of the concept, see L. MARTELLI (2021), *Il diritto a una vita dignitosa nell'epoca della pandemia*, in P. GARGIULO *et al.* (eds.), *Quaderno n. 20, L'azione dell'ONU per la promozione e*

This view of the right to a dignified life as a supreme principle is, today, also found in European Union law, although such a right also had to wait for the Lisbon Treaty to be explicitly recognized among the 'values' protected and enshrined in Art. 2, it too having had to follow the dynamics of the long process of integration in which the achievement of economic goals was prioritized over their protection. [8]

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la protezione dei diritti umani nel 75° anniversario dell'Organizzazione, the international Community, Napoli, 201. In particular, the legal application is explored here of the right to a decent life as the supreme principle relating to the status of every individual. For example, work, as a corollary of a dignified life, becomes a necessary means for the affirmation of one's personality (the right) and as a means of contributing to the material or spiritual progress of society (programmatic duty). Similarly, "well-being" becomes a necessary means for the pursuit of happiness, quality of life, and the development of one's personality (the right) and as a cultural burden of inner definition of essentiality (programmatic duty), in order to make well-being and happiness accessible to all the persons involved.

[8] This approach was justified for a long time by the member States by a firm political stance whereby fundamental rights were already largely guaranteed within the EEC – then the EC – by the application, to all member States, of the European Convention for the Protection of Human Rights and Freedoms (ECHR), as parties to it within the framework of the Council of Europe. It was only thanks to the jurisprudential activism of the Court of Justice, especially in the period prior to the Single European Act of 1986, that it became possible, on the one hand, to keep the issue of fundamental rights alive within the European Community and, on the other hand, to evolve the legitimacy of a preliminary or autonomous judicial control mechanism within the European Union, dealing with the violation of fundamental rights and entrusted to the Court of Justice itself. On the economic approach to European integration, see L. RAPONE (ed.) (2015), *Storia dell'integrazione europea*, Rome. On the Court's jurisprudential activism with regard to human dignity see A. DI STASI (2019), *Brevi considerazioni intorno all'uso giurisprudenziale della nozione di dignità umana da parte della Corte di giustizia dell'Unione europea*, in AA.VV., *Temi e questioni di diritto dell'Unione europea. Scritti offerti a Claudia Morviducci*, 861-873, Bari. With regard to the protection of dignity within the ECHR, for the purposes of this contribution, we wish to simply point out that the Convention does not directly mention among its principles the right to a dignified life, but only makes a general reference, in Art. 2, to the right to life. Nonetheless, through the jurisprudence of the European Court of Human Rights, this shortcoming has been made up for by elevating dignity to the "foundation and guiding motive of the Convention". This is the specific definition expressed by the European Court of Human Rights in *Pretty v. United Kingdom*, 29 April, 2002, but the reference to and protection of human dignity can be found in more than eight hundred cases submitted to it. For a more in-depth discussion of the

In particular, the Lisbon Treaty not only revised the entire system of the Union's inspiring principles by referring in Art. 2 of the Treaty on European Union to the current founding values – primarily respect for human dignity – but also gave direct effect to the Charter of Fundamental Rights of the European Union, which, in 2000, had merely been proclaimed by the member states. In fact, Art. 6(1) of the Treaty on European Union, by giving the Charter the same legal value as the Treaties, made it once and for all a source of primary law of the European Union, including its Art. 1 according to which "human dignity is inviolable. It must be respected and protected". [9]

Furthermore, in the Explanations on the Charter of Fundamental Rights, [10] the dignity of the human person is not only understood as a fundamental right in itself, but even forms the very basis of fundamental rights. [11]

3. How the violation of the right to a dignified life becomes the basis of "*migrantis voluntas*"

In the writer's opinion, it is truly incredible how the importance of the historical-political evolution of human rights can be perfectly summarized in the linear consequentiality, both semantic and lexical, existing between Art. 1 of the 1789 French Declaration of the Rights of Man

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subject, see J.P. COSTA (2013), *Human Dignity in the Jurisprudence of the European Court of Human Rights*, in C. MC CRUDDEN (eds.), *Understanding Human Dignity*, Oxford, 665-724.

[9] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17.12.2007), entry into force on 1 December 2009; Charter of Fundamental Rights of the European Union (C 326/391), Official Journal of the European Union.

[10] Explanations relating to the Charter of Fundamental Rights, Official Journal of the European Union (2007/C 303/02).

[11] The Explanations on the Charter of Fundamental Rights state, with reference to Art. 1 of the Charter of Fundamental Rights of the European Union, that "*the dignity of the human being is not only a fundamental right in itself, but constitutes the very basis of fundamental rights*" (emphasis added). This is also confirmed by the case law of the Court of Justice, an example of which is the judgment of 9 October, 2001, Case C-377/98, Kingdom of the Netherlands v. European Parliament and Council of the European Union, in which, in paragraphs 70-77 of the explanatory statements, the Court of Justice confirmed that «the fundamental right to human dignity is an integral part of Union law».

and of Citizens, according to which "men are born and remain free and equal in rights" – itself emulative of the 1776 American Declaration of Independence – with Art. 1 of the 1948 Universal Declaration of Human Rights where "all human beings are born free and equal in dignity and rights" and, the latter, with Art. 1 of the 2000 Charter of Fundamental Rights of the European Union whereby "Human dignity is inviolable. It must be respected and protected".

Dignity is the guiding thread of the democratic process, going so far as to constitute, today, the very basis of fundamental rights. In fact, while the Declarations of the late-18th century consecrated, for the first time, the ideal that the social unity of the State can only take place if those involved are recognized by the state as being equal and free in their rights, the Universal Declaration of 1948, like the first post-World War II Constitutional Charters, enhances the recognition of rights by consecrating dignity as the supreme human interest, to be guaranteed by means of the protection of all rights, enshrined as equal and inalienable, which together make life – a preordained state of being – dignified. Hence, with the Charter of Fundamental Rights of the European Union of 2000, as a modern example of a declaration of fundamental rights, to human dignity is attributed the position of greatest importance as regards the recognition of rights, not only by assigning it the first Article, followed by the second Article on the "right to life" and the third on the "right to the integrity of the person", but even giving it the name of chapter one, which encompasses all three of these basic rights.

Legally, such a democratic and state approach ought to mean considering the citizen, the foreigner, the migrant, the human person in general, as an entity with rights and obligations, having – at the same time – legal capacity and legal status, so that he or she is both the recipient of legal norms and the centre of attribution of legally and socially relevant interests.

It means making the object of the legislative, administrative and judicial action of the State a "human interest" with as its recipient the "individual", the holder of active and passive legal situations, where the former aim at having their own interests protected and realized and the latter at having those of others protected and realizable. Hence the central role, on the one hand, of human dignity as the supreme interest of state action and, on the other, of the fundamental rights of the individual, the protection of which by the State enables the person involved to express himself or herself and achieve the ultimate goal of existence: a dignified life.

To this end, since the Second World War, it has become of fundamental importance to strengthen the social and welfare policies characterizing not only state-constitutional experiences, but also those of a supranational nature, as demonstrated by the Universal Declaration of 1948 itself, described in the previous paragraph, as well as by the countless warnings and recommendations of many International Organizations operating as intergovernmental agencies of the United Nations and which monitor the close relationship between "work" and "well-being" (i.e., poverty) elevated by the Declaration itself, ever since 1948, to corollaries of the supreme principle of a dignified life. [12]

In fact, taking up an authoritative position which sees us very much in agreement, if the legal recognition of formal equality marked the transition from an absolute State to State of law, so the recognition of substantial equality marks the transition from a State of law to a welfare State understood as a supportive State capable of eliminating the obstacles that stand between a person and his or her real capacity to live a dignified life, considered as his or her supreme interest. [13]

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[12] In this sense, mention should be made of the most recent warnings and recommendations, expressed by the World Bank and ILO to calm the effects of the pandemic, on "poverty" and "work" respectively, issued in their 2019 to 2022 reports. Both conclude with calls for the countries involved: to adopt strong shared prosperity measures; to increase measures in support of job retention and creation; to close the gap between policy aspirations and their achievement; to improve data learning; to keep macroeconomic policies expansionary; and to keep alive international coordination and support for lower and middle income countries, considering that developing countries have limited means to adopt the economic and employment policies needed to sustain recovery. For a more detailed reconstruction see L. MARTELLI, *op. cit.*, 195-199; L. MARTELLI (2020), *La crisi più grave dalla seconda guerra mondiale: l'OIL costretta a rivedere la sua metodologia per fornire dati aggiornati inerenti l'impatto del COVID-19 sul mercato del lavoro*, in *WPO*, Napoli; L. MARTELLI (2020), *l'impatto della pandemia sul mercato del lavoro giovanile: la possibile nascita della "lockdown generation"*, in *WPO*, Napoli; L. MARTELLI, *Povertà e COVID-19: la Banca mondiale svela una "inversione storica" nella riduzione della povertà e la nascita di "nuovi poveri" nell'anno 2020*, in *WPO*, Napoli.

[13] The thought stems from the reflections of the constitutionalist Themistocles Martines, who by "formal equality" meant: "the legal recognition of freedoms and the consequent self-limitation of the State and the attainment of the status of citizen, with equal subjection to the law". And by "substantial equality": "the State's programmatic duty to remove economic and social obstacles that, by limiting *de facto* formally recognised freedom and equality, prevent the full development of the human being and his or her effective participation in

As will become clearer in the rest of this research work, [14] this task is still enshrined in a totally programmatic sense, both at the level of the European and non-European national constitutions – where present in an explicit form – and in other supranational experiences, but it is evident that, where a State is unable to ensure the "formal equality" of its citizens, by means of suitable "substantial equality" measures and policies aimed at the generalized well-being of its citizens, then these citizens acquire the inevitable awareness of having to look elsewhere for their happiness inherent in the respect of the right to a dignified life. In this lies the essence of "*migrantis vuluntas*".

Economic, food, climatic, war, religious, criminal or work-related causes are not in themselves the forced decision-making impetus that induces citizens to leave their country but correspond to the factual situation that makes it impossible for them to achieve self-determination, while yearning for a happy and dignified life. It is the violation of the right to a dignified life which represents the driving force behind the migratory phenomenon, and which prompts migrants to move away from the place they belong to, from the main centre of their affections, business and interests. This is due to "the direct intentionality" or "the indirect incapacity" [15] of their governments to adopt policies able to

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the political, economic and social organization of institutionally organized society". For this reason, Martines proposes that the legal recognition of freedoms, inherent in formal equality, should mark the transition from an absolute State to a State of law and how the recognition of the State's interventionist duty to guarantee "substantial equality", should mark the transition from a State of law to a welfare State. T. MARTINES, *op. cit.*, 120-583. For further reading in support of these ideas, see B. CARAVITA (ed.) (1984), *Oltre l'eguaglianza formale*, Padova; A. GIORGIS (ed.) (1999), *La costituzionalizzazione dei diritti all'uguaglianza sostanziale*, Napoli.

[14] See, *infra* para. 5.

[15] The violation of the right to a dignified life is not necessarily due to a conscious choice of the State, but can also result from the involuntary inability to respond to the causative events of a generalized lack of well-being. Suffice it to think of the repercussions of the COVID-19 pandemic. The corollary economic consequences of the spread of COVID-19 on the economic system of States, determines, in those countries where there are no efficient welfare solutions, an inevitable flight to countries which possess such forms of social security. This is confirmed by the World Bank's reports on global extreme poverty entitled "Poverty and shared prosperity", in particular that of 2020, the first pandemic year, which placed the current pandemic precisely among the three causes of the worrying slowdown in the decrease of extreme poverty, alongside armed

wipe out extreme poverty and food shortages, and to provide essential medical care, primary education and employment in accordance with individual ambitions and capacities, as well as to respond to epidemics, pandemics, natural disasters, floods, famines, earthquakes, and avoid racial, cultural, ethnic, religious, sexual and political discrimination.

4. "*Migrantis voluntas*" at the centre of a new path of global and sustainable governance of international migration

It was in 2015 that the 2030 Agenda for Sustainable Development was signed by the governments of the 193 member states of the United Nations, and subsequently approved by the UN General Assembly,[16] as a universal and long-term action plan for "people", the "planet" and "prosperity".

As specified in its preamble in fact, this Agenda "seeks to strengthen universal peace in larger freedom" and recognizes that "eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development". In this sense, poverty is seen as a tyranny, it being specified that "as we embark on this collective journey, we pledge that no one will be left behind".

To this end, 17 "Sustainable Development Goals" were announced and, within these, 169 "targets", defined as "integrated and indivisible", which the parties concerned, working together in partnership, undertake to achieve through the implementation of a 15-year plan dedicated to areas of crucial importance for humanity and the planet.

The preamble also puts focus on the five keywords of this ambitious sustainable development goal, among which stands out as the first word "People" to which is made to correspond the determination "to end poverty and hunger, in all their forms and dimensions, and to ensure that all human beings can fulfil their potential in dignity and equality and in a healthy environment".

For the issue being addressed here, the political impact of the 2030

conflicts and climate change. For a more in-depth study on the subject, see L. MARTELLI (2020), *Povertà e COVID-19: la Banca mondiale svela una "inversione storica" nella riduzione della povertà e la nascita di "nuovi poveri" nell'anno 2020*, in *WPO*, vol. 2, Napoli, 123-126.

[16] UN General Assembly, *The sustainable development agenda*, UN Doc. no. A/RES/70/1.

Agenda is unprecedented, since for the first time, the need is recognized, on the one hand, to comprehensively protect migrant status within the international policy of sustainable development, – 11 out of 17 goals contain relevant targets and indicators for the sustainable protection of migrants [17] and on the other, to recognize the extensive contribution which the migratory phenomenon gives within sustainable development.

Starting with the first profile, regarding the migrant as a "person", acknowledgement is made of the crucial role played, in his or her life, by the right to a dignified life and, by means of the protection of such right, the respect for "*migrantis voluntas*". Below are the four levels of argumentation.

In the first level, which we shall call "defining", Art. 23 attributes to the migrant the meaning of "person" to whom, as was seen in the preamble, is attributed the assurance whereby all human beings can achieve their own potential in "dignity" and "equality". By means of Art. 10, the concepts of "dignity" and "equality" take on the same meanings as those attributed by the Universal Declaration of human rights, taking into account that such Art. 10 places the Agenda in a relationship of consequentiality, it being guided by them, with "the 'purposes' and 'principles' of the Charter of the United Nations, including full respect for international law. It is grounded in the Universal Declaration of Human Rights, 1 international human rights treaties, the Millennium Declaration and the 2005 World Summit Outcome". Moreover, to rule out any misunderstanding, Art. 4 states that "the dignity of the human person is fundamental".

In the second level, which we could call "institutional", through the combination of Arts. 11 and 12, we achieve the "person" goal – with coordinates fixed in the previous level – within the institutional and su-

[17] Art. 23 of the Agenda acknowledges that "People who are vulnerable must be empowered. Those whose needs are reflected in the Agenda include all children, youth, persons with disabilities (of whom more than 80 per cent live in poverty), people living with HIV/AIDS, older persons, indigenous peoples, refugees and internally displaced persons and 'migrants'". Through the combination of this Article with the sectoral ones regarding the targets, the indirect application to migrants can be recognized of the goals 1, 2, 3, 4, 5, 6, 7, 16. On the other hand, in a direct manner as they are diagrammatically mentioned, migrants are the recipients of goal 4, by means of Art. 24; of goal 8, by means of para. 8.8; of goal 10, by means of paras. 10.7 and 10.c; of goal 17, by means of para. 17.18.

perficial system of sustainable development, as defined by the *lex specialis* which have succeeded one another over time in international environmental policies as "the outcomes of all major United Nations conferences and summits which have laid a solid foundation for sustainable development and have helped to shape the new Agenda". In particular, among them all, mention must go to "the Rio Declaration on Environment and Development" within whose institutional structure corresponding to the "Conference of Parties"(COP), an ethical view of sustainable development has today been reached, founded on the three pillars referred to in Art. 2 of the agenda itself, which correspond to the three dimensions – economic, social and environmental - of sustainable development, all confirmed, indirectly by Art. 12, which traces sustainability back to its paradigm, which is the "principle of common, but differentiated responsibilities".

A third level, which can be defined as instrumental, can be reconstructed by combining Arts. 3 and 13. After defining the real meaning of dignity in the first level, by making the "person" goal functional to the protection of the dignified life indicated in the Universal Declaration of human rights, after correctly defining "sustainable development" within the historical process which resulted in the three different meanings given to it and after functionalizing its institutionalization from the Rio Declaration onwards in pursuit of the goals of the Agenda, with Arts. 3, 4, and 13, the economic and legal instruments and the institutional structure of international environmental policy are made functional to the goals enshrined in Art. 3 and which correspond to the decision "between now and 2030, to end poverty and hunger everywhere; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to protect human rights and promote gender equality and the empowerment of women and girls; and to ensure the lasting protection of the planet and its natural resources. We resolve also to create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work for all, taking into account different levels of national development and capacities".

Finally, by lowering this infrastructure – firmly established in its generality around the "person" – into the specificity of the "migrant", the fourth and last level of debate can be constructed, which we shall call "functional" and which can be traced back to the combination of Arts. 13, 14 and 29. According to Art. 13 "the challenges and commitments identified at these major conferences and summits are interrelated and call for integrated solutions". In turn, Art. 29 makes Art. 13

functional to international migrations, sustaining the need for international cooperation "to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status, of refugees and of displaced persons". Hence the importance of Art. 14 which, with disarming awareness, lists all the driving forces[18] behind the migratory phenomenon which prompt the migrants to move away from the place they belong to, from the main centre of their affections, business and interests, because of "the direct intentionality" or "the indirect incapacity" of those in government to adopt policies suitable for removing or addressing them, thereby ensuring the preservation of a dignified life. This list, from Art. 14, is precisely understood as "immense challenges to sustainable development" which, as regards the protection of migrants' rights, translate into the exclusion of "*migrantis voluntas*", into the exclusion of the migrant's right to live a dignified life.

With regard to the second profile of the paper, in part already expounded with the above-mentioned third level, it is with Art. 29 that acknowledgement is made of "the positive contribution of migrants for inclusive growth and sustainable development. We also recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses".

What has been expressed so far, as well as the need for a compre-

[18] These are "Billions of our citizens continue to live in poverty and are denied a life of dignity. There are rising inequalities within and among countries. There are enormous disparities of opportunity, wealth and power. Gender inequality remains a key challenge. Unemployment, particularly youth unemployment, is a major concern. Global health threats, more frequent and intense natural disasters, spiralling conflict, violent extremism, terrorism and related humanitarian crises and forced displacement of people threaten to reverse much of the development progress made in recent decades. Natural resource depletion and adverse impacts of environmental degradation, including desertification, drought, land degradation, freshwater scarcity and loss of biodiversity, add to and exacerbate the list of challenges which humanity faces. Climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve sustainable development. Increases in global temperature, sea level rise, ocean acidification and other climate change impacts are seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States. The survival of many societies, and of the biological support systems of the planet, is at risk".

hensive approach to all migration issues, was immediately accepted by international politics, as evidenced by the immediate response of the Heads of State and Government who met on 19 September 2016 in the United Nations General Assembly to discuss migration and refugee issues for the first time at global level. The result was the adoption of the "New York Declaration for Refugees and Migrants" [19] in which the 193 member states of the United Nations recognized the need for a global approach to human mobility and for greater cooperation at global level. In particular, after explicitly linking the adoption of the Declaration to the path of global cooperation begun the year before with the 2030 Agenda, as well as to the purposes and principles of the United Nations Charter, to the reaffirmation of the Universal Declaration of Human Rights and to the tenets of international human rights treaties, the New York Declaration has the merit of launching, with its annex II, a process of intergovernmental consultations and negotiations for the development of a global compact for safe, orderly and regular migration. In particular, in annex II, in the part outlining the future content of the pact, the need stands out, in par. IIIc, "to address the drivers of migration, including through strengthened efforts in development, poverty eradication and conflict prevention and resolution". To therefore address the "driving factors" of migration.

This process ended on 10 December 2018 with the adoption of the "Global Compact" [20] by the majority of member States of the United Nations in an inter-governmental conference in Marrakesh, followed by the formal approval of the United Nations General Assembly on 19 December. [21] The Global Compact must be understood as the first negotiated intergovernmental agreement, prepared under the auspices of the United Nations, which covers all dimensions of international migration in a holistic and comprehensive way – albeit in a non-binding form – explicitly framed in goal 10.7 of the 2030 Agenda.

It is, therefore, the beginning of a journey, where the importance of a first step is never to be found in its ability to solve the problem being

[19] UN General Assembly, *New York Declaration for Refugees and Migrants,* UN Doc. no. A/71/L.1.

[20] UN General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, UN Doc. no. A/RES/73/195.

[21] Besides the Global Compact, for safe, orderly and regular migration, now under review, the UN General Assembly, *Global Compact on Refugees* (UN Doc. no. A/RES/73/151) was adopted separately on 17 December 2018.

addressed, but in its ability to contextualize it. The Global compact does this and does it explicitly. In the section dedicated to "shared responsibilities", at Art. 11, after reiterating that the global approach to the migratory phenomenon plays the role of "facilitating safe, orderly and regular migration, while reducing the incidence and negative impact of irregular migration through international cooperation and a combination of measures put forward in this Global Compact" and after having recognized "shared responsibilities" in fulfilling "an overarching obligation to respect, protect and fulfil the human rights of all migrants", the Global compact, at Art. 12, directly expresses the need to protect the dignified life of the migrant and the central role of "*migrantis voluntas*" in the following words: "This Global Compact aims to mitigate the adverse drivers and structural factors that hinder people from building and maintaining sustainable livelihoods in their countries of origin, and so compel them to seek a future elsewhere". The protection of the right to a dignified life, the protection of "*migrantis voluntas*" from its violation, from that which "compels them to seek a future elsewhere".

5. Problems relating to the application of the protection of "*migrantis voluntas*" in integration policies and open issues

The path traced in the previous paragraphs, enables us to say that, while the migratory phenomenon initially considered, as its first moment of management, the migratory act in itself, i.e. the management of the migratory flow in order to make it safe, orderly and legal, since 2016, international awareness has begun to view the beginning of the migratory phenomenon as the 'willful' moment of the migrant's action, rather than its actual "implementation". In other words, international politics has recognized that the problem of the migratory phenomenon, and therefore of its multi-level governance, no longer consists of two single moments such as the policy of managing the migratory movement in progress and its consecutive policy of integration or repatriation of the migrant; to these moments been added another, which precedes them and corresponds to the protection, as a person, of the migrant's right to a dignified life in the place where he or she belongs, in the main centre of his or her affections, business and interests before the violation of such right becomes "*migrantis voluntas*".

Thus, the international policy of global management of the migratory

phenomenon is tending to develop for the first time along the three consecutive lines of: policy for reducing the gap between States in their ability to adopt the appropriate measures to ensure the rights of their citizens (first moment); policy for managing the migratory movement underway (second moment); policy of integration or repatriation (third moment). The common thread of the three moments remains the protection of the migrant's right to a dignified life, although it determines in each of them different plans of action in order to ensure that this is respected. Despite the differences, however, it is possible to reconstruct the following orders of problems, to be understood more as open issues.

The first issue concerns the international view of the status of the individual as a legal person in relation to the sovereignty of States. As we have seen,[22] protecting the rights of a "person" means protecting a legal entity, one with rights and obligations, endowed – at the same time – with legal capacity and legal status, so as to be, at the same time, the recipient of the rule of law and the centre of attribution of legally and socially important interests. In this sense, the supreme human interest is the right to a dignified life. To date, there is no doubt that the will of the individual States is to preserve, in all three of the described moments, the direct relationship of their sovereignty with the "person" seen as a legal entity invested with legal capacity and status. This is made evident not only formally by the non-binding nature of the Global Compact, but also substantially by the explicit provision in art- 15(c) of "the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law".

The second issue concerns the level of governance of the subject matter attributable at international level in relation to sovereignty. The retention of sovereignty of the single State over "people" as legal entities means subjecting them independently to their own supreme institutional system in which the three legislative, executive and judicial powers are structured. This inevitably has repercussions on the degree of cooperation which sovereign States can grant in a global vision of the migration issue in its three moments. This is again made clear by Art. 15 where, in para. b, the Global Compact is delimited as "a non-legally binding cooperative framework that recognizes that no State can address migration on its own because of the inherently transnational na-

[22] See, *supra* para. 2 and para. 3

ture of the phenomenon. It requires international, regional and bilateral cooperation and dialogue. Its authority rests on its consensual nature, credibility, collective ownership, joint implementation, follow-up and review".

The third issue, and the most problematic, is that which concerns the relationship between this international governance and the actual ability of States to ensure the "substantial equality"[23] of its citizens, even before the other legal connotations of the "person", including the migrant. This aspect is crucial for understanding the directives that international cooperation must follow as regards the migratory phenomenon. If we look at the international system as split into developed and developing countries, and considering among the former, as prime examples, the major European countries, protagonists of European democratic constitutionalism after the Second World War, as an example of modern and long-lasting avant-garde, guarantors of rights generally recognized today,[24] it should be noted how, as part of them, the task of making sure the State protects the right to a dignified life, inherent in the principle of substantial equality, is still confirmed with a totally programmatic meaning –[25] where present in explicit form –[26] in line with

[23] For the definition, see, *supra*, para. 3

[24] For a detailed analysis of all the Constitutions of the countries belonging to the European Union in which the "recognition" of inviolable human rights is consecrated, rather than "attributed" by the State, with particular regard for the protection of the dignity of the person even before that of the citizen, make reference to L. MARTELLI (2022), *Nuovo Patto su migrazione e asilo e diritto ad una vita dignitosa dei migrant*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.) *Migrazioni Internazionali. Questioni Giuridiche Aperte*, in Collana *FSJ*.

[25] Martines, in defining the programmatic nature of the substantial equality enshrined in Art. 3 of the Italian Constitution, explains how this state duty to remove social obstacles is one that lies with the legislator and the other public powers as a commitment to put in place measures suitable for achieving the results set and not as a duty to which corresponds a fully subjective and operable right on the part of the citizen to obtain their implementation. For this reason, speaking of social rights in para. 18 in section four of chapter one, part three, Martines himself declares, that many of the subjective legal situations formally recognized as social rights protected by the Italian State and enunciated by the Italian Constitution, are recognized and envisaged only in programmatic norms and that the laws that should implement them have either not yet been enacted or are inadequate to make them concretely operative. T. MARTINES, *op. cit.*, 120 ff.

[26] To date, the constitutional charters of the member States of the European

the programming represented in the international context, within the United Nations and reconstructed in the previous paragraph. Such programming reflects, in very precise way, the difficulty which such democratic States, which by way of example represent the developed countries, have in implementing generalized welfare for their citizens at the level formally required by their respective cost-benefit charters. This is the first underlying problem, i.e. the ability to extend a welfare system which is difficult to apply, despite belonging to avant-garde democratic systems, to the large numbers entailed in migratory flows, which are constantly directed towards developed countries with a view to integration and thus to the third moment of the migratory phenomenon. The second underlying problem, on the other hand, concerns the analysis of the capacity of the remaining countries, in particular developing countries, to implement state welfare policies for their citizens on a scale, in terms of rights and services, such as to provide them with a dignified life, from the perspective of the first moment of the migratory phenomenon. In this sense, we shall limit ourselves to simply making reference to the already mentioned Art. 14 of Agenda 2023, as well as to the World Bank's annual reports on poverty, these too already mentioned.

The existence of these underlying problems has resulted in international cooperation to date focusing more on the second moment of the migratory phenomenon, corresponding to the management of migratory flows in order to make them safe, orderly and legal. It is, however, inevitable and desirable, given the impossibility of the welfare systems of democratic and developed States to absorb the extension of these systems to the totality of the migratory flows in terms of integration, i.e. in terms of extending the protection of the guarantee of the right to a dig-

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Union that expressly also contemplate equality in its substantial form are Italy (Art. 32 Const.); Spain (Art. 9 Const.); Ireland (Arts. 40 and 45 Const.); Malta (Arts. 14 and 45 Const.); Sweden (Art. 2 Cap. I and Arts. 15 and 16 Cap. II Form of Government Law); Hungary (Arts. 57, 66 and 70/A Const.). In this sense, as well as for an in-depth study of the constitutional forms of the principle of equality in the member States of the European Union and their tendency towards uniformity see E. PALICI DI SUNI (2009), *Il principio di eguaglianza nell'Unione europea*, in A. LUCARELLI, A. PATRONI GRIFFI (eds.), in *Quad. Rass. dir. pubbl. eur.*, vol. 5, Napoli. The quotation is supplemented with the necessary specification that Croatia, which only became a member State in 2013, presents only a formal equality and even for this, in the opinion of the writer, uniformity is to be found.

nified life to all migrants, while respecting their *migrantis voluntas*, that international cooperation intensify its focus on the first moment, on the drastic reduction of the gap between States as regards their ability to adopt the appropriate measures to ensure the rights of their citizens, in order to exclude the formation of a *migrantis voluntas* determined by the violation of the migrant person's right to live a dignified life, in the place to which such person belongs, in the main centre of his or her affections, business and interests.

This approach can also be grasped by tracing the migratory phenomenon back to the evolution of the international sustainable development system, with which many similarities can be detected. International environmental policy, too, has been based on non-binding agreements and more than two decades between 1972 and 1992 were to pass before it was institutionalized within the United Nations and binding obligations were set for the countries taking part. It took the same amount of time to reach a first ethical vision of sustainable development in terms of intra-generational and inter-generational equity, and a further thirty years for its current evolution towards the pursuit of a dignified life for every human being through the preservation of a healthy environment and the eradication of poverty. This, always with the utmost respect for the sovereignty of the Countries taking part as regards the management of their own natural resources.

Having managed to convey the migratory phenomenon within this path of sustainable development does not however only mean drastically halving the time needed for current international cooperation of the migratory phenomenon to evolve towards a recently affirmed global approach, but above all means directing resources, the same resources of the two international policies, towards the pursuit of the very same goal.

6. Conclusions

Ever since the earliest constitutional Charters, dignity has been the guiding thread of the democratic process, going so far, today, as to form the very basis of fundamental rights. Then, starting with the Universal Declaration of Human Rights, dignity became the supreme human interest to be guaranteed by means of the protection of all rights, enshrined as equal and inalienable, which together make life – the preordained state of being –, dignified.

From a legal point of view, such a democratic and state-oriented approach should mean understanding the citizen, the foreigner, the migrant, the human person in general, as an entity with rights and obligations, endowed – at the same time – with legal capacity and legal status, in order to be both the recipient of legal norms and the centre of attribution of legally and socially relevant interests. It means making the "human interest" the object of the State's legislative, administrative and judicial action and the "person", as the holder of active and passive legal situations, its recipient, where the former are directed towards seeing his/her own interests protected and realized and the latter to making others' interests protected and realizable. Hence the central role played, on the one hand, by "human dignity" as the supreme interest of state action and, on the other, by the fundamental rights of the person, the protection of which by the State enables the individual to express himself or herself and achieve the ultimate goal of existence: a dignified life.

Wherever a State is unable to provide its citizens with "formal equality", by means of suitable "substantial equality" measures and policies aimed at their general well-being, then such citizens inevitably come to realize that they have to seek elsewhere the happiness that comes with respect for the right to a dignified life. This is where the essence of "*migrantis voluntas*" lies. The violation of the right to a dignified life creates the driving forces behind the migratory phenomenon and which prompt migrants to move away from the place they belong to, from the main centre of their affections, business and interests. This is due either to "the direct intentionality" or "the indirect inability" of their governments to adopt policies suitable for removing or addressing such driving forces.

Starting in 2015, within the United Nations, we have witnessed a new approach to the global and sustainable governance of international migration. By analysing the first results of this approach, such as the 2030 Agenda for Sustainable Development of 2015, the New York Declaration for Refugees and Migrants of 2016 as well as the two Global Compacts of 2018, it would seem that the contribution has been fully recognized which the migratory phenomenon makes to sustainable development as well as the role of the "*migrantis voluntas*" within it. In particular, starting from this recognition, we can safely say that while before, the migratory phenomenon saw, as its first moment of management, the migratory act itself, i.e. the management of the migratory flow in order to make it safe, orderly and legal, starting in 2016, international

sensibility began to focus more on the "willful" moment of the migratory act as the beginning the migratory phenomenon, rather than on the moment of "implementation". In other words, international policy has recognized that the problem of the migratory phenomenon, and therefore of its multilevel governance, no longer consists of two single moments such as that of the policy of management of the migratory movement in progress and its consecutive policy of integration or repatriation of the migrant, but that a new moment has been added to these, one that preceded them, and which corresponds to the protection, as a person, of the migrant's right to a dignified life in the place where he or she belongs, in the main centre of his or her affections, business and interests, before the violation of such right becomes "*migrantis voluntas*".

In this sense, despite the many issues analysed and still open, the inclusion of the migratory phenomenon, within the evolution of the path of sustainable development can be interpreted precisely as the international intent not only to want to drastically halve the timeframe of the evolution of current international cooperation on the migratory phenomenon based on the recently affirmed global approach, but above all to want to direct resources, the same resources of the two international policies, towards the pursuit of the same goal: the protection of the right to a dignified life for every human being.

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Chapter 10

RIGHT TO FAMILY REUNIFICATION OF MIGRANTS AND REFUGEES IN THE LATIN AMERICAN SYSTEM

Rita Mazza

ABSTRACT: *Family reunification of migrants and refugees is a right to be guaranteed and, at the same time, an instrument that contributes to the regularization of migratory flows. The new types of migration complicate the application of the international protection regime. The Latin American protection system of migrants and refugees has specificities that meet the new need of the migratory flows, which, in this region, are mainly intercontinental. This analysis is aimed at verifying how the features of the regional system affect the right to family reunification of migrants and refugees. It takes into account on the one hand the regional instruments in force, and, on the other hand, the State practice on the matter in the reference area, highlighting elements that risk questioning the formally liberal approach of the Latin American model.*

1. Introduction

The 'mixed' and mass nature of contemporary migratory flows, in addition to undermining the migration policies of the States, makes the limits and weaknesses of the international protection regime stand out, which separates migrants from refugees, whose treatment is calibrated on the condition of the single individual. However, the reasons for the current mass flows of people have resulted in different figures of migrants and refugees than in the past, such as migrants leaving due to climate change, or refugees wanting to escape generalised violence and massive violations of rights perpetrated in their country of origin.

Latin America's regional system contains particular elements of response to the new migratory needs. The broad notion of refugee contained in the main regional instruments and in many national legislations in the reference area makes it possible to welcome foreigners in need of protection even in the event of mass mobility. Moreover, the use, at a State level, of reception measures dedicated to migrants coming from specific countries of departure appears as an instrument to react to the massive migratory flows of common origin. This is the case of Venezuelan migrants who, currently, represent the largest percentage of migrations in Latin America. [1]

South America's migratory flows, essentially of an intra-regional nature, involve in particular Brazil, Chile and Peru [2] as destination States for migrations coming largely from Venezuela. Here, as is known, there is a general situation of widespread violence and a systematic violation of human rights. It is worth noting that the infra-continental origin of migrants can have a positive impact on the degree of integration in the host community, given that, in this case, the cultural and religious differences are minimal.

Human mobility inevitably affects the family unit, which is lost when a family member leaves the country of origin. Since family unity is a right attributed to the individual by international law, its application towards the migrant, *lato sensu*, is guaranteed by recourse to the complementary right to family reunification. The latter, in this analysis, after a preliminary examination of the relevant international norms, will be examined in the prism of the Latin American system, with the aim of verifying the repercussions that the specific features of the system produce on the migrant's/refugee's right to be reunited with their family. We will also examine if the formally liberal system that emerges runs risks in terms of application. The analysis' significance is strengthened if one considers the stabilizing effect in social relationships generally attributed to the family group [3] which, clearly, also affects the security of the host State.

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[1] IDB, OECD (2016), *Migration Flows in Latin America and the Caribbean. Statistics on Permits for Migrations*, 2021, 32 ff. Also, *Ibidem*, Country Tables, 42 ff.

[2] *Ivi*, 15 and 22.

[3] The International Organization for Migration (IOM) highlighted this aspect in its *Documento temático para el Pacto Mundial/Reunificación familiar*, 2016, 2. In this sense, recently Proceso de Quito, VIII Reunión regional, *Nota Conceptual*, *Taller temático de Reunification Familiar*, 2022, 1. V. also S.G. ARAUJO, C.

The instrumental nature of the right to reunification requires an initial analysis of the right to family unity which the migrant can recover only through the reunification with the family in his new home. Actually, family reunification becomes the only instrument to maintain family unity in the case of a refugee who, due to his condition, is unable to return to his country of origin where the rest of the family has remained. Instead, in the case of the migrant in the strict sense who decides to move for economic, environmental or other reasons, separation from the family can be considered a choice, even if sometimes it's induced by reasons external to the person, which he can modify by returning to the country of origin. Precisely this difference could justify different treatments between migrants and refugees in terms of family reunification. [4]

The scope of the right to family reunification is conditioned by the identification of the holders and beneficiaries of the right. The breadth of the notions of refugee and family contained in South American regional instruments and absorbed by various national legislations entails an extension, at least formally, of the recognition of the right to family reunification. The latter, despite the complications due to the involvement of a plurality of vulnerable subjects and connected rights, should be valued for its potential function in the regularization of migratory channels. However, the liberality of the system that is observed on a formal level seems to waver in the application phase.

2. The right to unity and family life of adults and children in international law

The family is assigned a central role in society already in the Universal Declaration of Human Rights of 1948 which, in Art. 16(3) describes it as "the natural and fundamental group unit of society", including the right to family life in the decalogue of human rights to be protected. This vision of the family later found confirmation in binding instru-

PEDONE (2014), *Introducción: Familias migrantes y Estados: vínculos entre Europa y América Latina*, in *Papels del CEIC*, 2, 2.

[4] The refusal to grant family reunification in the case of immigrants who can enjoy family life elsewhere has been considered legitimate in particular in the jurisprudence of the European Court of Human Rights which has embraced the so-called "elsewhere approach". As a reference we recall ECHR, judgment 19.2.1996, application no. 23218/94, *Gül v. Switzerland*; and ECHR, judgment 28.11.1996, application no. 73/1995/579/665, *Ahmut v. The Netherlands*.

ments such as the 1966 Pacts, which impose a duty of protection and assistance on States.[5]

Since these are conventional regimes intended to apply to all individuals, the status of migrant and/or refugee cannot represent a limit to the exercise of the guaranteed right. Providing for reunification with the family for those who are separated by crossing the border is the most appropriate instrument to enable a person to re-establish family unity. Family unity must be guaranteed in all circumstances, and this is evidenced by the fact that, even in an extremely difficult context such as armed conflict, States must respect the commitments established by the international humanitarian law for the protection of family unity in the event of missing families.[6] or of transfers and evacuations ordered by the Occupying Power,[7] or in the event of internment.[8]

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[5] International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, Art. 23(1) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State") and International Covenant on Economic, Social and Cultural Rights of 16 December 1966, Art. 10 ("The States Parties to the present Covenant recognize that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society").

[6] Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Art. 26: "Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations". See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, Art. 74: "The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task in accordance with the provisions of the Conventions and of this Protocol and in conformity with their respective security regulations".

[7] Geneva Convention, cit., Art. 49(3): "The Occupying Power undertaking (…) transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons (…) and that members of the same family are not separated".

[8] Geneva Convention, cit., Art. 82(2): "Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health or for

It should be emphasized that while the migrant worker's family unity is expressly recognized among his rights by the 1990 Migrant Workers' Rights Convention,[9] the refugee's family unity is not specifically protected in the 1951 Refugee Convention (hereafter 1951 Convention). However, it can be derived from the provisions relating to children and marriage which clearly underlie the existence of a family.[10] In any case it is affirmed in the Final Act accompanying the Convention, where the vision of the family unit as "the natural and fundamental group unit of society" is reaffirmed, the extension of the refugee's rights to the family members is envisaged and governments are recommended to take the necessary measures to protect the family and, in particular, to maintain family unity.[11] Also the provision of Art. 5 of the 1951 Convention should

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the purposes of enforcement of the provisions of Chapter IX of the present Section. Internees may request that their children who are left at liberty without parental care shall be interned with them. Wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life". For a comment on the application of the IHL to family reunification see K. TOPIDI (2008), *Unaccompanied Minors and the Right to Family Reunification in International Humanitarian Law and Human Rights Law: the Iraqi Experience*, in R. ARNOLD, N. QUÉNIVET, *International Humanitarian Law and Human Rights Law*, The Hague, 403 ff.

[9] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Assembly resolution 45/158 of 18 December 1990, Art. 44(1): "1. States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers".

[10] Convention Relating to the Status of Refugees 1951, Arts. 4 ("[…] freedom as regards the religious education of their children […]), 12(2) ("[…] rights attaching to marriage […]"), Art. 24 ("[…] family allowances […]").

[11] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Recommendation (B): "The Conference, considering that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and noting with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems (E/1618, p. 40), the rights granted to a refugee are extended to members of his family, recommends Governments to take the necessary measures for the protection of the refugee's family especially with a view to: (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular

be noted, which is without prejudice to "any rights and benefits granted by a Contracting State to refugees apart from this Convention". It is to be considered in a complementary manner with the principle that the right to family unity, provided for in the many international acts mentioned, as a human right, is to be guaranteed to all individuals regardless of their condition. [12] Therefore it is clear that the lack of an *ad hoc* provision in the 1951 Convention does not preclude recognition of the right to family unity also for refugees.

Since family unity is a condition that also involves children in addition to adults, the 1989 Convention on the Rights of the Child (hereafter CRC) is also relevant. It makes the child's best interests its leitmotif, in the name of which the child's right to family life free from arbitrary interference is recognized, [13] and the duty of public and private institutions, courts, administrative authorities and legislative bodies to take this into account prominently in their decisions concerning children is established. [14] Also, the obligation of the States to supervise the separation of the child from his parents [15] and family reunification is envisaged. [16] Also in this case we are faced with rights recognized to all children who are under State jurisdiction, whether they are regular or irregular migrants, asylum seekers, refugees, stateless persons or victims of trafficking. [17]

The separation of children from their family, due to reasons related to conditions of poverty, the need to flee persecution, armed conflicts and violence, or even produced by State migration policies, exposes the child to serious risks of violence, abuse, trafficking and exploitation, making it essential to take actions aimed at preventing it, or activating mechanisms to facilitate reunification and restore family unity.

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country, (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption".

[12] In this sense, see the Human Rights Committee in its General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, para. 7.

[13] Convention on the Rights of the Child (Resolution 44/25 of 20 November 1989), Art. 16.

[14] Art. 3 of the Convention.

[15] Art. 9 of the Convention.

[16] Art. 10 of the Convention.

[17] Human Rights Council, *Rights of the Child and family reunification*, *Report of the United Nations High Commissioner for Human Rights*, A/HRC/49/31, 2 March 2022, point 25.

The family also finds protection at a regional level, and more specifically, as far as we are concerned here, in the 1969 American Convention on Human Rights which, in Art. 17, in providing for the rights of the family, describes it as a "natural and fundamental group unit of society"; and in several acts of *soft law*, the relevance of which is strengthened by State regulatory practice that in some cases incorporates the contents of these acts, as in the case of the Cartagena Declaration on Refugees of 1984,[18] the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America of 2004[19] and of the Brazil Declaration of 2014[20] and, more articulately, of the Resolution 4/19 of the Inter-American Commission of Human Rights of 2019,[21] where each migrant family is granted the right to be protected by society and the State.[22] Moreover, the opposition between family unity and the right to emigrate is excluded to the extent that the separation of the family cannot be used to force the parents to give up looking for a foreign new location in a foreign country nor the parent's migrant status can be a reason for the loss of custody, parental authority or visitation rights.[23]

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[18] *Declaratión de Cartagena sobre refugiados*, 22 November 1984, point 13 ("Reconocer que la reunificación de las familias constituye un principio fundamental en materia de refugiados, el cual debe inspirar el régimen de tratamiento humanitario en el país de asilo y de la misma manera las facilidades que se otorguen en los casos de repatriación voluntaria").

[19] Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, Mexico City, 16 November 2004, point 10 ("Recognizing that family unity is a fundamental human right of refugees, and recommending, therefore, the adoption of mechanisms to guarantee its respect").

[20] Brazil Declaration, 3 December 2014, point 9 that recalls the principles recognized in the Convention on Rights of the Child, in particular "to preserve the family unit".

[21] Comisión Interamericana de Derechos Humanos, *Principios Interamericanos sobre los derechos humanados de Todas las personas migrantes, refugiadas, apátridas y las víctimas de la trata de personas* (Resolución 4/19, 7 de dicembre de 2019).

[22] Principle 32.

[23] Principle 33.

3. Reunification as a family unity instrument for migrants and refugees

The instrumental nature of family reunification, as a positive measure to restore lost family unity, is fully manifested in the case of separation linked to migration.[24] Nor is it worth stating that reunification could be satisfied with the return of the migrant to the country of origin, considering that significant objections can be drawn from the rules just examined, namely that reunification is impracticable for refugees who are prevented from returning to their country of origin because a well-founded fear of being "persecuted", according to Art. 1 of the 1951 Convention; that the preservation of the family unit must not act as a "deterrent" with respect to the exercise of the "right to leave"; that reunification in the country of origin cannot take place if it conflicts with the aforementioned best interests of the child; that the reunification of the migrant/refugee child falls under the protection and specific assistance granted to him by the CRC.[25] On this last point, it is worth emphasizing the importance of a careful assessment of the child's condition in his country of origin to avoid the risk that he could be "used" as a means to facilitate the emigration of other family members.[26]

The right to family reunification, in addition to being derived indirectly from international standards protecting family unity, is expressly provided for in the Convention on the Rights of Migrant Workers which, in Art. 44, commits the States to adopt appropriate measures to "facilitate" the reunification of the migrant with his family members and asks the State of employment to "favourably" consider the possibility of granting, for humanitarian reasons, equal treatment to family members other

[24] Joint general comment no. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para. 27.

[25] CRC, Art. 22 which imposes a duty of cooperation on the contracting States "to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family".

[26] Some States, such as Canada and Poland, in order to hinder phenomena of this type, do not allow the request for family reunification of unaccompanied and separated minors recognized as refugees with their parents. On point see K. JASTRAM, K. NEWLAND (2003), *La unidad familiar y la protección da los refugiados*, in K. JASTRAM, K. NEWLAND, *Family Unit and Refugee Protection*, Cambridge, 621.

than the spouse and the children.[27] The recognition of the right to family reunification of migrants and refugees is also based on *soft law* instruments, such as the New York Declaration of 2016 which, for the purpose of safe and regular migration, encourages family reunification[28] and the two Global Compacts, adopted in 2018. These include family reunification among the measures to diversify the modalities leading to regular migration and as a complementary admission path in the case of refugees' family members.[29] With reference to the Latin American regional system, the Cartagena Declaration of 1984 should be recalled, which recognizes family reunification as "un principio fundamental en materia de refugiados".[30]

Family reunification, which is functional to the migrant's family unit but also a tool for setting up regular migratory channels, can find obstacles in national legislation and policies regarding minimum requirements. Often, access to procedures is limited by the lack of information and scarce assistance, so much so that the solicitations of the international

[27] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990, Art. 44, paras. 2 and 3: "2. States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children. 3. States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers".

[28] General Assembly Resolution (2016), *New York Declaration for Refugees and Migrants*, 3 October 2016, UN Doc. A/RES/71/1, para. 57.

[29] The Global Compact on Refugees, 17 December 2018, A/RES/73/151 (Part II), para. 95 ("The three-year strategy on resettlement (…) will also include complementary pathways for admission (…). Contributions will be sought from States, with the support of relevant stakeholders, to facilitate effective procedures and clear referral pathways for family reunification"); and The Global Compact for safe, orderly and regular migration, A/RES/73/195, 11 January 2019, Objective 5: Enhance availability and flexibility of pathways for regular migration, para. 21, lett. (i) ("Facilitate access to procedures for family reunification for migrants at all skills levels through appropriate measures that promote the realization of the right to family life and the best interests of the child, including by reviewing and revising applicable requirements, such as on income, language proficiency, length of stay, work authorization, and access to social security and services").

[30] Declaración de Cartagena, cit., Conclusion III (13).

bodies of the sector push towards the overcoming of these obstacles and the simplification of the verification procedures. [31]

4. The relevant notions of refugee and family and their extension in the Latin American system: inclusion of mass flows and overcoming the traditional family

In applying the international norms on the right to family reunification in the context of migrations, the Latin American system is characterized by the breadth of the notions of refugee and family, i.e. the holder of the right and the recipient of the related measures, implying the extension of the subjective field of the right.

Actually, for both the notions in question the legal source is represented by non-binding acts, the significance of which, limited on a formal level, is to be sought in the State practice of the reference area which, as will be seen, [32] in many cases integrates the regional notions of *soft law*, creating a common legal basis.

For the purpose of recognizing the refugee status, the Cartagena Declaration, in addition to recalling the elements envisaged in the 1951 Convention and its 1967 Additional Protocol, also indicates as refugees "las personas que han huido de sus países porque su vida, seguridad o libertad han sido amenazadas por la violencia generalizada, la agresión extranjera, los conflictos internos, la violación masiva de los derechos humanos u otras circunstancias que hayan perturbado gravemente el orden público". [33]

The expansion of the notion of refugee responds to the need to deal with mass flows, scarcely compatible with the, so to speak, individualist dimension of the 1951 Convention, centred on the condition of the single individual, which in the implementation phase does not suit the case of groups of people linked by a common state of "persecution", such as generalized violence, foreign aggression or internal conflicts. [34]

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[31] Joint general comment no. 4, cit., para. 32.

[32] See *infra* para. 5.

[33] Declaración de Cartagena, cit., Conclusion II (3).

[34] The Declaration expressly motivates the choice to extend the notion of refugee with the situation that characterizes the region, where a mass influx of refugees is registered, drawing inspiration from the African Union Convention, which in Art. 1(2) foresees that: "The term 'refugee' shall also apply to every

If the novelty introduced by the Cartagena Declaration is to be read in a positive way on a formal level, on the other hand, during its application, the verification of the objective elements of a general nature, i.e. the specific context situations in which the person develops his fear of "persecution", is subject, more than anything else, to a political evaluation that could be influenced by logics of "securitization" of the borders, to the detriment of the humanitarian aims that can be inferred from the Cartagena Declaration from the preamble. From this point of view, the existence of national verification procedures that also involve entities outside the State, such as the United Nations High Commissioner for Refugees (UNHCR), has a mitigating effect, as it occurs, for example, in the mechanism for recognizing the refugee status in Brazil, as we will see in the next paragraph.

Moving on to the second relevant notion for the purposes of family reunification, i.e. the family, it should be noted that migratory flows force States to deal with very different models of family, and that the Latin American system is characterized, also in this case, by the breadth of its vision.

Given that the rules that protect family unity and provide for the right to family reunification, as well as other rules to some extent connected to the family, do not indicate the notion of family to be used as a reference, the definition of family at the international level essentially derives by the interpretation given by the supervisory bodies in the field of human rights, which is then reflected in the State legislation to a greater or lesser extent.

It is reasonable to assume that the need not to make one model prevail over another has led the Human Rights Committee and the Committee for the Rights of the Child to lean towards an inclusive interpretation of the term "family", contained in Art. 17 of the Covenant on civil and political rights and in Art. 16 of the CRC, which makes it possible to overcome the concept of "nuclear family", consisting of father, mother and children and also to take into account local customs. [35]

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person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

[35] CCPR, *General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, HRI/GEN/1/Rev.9 (Vol. I), 8 April 1988, para. 5

Specifically, the Inter-American Court of Human Rights in its Advisory Opinion on the Rights and Guarantors of Children in the Context of Migration and/or in Need of International Protection expressly states that "there is no single model for a family". It also states that the definition of family cannot be restricted to the traditional notion based on a couple and their children. It must be expanded according to an extended family concept which, in addition to other relatives, can also include people not linked by biological ties up to including ties, so to speak, of circumstance that in the specific migratory context may form, especially with reference to unaccompanied children. [36] The broad approach to the definition of family adopted by the Inter-American Court finds confirmation in various national legislations of Latin America, as will be seen.

In the name of a flexible approach, the UNHCR also encourages States to allow reunification also for family members who are "dependent" for economic, social and, also, for "emotional reasons". [37] Given the

("Regarding the term "family", the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned"); and CRC *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, 29 May 2013, para. 59 ("The term 'family' must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art. 5)").

[36] IACrtHR, Advisory Opinion OC-21/14, 19 August 2014, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, para. 272: "[…] the family to which every child has a right is, above all, her or his biological family, including extended family, and which should protect the child and also be the priority object of the measures of protection provided by the State. Nevertheless, the Court recalls that there is no single model for a family. Accordingly, the definition of family should not be restricted by the traditional notion of a couple and their children, because other relatives may also be entitled to the right to family life, such as uncles and aunts, cousins, and grandparents, to name but a few of the possible members of the extended family, provided they have close personal ties. In addition, in many families the person or persons in charge of the legal or habitual maintenance, care and development of a child are not the biological parents. Furthermore, in the migratory context, "family ties" may have been established between individuals who are not necessarily family members in a legal sense, especially when, as regards children, they have not been accompanied by their parents in these processes".

[37] UNHCR (2011), *Resettlement Handbook and Country Chapters*, 178.

propensity of Latin American States to accept an extended notion of family, one could wonder whether, in the future, they could go further and accept the most recent indications of the UNHCR. These include, among the family members admitted to reunification, those who are linked by polygamous marriages or same-sex couples or informal unions [38] which presuppose, on the one hand, the solution of possible cultural conflicts and, on the other, the overcoming of the difficulties of verifying non-formalized bonds.

5. Right to family reunification in the South American States' practice: is it a liberal model at risk?

The attribution to migrants and refugees of the right to family unity and family reunification is widely recognized in the national legislation of South American States, sometimes even at a constitutional level. [39]

State legislative practice in Latin America has absorbed the features that distinguish the right to family reunification in the regional protection system, characterized, as mentioned above, by the expansion of the notion of refugee and by the extension of reunification with family members other than those traditional ones belonging to the nuclear family.

With very few exceptions, [40] South American States substantially adopt

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[38] UNHCR (2020), *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, 232.

[39] It is worth mentioning Bolivia (Constitución Política del Estado (CPE), Art. 29); Costa Rica (Decreto núm. 36831-G de Reglamento de personas refugiadas, 28.9.2011, Art. 64); Chile (Resolucion Núm. 3.042 exenta. – Santiago, 9 de agosto de 2019, Art. 1); Ecuador (Ley Orgánica de movilidad humana, Oficio No. T.7166-SGJ-17-0100, 6 de febrero de 2017, Arts. 2, 3.11); Mexico (Ley sobre Refugiados y Protección Complementaria (Última Reforma DOF 18-02-202), Art. 44); Panama (Decreto ejecutivo n. 5, 14 de enero de 2018, Arts. 78,80,83.11); Uruguay (Ley Nº 18.250 Migración, 27 de diciembre de 2007, Arts. 1, 10).

[40] It is the case of Panama (Decreto ejecutivo no. 5, cit., Arts. 1 e 5) and Costa Rica (Decreto núm. 36831, cit., Art. 4). For Costa Rica, the intervention of the administrative judge should be noted who, after stating that the Cartagena Declaration has been incorporated into domestic law "as a benchmark of constitutionality", states that the extended definition of refugee should be considered "as part of the national law on future occasions" (Sentence of the Administrative Dispute Tribunal, Section Four, at fourteen hundred hours on 28 November, 2014 (vote number 0103-2014 IV)).

the regional definition of refugee,[41] specifying, in some cases, additional limits or criteria. This is the case of Brazil, Honduras, Paraguay and Peru which, while including among the requirements for the recognition of refugee status those general situations that the Cartagena Declaration adds to the elements contained in the 1951 Convention and the 1967 Protocol, limit the application to people who are "forced" or "obliged" to leave the country, whereas the "fear of persecution" indicated in the Cartagena Declaration is more generic.[42] This is also the case of Mexico and Uruguay, which add the persecution perpetrated by associations that control the territory and by non-State agents, and terrorism respectively to the criteria envisaged by the Cartagena Declaration;[43] and Chile which,

[41] Argentina (Law No. 26165. General Law on the Recognition and Protection of Refugees, Art. 4 (b)); Bolivia (Ley N° 251 de 20 junio de 2012, Art. 15(b); Supreme Decree No. 19640, Art. 2, e Supreme Decree No. 28329, Art. 12); Brazil (Law 9474 of 22 July 1997, Art. 1(III)); Chile (Law 20430 of 15 April 2010, Art. 2(2)); Colombia (Decree 2840 of 6 December 2013, Art. 1(b) e Decree 4503 of 2009, Art. 1(b)); Ecuador (Ley Orgánica de movilidad humana, cit, Art 98(2); El Salvador (Decree No. 918 Law for the Determination of Refugee Status, 14 August 2002, Art. 4 (C)); Guatemala (Acuerdo Gubernativo No. 383-2001, 14 de septiembre de 2001, Art. 11 (c); National Migratory Authority Agreement 2-2019 Regulations of the Refugee Status Determination Procedure, Art. 4 (b)); Honduras (Decreto N° 208-2003 Ley de Migracióny Extrnjería, 3 de marzo de 2004, Art. 42.3); Mexico (Ley sobre Refugiados, Protección Complementaría Y Asilo Político, 27 de noviembre de 2011, Art. 13(II)); Nicaragua (LAW No. 655 of Refugee Protection, 2008, Art. 1 (C)); Paraguay (Ley N° 1938, 9 July 2022, Art. 1(b)); Peru (Law No. 27891. Refugee Act, 20 December 2002, Art. 3(b)); Uruguay (Law 18076 on the Status of Refugees, 5 January 2007, Art. 2 (B)).

[42] For regulatory references see note 41. Peru, in particular, removes generalized violence from the definition of refugee but adds to it "foreign occupation or domination".

[43] For regulatory references see note 41. Mexico, in particular, provided detailed explanations of generalized violence, foreign aggression, internal conflicts, massive violation of human rights, disturbance of public order in the Reglamento de la Ley sobre refugiados e protección complementaria, 21 de febrero de 2012, Art. 4 ("VII. Violencia generalizada: Enfrentamientos en el país de origen o residencia habitual, cuya naturaleza sea continua, general y sostenida, en los cuales se use la fuerza de manera indiscriminada; VIII. Agresión extranjera: El uso de la fuerza armada por parte de un Estado en contra de la soberanía, integridad territorial o independencia política del país de origen o residencia habitual del solicitante; IX. Conflictos internos: Los enfrentamientos armados que se desarrollen en el territorio del país de origen o residencia habitual entre sus fuerzas

in interpreting the requirements indicated by the Declaration, recommends adopting a gender and age-sensitive approach. [44]

It should be noted that some legislations, in order to provide adequate responses to mass flows, including those caused by environmental disasters or originating from certain States, in particular from Venezuela, contemplate *ad hoc* provisions, [45] intended to apply to selected groups of migrants.

Latin American State legislation also shows a particular openness with reference to the definition of family for the purposes of family reunification, in line with the position of the Inter-American Court of Human Rights, referred to above, of not considering "a single family model" valid. It goes beyond traditional legal or blood ties to also take into account *de facto* ties or ties arising from relationships of dependence, be it social, economic or even emotional, [46] up to the point of influencing decisions on family reunification to considerations on the values and cultural and social habits of the country of origin of the refugee. [47]

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armadas y grupos armados organizados o entre tales grupos; X. Violación masiva de los derechos humanos: Las conductas violatorias contra los derechos humanos y las libertades fundamentales en el país de origen, a gran escala y conforme a una política determinada, y XI. Otras circunstancias que hayan perturbado gravemente el orden público: Las situaciones que alteren de forma grave la paz pública en el país de origen o residencia habitual del solicitante y que sean resultado de actos atribuibles al hombre».

[44] Law 40230, cit., Art. 3.

[45] It is the case of Argentina (Decree 616/2010 Regulations to Migration Law 25871/2010, Art. 24(h); Brazil (Law 13.445 Migration Law, 2017); Colombia (Special Permit Permanence Implemented through Resolution 5.797, 2017 and Resolution 1.272, 2017); Ecuador (Law 938 Human Mobility Law, 2017); El Salvador (Decree 918, cit., Art. 53 and Executive Decree 79, 2005, Arts. 2, 34-36); Guatemala (Decree 44 Migration Code, 2016, Art. 68); Mexico (Law on Refugees, Complementary Protection, and Political Asylum, 2011, Art. 26 and Regulations of the Law of Refugees and Complementary Protection, 2012, Art. 44); Panama (Decree 3, 2008, Arts. 23, 57-58); Peru (Law 27.891 Refugee Law, 2002, Arts. 35-36); Venezuela (Decree 2.491 Regulation on the Law on Refugees and Asylum Seekers, 2003, Arts. 21-23).

[46] So Argentina (Ley No. 26165, cit., Arts. 2,6, 25; Bolivia (Ley No. 251, cit., Art. 9); Brazil (Law No. 9474, cit., Art. 2); Ecuador (Decreto Ejecutivo No. 1182 de 2012, Reglamento para la aplicación en Ecuador del Derecho de Refugio, 19 de juio de 2012, Art. 6); Mexico (Law on Refugees, Complementary Protection and Political Asylum, cit., Art. 58); Uruguay (Ley N° 18076, cit., Art. 21.).

[47] It is the case of Chile (Ley 20430, cit., Arts. 3, 9, 22).

The clearly liberal imprint of the State legislation on refugees and their right to family reunification runs the risk of remaining limited to the level of concepts whereas a restrictive attitude is found in the application phase. The case of Brazil is significant, which according to UNHCR data is among the States with the highest number of asylum seekers.[48] While accepting a broad notion of family and having extended the right to family reunification to all migrants, not just refugees, with the 2017 Migration Law (hereafter 2017 Law),[49] the Brazil model presents aspects that limit the effective enjoyment of this right.

The 1997 Law on refugees (hereafter 1997 Law),[50] in providing the notion of refugee, internalizes the Cartagena Declaration, and it does not merely take as criteria for refugee status those provided by the 1951 Convention and the Protocol of 1967. The law also includes the massive and generalized violation of human rights although, in the latter case, it is required that the person is "forced to leave their country of nationality to seek asylum in another country". In this sense it deviates from the definition provided by the Cartagena Declaration which simply requires that the departure be the consequence of a threat, without specification, to the life, safety, or freedom of the person resulting from one of the objective situations considered.[51]

The 1997 Law does not expressly speak of a refugee's right to family reunification. However, in providing for the possibility of extending "the effects of the condition of refugees" to the spouse, ascendants, descendants and other economically dependent family members who are in Brazilian territory,[52] it does nothing but allow the family members admitted to be reunited in the host State. Then, the 2017 Law, in recognizing all migrants the right to family reunification, extends the possibility of reunification also to partners "without any discrimination",

[48] Brazil is the sixth State in the world for asylum requests made in 2019, and the second, after Peru, in Latin America. V. UNHCR (2020), *Global Trends: Forced Displacement in 2019*, *Report*, 39, in www.unhcr.org/5ee200e37.pdf.

[49] Lei n. 13.445 de 24 majo de 2017, in Diário Oficial Nº 99, quinta-feira, 25 de maio de 2017.

[50] Lei n. 9.474 de 22 de julho de 1997 in Diário Oficial Nº.139, quarta feira, 23 de Julho de 1997.

[51] See *supra* note 33.

[52] Art. 2, Lei n. 9.474, cit.

to collateral relatives up to the second-degree relatives and to people under guardianship. [53]

The recognition of refugee status and the assessment of applications for reunification are carried out according to a procedure headed by the National Committee for Refugees (CONARE from the Portuguese acronym of Comitê Nacional para Refugiados), established by the 1997 Law. [54] This Committee carries out an important role in interpreting the relevant legislation, establishing detailed measures and putting in place practices which, together with recent legislative changes, risk, in some ways, to undermine the formally liberal approach of the Brazilian legislation on refugees /migrants and their right to reunification.

In the procedure outlined in 1997 Law [55] and put into practice by CONARE a positive feature is represented by the involvement, in addition to the government representatives who make up the Committee, [56] of the UNHCR and non-governmental organizations that provide assistance in the preliminary phase of verifying the individual conditions of asylum seekers. [57] So one could say that it has the effect of diminishing the risk of ideological choices inherent in an exclusively internal political decisions. It should be noted, however, that the *side* action of the NGOs and the UNHCR, without voting right, is marginal with respect to the final decisions of CONARE, which is accused of acting excessively slowly and inconsistently applying the protection standards set at a regional level. [58] In fact, the data of practice indicate that, especially with reference to Venezuelan migrants who currently cover most of the migratory flows in the country, [59] the notion of refugee contained in the Cartagena Declaration, and also absorbed in national legislation, is applied in a restrictive manner. In fact, it is

[53] Sec. V, Lei n. 13.445, cit.

[54] Art. 11, Lei n. 9.474, cit.

[55] Arts. 17-20, Lei n. 9.474, cit.

[56] Art. 14, Lei n. 9.474, cit.

[57] For a detailed description of the procedure see. L. LYRA JUBILUT, S. MENICUCCI DE OLIVEIRA SELMI APOLINÁRIO (2008), *Refugee Status Determination in Brazil: A Tripartite Enterprise*, in *Canada J. Refug.*, 25, 29 ff.

[58] N. CINTRA DE OLIVEIRA TAVARES, V. PUREZA CABRAL (2020), *The application of the Cartagena Declaration on Refugees to Venezuelans in Brazil: An analysis of the decision-making process by the National Committee for Refugees*, in *LALR*, 121 ff.

[59] UNHCR (2022), *Global Trends: Forced Displacement in 2021*, *Report*, 14.

considered only in a subsidiary way with respect to the 1951 Convention, in the sense that it is used only when it is not possible to apply the conventional provision. [60]

An analogous contradiction between the breadth of the notion and the application restrictions can be found in the treatment of family reunification. On the basis of the provision contained in the 1997 Law, [61] a detailed resolution was adopted in 1998 which confirms the extensive approach, specifying, among other things, the meaning of 'dependent' family members, [62] Although the family reunification procedure is facilitated by the absence of requirements that could have been an obstacle, such as DNA testing, a minimum period of residence or minimum knowledge of the language, two aspects should be underlined which disadvantage the refugee who intends to reunite with his family in Brazil. Firstly, with the adoption of 2017 Law that extends the right to family reunification to all migrants, he has to follow the same procedure as other migrants without specific benefits. Secondly, the refugee undergoes the effects of the modification to the procedure introduced in 2018 [63] that 'externalizes' the procedure, as centres for the collection and evaluation of reunification requests become the Brazilian consular offices abroad, which are given a margin of discretion in the decision with very little possibility of challenge, given that the practice followed, according to recently conducted studies, [64] is not give reasons for any denial.

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[60] N. CINTRA DE OLIVEIRA TAVARES, V. PUREZA CABRAL (2020), *The application of the Cartagena Declaration on Refugees*, cit., 132.

[61] See *supra* note 52.

[62] CONARE, Resolução normativa N° 04, de 1 de Dezembro de 1998, available online. In particular, the resolution specifies the concept of "dependence" to which the 1997 Law refers, establishing in Art. 2: "Para efeito do disposto nesta Resolução, consideram-se dependentes: I – o cônjuge; II – filhos (as) solteiros (as), menores de 21 anos, naturais ou adotivos, ou maiores quando não puderem prover o próprio sustento; III – ascendentes; e IV – irmãos, netos, bisnetos ou sobrinhos, se órfãos, solteiros e menores de 21 anos, ou de qualquer idade quando não puderem prover o próprio sustento; § 1º Considera-se equiparado ao órfão o menor cujos pais encontrem-se presos ou desaparecidos. § 2º A avaliação da situação a que se refere os incisos II e IV deste artigo atenderá a critérios de ordem física e mental e deverá ser declarada por médico".

[63] Portaria Interministerial no. 12, de 13 de Junho de 2018, D.O.U. de 14.6.2018.

[64] J. PALANDER (2023), *International Human Rights Frameworks in Relation*

The elements just outlined confirm the idea, presented at the beginning, of a South American regional system for the protection of migrants/refugees and their right to family reunification as a virtuous model at a definitional level, but limited in its application.

to National Family Reunification Policy and Administrative Practice, in M. TIILIKAINEN, J. HIITOLA, A.A. ISMAIL, J. PALANDER (eds.), *Forced Migration and Separated Families. Everyday Insecurities and Transnational Strategies*, Cham, 15 ff.

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Chapter 11

THE RELEVANCE OF SOCIAL AND FAMILY TIES OF THIRD-COUNTRY NATIONALS: FROM PROTECTION AGAINST EXPULSION TO THE EUROPEAN ARREST WARRANT

Giovanna Naddeo

ABSTRACT: *This chapter aims to analyse the relevance of the fundamental right to private and family life as a bar to the deportation of long-term integrated immigrants following a criminal conviction. Based on recent ECHR and ECJ case law concerning "pathological events" in the relationship between third-country nationals and host States, the analysis focuses on the criteria and grounds for deeming social and family ties to be of such significance that expulsion or the execution of a European arrest warrant under Art. 4(6) of Framework Decision 2002/584/JHA should be denied. In view of the ECJ Grand Chamber judgment of 6 June 2023 in case C-700/21, O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers), this also marks a new step in the dialogue between the Luxembourg Court and the Italian Constitutional Court. As it will be seen, this issue is central in the relationship between EU immigration policy, judicial cooperation in criminal matters, and the protection of fundamental rights.*

1. Introduction

More than two decades after the Tampere Conclusions, the effective integration of third-country nationals lawfully residing in the European Union is a milestone yet to be achieved.[1] Indeed, integration and inclusion

[1] Presidency Conclusions Tampere 15 and 16 October 1999, adopted by European Council on 15/16.10.1999, paras. 4, 18, 20-21. See S. CARRERA, D.

of migrants is widely recognised as a "win-win process",[2] whereby migrants are offered assistance to become fully integrated economically, socially and culturally, and in return, actively seek to integrate into the host Member State and contribute to the effective completion of the internal market. However, shortcomings in the implementation of the EU framework for legal migration continue to undermine the full achievement of one of the objectives of the EU's common immigration policy in the Area of Freedom, Security and Justice, namely to ensure the fair treatment of third-country nationals residing legally in Member States.[3] As well known, third-country nationals migrate to the EU for economic or family reasons, to study, or seek international protection. Some remain in the territory of the Member State where they consolidate their social and family ties, and over time, integrate in the society in which they live. As such, over the last twenty years, a number of directives have been adopted to grant entry and residence rights to specific categories of individuals, namely long-term residents, students, researchers, and highly-skilled workers. The most general piece of EU legislation in this area is the Long-Term Residents Directive,[4] adopted in 2003, which grants, after five years

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CURTIN, A. GEDDES (eds.) (2020), *20 Year Anniversary of the Tampere Programme. Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*, San Domenico di Fiesole; A. DI STASI, L.S. ROSSI (eds.) (2020), *Lo spazio di libertà, sicurezza e giustizia. A vent'anni dal Consiglio europeo di Tampere*, Napoli.

[2] Communication, *Action plan on integration and inclusion 2021-2027*, 24.11.2020, COM/2020/758 final, 2. See M.C. CARTA (2021), *Il "nuovo" Patto europeo sulla migrazione e l'asilo: recenti sviluppi in materia di solidarietà ed integrazione*, in *FSJ*, 2, 9 ff.

[3] P. WEINGERL, M. TRATNIK (2022), *Climbing the Wall around EU Citizenship: Has the Time Come to Align Third-Country Nationals with Intra-EU Migrants?*, in *EJIL*, 1, 15 ff.

[4] Council Directive 2003/109/EC *concerning the status of third-country nationals who are long-term residents*, OJ L016, 23.01.2004, 44 ff. See A. DI STASI (2022), *La prevista riforma della direttiva sul soggiornante di lungo periodo: limiti applicativi e sviluppi giurisprudenziali*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.), *Migrazioni internazionali. Questioni giuridiche* aperte, Napoli, 435 ff.; D. THYM (2022), *Long Term Residents Directive 2003/109/EC*, in D. THYM., K. KAILBRONNER (eds.), *EU Immigration and Asylum Law*, 3rd ed., München-Oxford-Baden-Baden, 540 ff.; A. PITRONE (2018), *Regimi speciali in ragione di ingresso e soggiorno di cittadini di Paesi terzi nell'Unione europea*, Napoli, 95 ff.; D. ACOSTA ARCARAZO (2015), *Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form*

of legal and continuous residence, some specific rights to equal treatment in economic and social matters, as well as the right to reside in Member States other than the State that granted long-term resident status. In line with the integration objective, third-country nationals who are long-term residents also enjoy enhanced protection against expulsion. According to Art. 12 of the Directive, Member States may take a decision to expel a long-term resident only if he or she constitutes a real and sufficiently serious threat to public policy or public security.

In light of "the criteria established by the case-law of the European Court of Human Rights", as recalled in recital 16 of the Directive, Member States must take into account a number of factors closely linked to the private and family life of individuals before deciding to expel them. Based on the European Court of Human Rights' interpretation of Art. 8 of the European Convention on Human Rights, the notion of private life guaranteed by Art. 7 of the Charter of Fundamental Rights can be characterised as "encompassing the physical, psychological and moral aspects of the personal integrity, identity and autonomy of individuals".[5] Thus, as provided for in Art. 12(3), these balancing factors specifically concern the length of residence in the territory, the age of the person, the consequences for the person and his or her family members, and links with the country of residence or lack of links with the country of origin, irrespective of whether the measure has been taken in the form of an administrative penalty or as a result of a criminal conviction. Furthermore, the decision to expel may not be based on economic considerations.

As highlighted in the 2019 Report on the implementation of the Directive,[6] the ECJ has limited the discretion of Member States in relation to, for example, integration tests[7] and core benefits.[8] Similarly, the ECJ

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of Membership, in *Eur. Law J.*, 2, 200 ff.; P. DE PASQUALE (2015), *Il trattamento degli "stranieri lungo soggiornanti" fra libera circolazione e profili economici della parità di trattamento*, in S. AMADEO, F. SPITALERI (eds.), *Le garanzie fondamentali dell'immigrato in Europa*, Torino, 33 ff.

[5] D. MANGAN (2021), *Article 7 (Private life, Home and Communications)*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights*, Croydon, 151 ff., 154.

[6] Report *on the implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents*, 29.3.2019, COM/2019/161 final.

[7] See ECJ, judgment 26.4.2012, *Commission v. Netherlands*, case C-508/10; judgment 2.9.2015, *CGIL and INCA*, case C-309/14.

[8] See ECJ, Grand Chamber, judgment 24.4.2012, *Kamberaj*, case C-571/10;

ruled that such a measure cannot be adopted automatically following a criminal conviction, but requires a case-by-case assessment taking into account the elements set out in Directive 2003/109.

These considerations are also relevant, *mutatis mutandis*, in the context of another pillar of the Area of Freedom, Security and Justice, namely judicial cooperation in criminal matters, and more specifically, European arrest warrants issued against third-country nationals who are permanently established (residing or staying) in the host Member State. Under Art. 4(6) of Council Framework Decision 2002/584/JHA,[9] and in light of the *aut dedere aut punire* principle, the executing judicial authority may refuse to execute the European arrest warrant "if […] the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law".

First and foremost, the ECJ has emphasised in its jurisprudence that the terms "resident" and "staying" concern autonomous concepts of EU law relating respectively to "actual place of residence in the executing member State" and "a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence",[10] thereby excluding the automatic execution of a European arrest warrant issued against a person residing or staying in the executing Member State, irrespective of their links with the territory and society. On the contrary, the Court stressed the need for an overall case-by-case assessment of the duration, nature, and conditions of the requested person's presence, as well as their family and economic links with the executing Member State, in order to determine, again on a case-by-case basis, whether there are connections between the latter

judgment 25.11.2020, *Istituto nazionale della previdenza sociale v. VR*, case C-303/19.

[9] Council Framework Decision 2002/584/JHA, *on the European arrest warrant and the surrender procedures between Member States*, 18.7.2002, OJ L190, 1 ff. On the implementation of this Framework Decision in practice, see Report *on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, 2.7.2020, COM/2020/270 final. See also W. VAN BALLEGOOIJ (2020), *European Implementation Assessment 2004-2020 on the European Arrest Warrant*, in *Eucrim*, 2, 149 ff.

[10] ECJ, Grand Chamber, judgment 17.7.2008, *Kozłowski*, case C-66/08, para. 46.

and the host State.[11] The *ratio* of this provision is to protect the relationships and situations of the private and family life of the requested person with a view to facilitating their social rehabilitation.[12]

In light of the above, this chapter analyses the relevance of the fundamental right to private and family life with regard to these "pathological events" in the relationship between third-country nationals and the host Member State, with particular reference to the criteria and grounds for deeming the personal ties of the living or residing person to be of such significance that expulsion or surrender should be refused. As will be seen, this issue is central in the relationship between EU immigration policy and judicial cooperation in criminal matters, given the importance of fundamental rights in the EU legal order.[13] Moreover, the issue marks a new step in the dialogue between the ECJ and national courts, given the recent judgment of the ECJ Grand Chamber in case C-700/21, *O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)*, following the preliminary reference on the matter issued by the Italian Constitutional Court.[14]

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[11] ECJ, Grand Chamber, *Kozłowski*, cit., para. 48. See also ECJ, Grand Chamber, judgment 6.10.2009, *Wolzenburg*, case C-123/08, para. 78, where the Court ruled that the national requirement of five years' continuous residence does not go beyond what is necessary to achieve the objective of ensuring that requested persons who are nationals of other member States achieve a degree of effective integration in the executing member State.

[12] ECJ, Grand Chamber, *Wolzenburg*, cit., para. 67. With specific regard to the notion of the "social rehabilitation of the sentenced person", see also A. ROSANÒ (2022), *I trasferimenti interstatali di detenuti nel diritto dell'Unione europea*, Bari, 185 ff.

[13] See Š. IMAMOVIC (2022), *The Architecture of Fundamental Rights in the European Union*, Oxford-New York. With specific regard to the link between the task of perfecting the Area of Freedom, Security and Justice, and the protection of fundamental rights, see S. IGLESIAS SÁNCHEZ, M. GONZÁLEZ PASCUAL (eds.) (2021), *Fundamental Rights in the EU Area of Freedom, Security and Justice*, Cambridge; A. DI STASI (ed.) (2019), *Tutela dei diritti fondamentali e spazio europeo di giustizia*, Napoli.

[14] ECJ, Grand Chamber, judgment 6.6.2023, *O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)*, case C-700/21. See C. AMALFITANO, M. ARANCI (2022), *Mandato di arresto europeo e due nuove occasioni di dialogo tra Corte Costituzionale e Corte di giustizia*, in *Sist. pen.*, 1, 5 ff.

2. Protection against expulsion of third-country nationals in ECHR and ECJ case law

As well known, private life is a central aspect of the existence of every human being, and the right to respect for private life is recognised in a number of international human rights instruments.[15] At the European level, the dynamic and evolving interpretation of the European Convention on Human Rights (ECHR) by the Strasbourg Court has brought "*the totality of social ties between settled migrants and the community in which they are living*"[16] within the protective reach of Art. 8 ECHR, as part of the broad concept of private life.[17]

Although contracting States have the right to control the entry, residence, and expulsion of aliens as a matter of settled international law, the Strasbourg Court has developed a considerable body of case law on the negative obligation of States not to expel foreign nationals to safeguard their personal and family ties under Art. 8 ECHR.

The fundamental question is whether a State's refusal to allow entry or residence in circumstances where family life cannot reasonably be expected to be enjoyed elsewhere deprives the applicant of the opportunity to enjoy his or her right, thus constituting a sufficiently serious violation. In addition, in the field of immigration law, Art. 8 has successfully been invoked both to grant family reunification[18] and to resist

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[15] For example, Art. 12 of Universal Declaration of Human Rights, 1948; Art. 17 of International Covenant on Civil and Political Rights, entered into force 23 March 1976; Art. 14 of International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, entered into force 1 July 2003. See R. PISILLO MAZZESCHI (2021), *International Human Rights Law. Theory and Practice*, Cham, 431 ff.

[16] ECHR, Grand Chamber, judgment 23.6.2008, application no. 1638/03, *Maslov v. Austria*, para. 63; Grand Chamber, judgment 7.12.2021, application no. 57467/15, *Savran v. Denmark*, para. 173 (emphasis added).

[17] See the leading case, ECHR, judgment 29.4.2002, application no. 2346/02, *Pretty v. the United Kingdom*, para. 61. For a commentary, see D. HARRIS, M. O'BOYLE, E. BATES, C.M. BUCKLEY (2018), *Law of the European Convention on Human Rights*, Oxford, 500 ff.

[18] ECHR, judgment 19.2.1996, application no. 23218/94, *Gül v. Switzerland*; judgment 31.1.2006, application no. 50435/99, *Rodrigues Da Silva and Hoogkamer v. The Netherlands*; Grand Chamber, judgment 24.5.2016, application no. 38590/10, *Biao v. Denmark*; Grand Chamber, judgment 10.12.2021, application no. 15379/16, *Abdi Ibrahim v. Norway*.

expulsion from host States following a criminal conviction. In the latter case, settled migrant applicants argued that expulsion would disproportionately interfere with their right to respect for private and family life.

In assessing whether the termination of lawful residence would amount to a violation of Art. 8, the Court generally recalled that the Convention does not guarantee any right for aliens to enter or reside in the territory of the State, and that to prevent disorder or crime, contracting States have the power to expel aliens who have been convicted of criminal offences. However, the decisions in this area must comply with the requirements of Art. 8(2) ECHR.

To strike a fair balance between the competing interests, in the *Boultif* and *Üner* judgments [19] the Court set out ten broad and relevant criteria covering various aspects of the life of immigrants, the offence committed, and the expulsion measure threatened to assist the judges in their assessment. These criteria concern: the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period; the nationality of the various persons concerned, the applicant's family situation, such as length of marriage and other factors reflecting the effectiveness of a couple's family life; whether the spouse was aware of the offence on entering into a family relationship; whether there are children of the marriage, and if so, their age; the seriousness of the difficulties the spouse is likely to encounter in the country to which the applicant is to be expelled; the best interests of the children's welfare, particularly the seriousness of the difficulties that any of the applicant's children are likely to encounter in the country to which the applicant is to be expelled; the solidity of the social, cultural, and family ties with the host country and with the country of destination.

In view of its subsidiary role in the protection of human rights, the Strasbourg Court in its more recent jurisprudence clarified the scope of so-called "European supervision" in cases concerning the expulsion of settled migrants: it is for the Court to substitute its own assessment of the merits (including, in particular, the factual details of proportionality) for that of the domestic courts only if the latter have not carefully

[19] ECHR, judgment 2.8.2001, application no. 54273/00, *Boultif v. Switzerland*; Grand Chamber, judgment 18.10.2006, application no. 46410/99, *Üner v. the Netherlands*. See Y. RONEN (2012), *The Ties that Bind: Family and Private Life as Bars to the Deportation of Immigrants*, in *Int. J. Law Context*, 2, 283 ff.

applied the criteria laid down in the Court's case law and have not given adequate reasons for their decisions. [20]

For instance, in *Narjis v. Italy*, [21] the Strasbourg Court saw no reason to substitute its own view for that of the Italian Council of State because in its fully reasoned judgment, the latter had taken into account all the circumstances to strike a fair balance of interests in compliance with the criteria laid down by the Court. The case concerned the Italian authorities' refusal to renew the residence permit of an alien – a 39-year-old unmarried adult with no children, who had no family ties and who had committed criminal offences – and the decision to expel him from the national territory, while respecting the applicant's right to respect for his private life. As regards the need to interfere in a democratic society, the Court noted that the applicant's criminal record included a number of convictions at the last instance for serious offences, which indicated a clear and growing tendency toward repeat offences. The Court thus affirmed that in view of his criminal record, regular drug use, and apparent inability to integrate into working life, the Italian authorities had legitimate grounds for doubting the solidity of his social and cultural ties with the host country. On the other hand, in *Unuane v. The United Kingdom*, [22] the Court itself carried out the balancing exercise and unanimously concluded that the expulsion of the applicant – a foreign national who resided permanently with his partner and their three children in the State in which he had been convicted – constituted a disproportionate interference with his right under Art. 8 ECHR. With particular regard to respect for family life, the Court recognised that the seriousness of the offences he had committed was only one factor to be weighed in balancing the aforementioned criteria, *inter alia*, with the best interests of the children. In the present case, the Upper Tribunal acknowledged the acute need for parental support for the eldest child who had a heart condition and was due to undergo surgery that was not available in the country of destination. Although many of the factors relevant to the applicant's partner's appeal were essentially the same as his own, the applicant's appeal against expulsion was rejected, while his partner's and children's appeals were upheld on the sole basis that there

[20] ECHR, judgment 14.7.2017, application no. 41215/14, *Ndidi v. The United Kingdom*, paras. 75-76.

[21] ECHR, judgment 14.2.2019, application no. 57433/15, *Narjis v. Italy*.

[22] ECHR, judgment 24.11.2020, application no. 80343/17, *Unuane v. The United Kingdom*.

were no "very compelling circumstances", as required by the immigration rules, over and above the existing parental relationship with his children. The Strasbourg Court considered that it was in the best interests of the children for the applicant to remain in the United Kingdom, and therefore that deportation was disproportionate to the legitimate aim of preventing disorder and crime.

Similarly, in *Savran v. Denmark*,[23] the Grand Chamber considered that the national courts had failed to carry out an adequate balancing exercise to determine whether the applicant's right to respect for his private life outweighed the public interest in his expulsion. As regards the applicant's mental illness, and consequently his greater vulnerability than that of an average settled migrant, the Court noted that the Danish Supreme Court referred only briefly to the seriousness and gravity of his offence, while taking no account of the fact that the applicant was ultimately exempted from any punishment but was instead sentenced to committal to a forensic psychiatric facility. The Strasbourg Court therefore considered that the national authorities had not taken into account in a sufficiently thorough and careful manner the clinical and behavioural progress made since committing the crime, and the greater strength of the applicant's social and family ties with the host country than with the country of destination. Furthermore, the Strasbourg Court considered that the permanent nature of the re-entry ban was too drastic and therefore disproportionate. Finally, in *Otite*,[24] the Court conducted its own substantive review of the case, having considered that the balancing exercise of the national court had been carried out solely within the framework of national law and not with reference to the Court's case law. In the present case, while the applicant's deportation would certainly be difficult for his wife and children, there was nothing to suggest that they were absolutely dependent on him, unlike in the *Unuane* judgment where the applicant's partner and children had to remain in the host country because the eldest child was awaiting heart surgery. Furthermore, there was no evidence that his family could not return with him to his country of origin or that they could not remain and maintain contact with him. Ultimately, the Court concluded that the strength of the applicant's family and private life in the host country

[23] ECHR, Grand Chamber, judgment 7.12.2021, application no. 57467/15, *Savran v. Denmark*.

[24] ECHR, judgment 27.9.2022, application no. 18339/19, *Otite v. The United Kingdom*.

was not such as to outweigh the public interest in his expulsion, and therefore did not violate Art. 8 ECHR.

In conclusion, although contracting States are granted a wider margin of appreciation in the field of immigration, the degree of social integration in the host country must be the decisive factor in assessing protection from expulsion under Art. 8 ECHR and the State's margin of appreciation must always go "hand in hand with European supervision".[25]

In the EU context, Art. 52(3) of the Charter of Fundamental Rights suggests the use of ECHR as a minimum standard of protection, so the extension of Art. 8 ECHR to broader social relations in private life has become an important criterion for the assessment of the restrictions of long-term residence status under Art. 12 of Directive 2003/109.[26]

In *López Pastuzano*,[27] the ECJ ruled that Spanish legislation was non-compliant with the Directive in that it did not provide for the assessment of the factors listed in Art. 12 in expulsion decisions following the conviction for a criminal offence punishable by a term of imprisonment of more than one year. As the Luxembourg Court noted, "the adoption of such a measure may not be ordered automatically following a criminal conviction, but rather requires a case-by-case assessment which must, in particular, have regard to the elements mentioned in Art. 12(3) of Directive 2003/109".[28] In the subsequent *WT* case,[29] which concerned the same provision of Spanish law as that referred to by the national court in *López Pastuzano*,[30] the ECJ reaffirmed that Art.

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[25] ECHR, judgment 7.12.1976, application no. 5493/72, *Handyside v. The United Kingdom*, paras. 48-50. See H. MOLBÆK-STEENSIG (2023), *Subsidiarity Does Not Win Cases: A Mixed Methods Study of the Relationship between Margin of Appreciation Language and Deference at the European Court of Human Rights*, in *LJIL*, 36, 83 ff.

[26] D. THYM (2008), *Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?*, in *ICLQ*, 1, 87 ff.

[27] ECJ, judgment 7.12.2017, *López Pastuzano*, case C-636/16. See A. TRANFO (2018), *L'allontanamento dello straniero extracomunitario soggiornante di lunga durata condannato a pena detentiva: tra "automatismi legislativi" e tutela dell'integrazione*, in *DPCE Online*, 1, 277 ff.

[28] ECJ, *López Pastuzano*, cit., para. 27.

[29] ECJ, judgment 11.6.2020, *WT*, case C-448/19.

[30] ECJ, *WT*, cit., para. 14. See V. PASSALACQUA (2020), *Revoca dello stato di lungo soggiornante e ordine pubblico: secondo tentativo per le corti spagnole*, in *ADiM Blog*.

12 of Directive 2003/109 precludes a Member State from adopting a decision to expel a third-country national who is a long-term resident solely on the basis of a past criminal conviction without determining whether that third-country national represents a genuine and sufficiently serious threat to the public order or security of that Member State, and without taking into account various factors, such the length of residence in that Member State, the age of the person concerned, the consequences of expulsion for the person concerned and his family members, and the links with the country of residence or the lack of links with the country of origin.

Moreover, in the absence of more favourable provisions in EEC-Turkey Association law, Art. 12 of Directive 2003/109 also constitutes the minimum protection rule against the expulsion of Turkish nationals holding the status of long-term legal residents in the territory of a Member State. In the *Ziebell* case,[31] the ECJ also noted that measures on the grounds of public policy or public security may only be taken after a case-by-case assessment by the competent national authorities, which must also respect both the principle of proportionality and the fundamental rights of the person concerned, in particular the right to privacy and family life.[32] Consequently, it is for the domestic court "to weigh up, on the one hand, the need for the planned interference with [his] right of residence in order to safeguard the legitimate interest pursued by the host Member State and, on the other, the actual integration factors enabling the individual concerned to reintegrate into society in the host Member State".[33] Lastly, in the recent *Staatssecretaris van Justitie en Veiligheid* case,[34] the Court reiterated that the withdrawal of the right of residence or the expulsion of third-country nationals from the host Member State is not automatic following a criminal conviction, but that factual matters must be taken into account, including the family and economic situation, social and cultural integration in that member State, the extent of links with the country of origin, and that the severity of the penalty imposed on the person concerned as punishment for the offence committed must be weighed against the length of residence.

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[31] ECJ, judgment 8.12.2011, *Ziebell*, case C-371/08.

[32] ECJ, *Ziebell*, cit., para. 82.

[33] ECJ, *Ziebell*, cit., para. 85.

[34] ECJ, judgment 9.2.2023, *Staatssecretaris van Justitie en Veiligheid v. S*, case C-402/21.

3. *To be, or not to be*…surrendered? European arrest warrant for non-EU citizens legally residing or staying in the executing Member State

In recent years, the balance between the common interests of security and justice and the protection of fundamental rights has been widely debated in legal doctrine, particularly with regard to the effectiveness of the European arrest warrant mechanism.[35] In the context of the rich ECJ case law on situations where the respect for fundamental rights is at stake,[36] the Luxembourg Court, after its initial position of strong defence, recognised that mutual trust is not the same as "blind trust",[37] and that the protection of fundamental rights may limit the obligation to execute the order. In fact, even before the *Aranyosi and Căldăraru* judgment,[38] the Advocates General had adopted interpretations different from that of the Luxembourg Court more inclined to guarantee the primacy of the effectiveness of Framework Decision 2002/584/JHA.[39]

In *Lopes da Silva*,[40] Advocate General Mengozzi recognised that the

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[35] C. SAENZ PEREZ (2022), *What about Fundamental Rights? Security and Fundamental Rights in the Midst of a Rule of Law Breakdown*, in *New J. Eur. Crim. Law*, 4, 526 ff.; N. DAMINOVA (2022), *The ECHR Preamble vs. the European Arrest Warrant: Balancing Human Rights Protection and the Principle of Mutual Trust in EU Criminal Law?*, in *RECoL*, 2, 97 ff.; S. MONTALDO (2016), *On a Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights in the Recent Case-law of the Court of Justice*, in *European Papers*, 3, 965 ff.

[36] See the recent ECJ, Grand Chamber, judgment 31.1.2023, *Puig Gordi*, case C-158/21 where it observed that, under Art. 1(3) of Framework Decision 2002/584/JHA, an executing authority may refrain from giving effect to the European arrest warrant if surrender would result in the infringement of the right to a fair trial guaranteed by Art. 47 of the Charter of Fundamental Rights.

[37] K. LENAERTS (2017), *La vie après l'avis: Exploring the Principle of Mutual (yet not Blind) Trust*, in *CML Rev.*, 3, 805 ff.

[38] ECJ, Grand Chamber, judgment 5.4.2016, *Aranyosi and Căldăraru,* joined cases C-404/15 and C-659/15 PPU. See A. ŁAZOWSKI (2018), *The Sky Is Not the Limit: Mutual Trust and Mutual Recognition après Aranyosi and Căldăraru*, in *CYELP*, 14, 1 ff.; L. PANELLA (2017), *Mandato di arresto europeo e protezione dei diritti umani: problemi irrisolti e "incoraggianti" sviluppi giurisprudenziali*, in *FSJ*, 3, 5 ff.

[39] Opinion of Advocate General Y. BOT, delivered on 24.3.2009, in the case C-123/08, *Wolzenburg*, paras. 147-151; Opinion of Advocate General E. SHARPSTON, delivered on 18.10.2012, in the case C-396/11, *Radu*, paras. 70-72.

[40] ECJ, judgment 5.9.2012, *Lopes Da Silva*, case C-42/11.

reference to fundamental rights in Art. 1(3) of the Framework Decision must act as a "safeguard" [41] in the application of the principle of mutual recognition in the Area of Freedom, Security and Justice, stating "It is in the light of the higher principle represented by the protection of human dignity, the cornerstone of the protection of fundamental rights within the European Union legal order, that the free movement of judgments in criminal matters must not only be guaranteed but also, where appropriate, limited". [42] In his Opinion, [43] Advocate General Mengozzi predicted that in the near future, the ECJ will have to consider that a member State should extend the application of the optional non-execution clause of the European arrest warrant to cases concerning third-country nationals. This is why the Italian Constitutional Court referred the question to the ECJ, asking whether legislation such as that of Italy, which automatically and absolutely precludes refusal to surrender third-country nationals living or legally residing within its borders, is compatible with the fundamental right to private and family life of the individual concerned. [44]

In the Italian legal system, the transposition of Art. 4(6) has given rise to a normative and jurisprudential *querelle* that finally has reached a definitive conclusion. In particular, following the first version of the transposition of Framework Decision 2002/584/JHA, which reserved the grounds for refusal in question only to Italian citizens, [45] the Constitutional Court, in judgment no. 227/2010, [46] declared the constitutional illegality of the national provision insofar as it did not provide for the refusal of surrender to a citizen of an EU Member State other than Italy who is legitimately and effectively residing or staying in the Italian territory for the purpose of serving a prison sentence in accordance with national law, also in violation of the principle of non-discrimination on grounds of nationality. In 2021, the issue of extending the scope of the optional ground for refusing surrender established in Art. 4(6) of the

[41] Opinion of Advocate General P. MENGOZZI, delivered on 24.3.2012, in the case C-42/11, *Wolzenburg*, para. 28.

[42] Opinion of Advocate General P. MENGOZZI, cit., para. 28.

[43] P. MENGOZZI (2014), *La cooperazione giudiziaria europea e il principio fondamentale di tutela della dignità umana*, in *Studi integr. eur.*, 1, 225 ff.

[44] Italian Constitutional Court, order 21.10.2021, no. 217.

[45] Art. 18(1)(r) of Law no. 69 of 22 April 2005 (*Provisions to transpose Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*).

[46] Italian Constitutional Court, judgment 21.6.2010, no. 227.

Framework Decision became the subject of a new assessment before the Italian Constitutional Court, this time with specific reference to third-country nationals and the risk that automatic execution of the order could seriously infringe their right to respect for private and family life, as guaranteed by Art. 2 of the Constitution, Art. 8 ECHR, and Art. 7 of the Charter.[47] After an initial ruling in which the Constitutional Court referred the case back in view of the amendment of the national legal framework,[48] the Constitutional Court was subsequently asked to declare the national legislation unconstitutional, insofar as it did not provide for the refusal to surrender a third-country national who is legally and effectively residing in the country, and in light of Italy's commitment to execute the order in question.[49] Given that the questions of constitutionality raised by the national court essentially concern the interpretation of Art. 4(6) of the Framework Decision on a point that has yet to be clarified by the ECJ with regard to the treatment of third-country nationals, since the principle of non-discrimination on grounds of nationality cannot be invoked,[50] the Court, by order no. 217/2021, referred to the ECJ the question of whether legislation such as that of Italy, which automatically and absolutely precludes refusal to surrender

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[47] Art. 18-*bis*(1)(c) of Law no. 69 of 22 April 2005 (*Provisions to transpose Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*) as amended by Article 6(5)(b) of Law no. 117 of 4 October 2019 (*Delegation to the Government to transpose European directives and implement other acts of the European Union – European Delegation Act 2018*). See also Report from the Commission to the European Parliament and the Council *on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, 2.7.2020, COM/2020/270 final, reporting that other Member States have transposed it in different ways.

[48] Italian Constitutional Court, order 11.3.2021, no. 60. See C. AMALFITANO, M. ARANCI (2021), *Mandato d'arresto europeo ed extracomunitario residente o dimorante in Italia: ancora nessuna tutela da parte della Corte Costituzionale (né del legislatore)*, in *Sist. pen.*, 10, 5 ff.

[49] Bologna Court of Appel, order 27.10.2020, *Official Gazette of the Italian Republic*, First Special Series - Constitutional Court of 14.4.2021, no. 15, 50 ff. In this case, the Court of Appeal was called upon to decide whether to execute a European arrest warrant issued by a Romanian judicial authority against a third-country national so that he could serve a five-year prison term in Romania. The individual concerned has resided in Italy for more than ten years and is now settled here.

[50] ECJ, Grand Chamber, judgment 2.4.2020, *Ruska Federacija*, case C-897/19 PPU, para. 40.

third-country nationals living or legally resident within its borders, is compatible with the fundamental right to private and family life of the individual concerned. In the event it is found incompatible, the Court asked the ECJ to specify the criteria and grounds for deeming the personal ties of a person living or residing in Italy to be of such significance that surrender should be refused. [51]

With the judgment handed down on 6 June 2023 in case C-700/21, *O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)*, [52] the Grand Chamber of the ECJ has ruled out differences between EU citizens and third-country nationals on the basis of the principle of equality before the law, as guaranteed by Art. 2 TEU and Art. 20 of the Charter. [53] From the wording and the objective of Art. 4(6) of Framework Decision 2002/584/JHA, the Court has observed that the scope *ratione personae* of that provision covers persons staying or residing in that Member State, irrespective of whether they are EU citizens or third-country nationals; those persons may be in comparable situations, for the purpose of applying that ground of optional non-execution, when they are integrated to a certain extent in the executing Member State. In order to assess whether it is appropriate to refuse to execute the European arrest warrant issued against a third-country national who is staying or resident in the territory of the executing Member State, the executing judicial authority must make an overall assessment of the specific elements characterising the situation of the requested person, which include the family, linguistic, cultural, social or eco-

[51] Italian Constitutional Court, order 21.10.2021, no. 217. For a first comment, A. MASSARO (2021), *Mandato d'arresto europeo e rifiuto facoltativo di consegna del cittadino di un Paese terzo: l'ordinanza n. 217 del 2021 della Corte Costituzionale*, in *Nomos*, 3, 1 ff. See also S. MONTALDO, S. GIUDICI (2022), *Nuove opportunità di tutela degli individui nel sistema del mandato d'arresto europeo: le ordinanze 216 e 217 del 2021 della Corte Costituzionale*, in *Legisl. pen.*, 1, 323 ff.

[52] ECJ, Grand Chamber, judgment 6.6.2023, *O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)*, case C-700/21. For a first comment, C. AMALFITANO (2023), *Mandato di arresto europeo e garanzie di risocializzazione del condannato: tutela anche all'extracomunitario radicato nello Stato di esecuzione*, in *I Post di AISDUE,* V, *Sezione "Articoli"*, 6, 102 ff.

[53] See also Opinion of Advocate General M. CAMPOS SÁNCHEZ-BORDONA, delivered on 15.12.2022, in the case C-700/21, *O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)*, paras. 47-53, underlining that the margin of discretion available when it comes to transposing this provision of EU law cannot, therefore, be a set of rules that treats nationals of third countries worse than nationals of Member States.

nomic links that the third-country national has with the executing Member State, as well as the nature, duration and conditions of his or her stay in that Member State. In this respect, the Court has emphasised the long-term resident status, provided for by Directive 2003/109. As the Grand Chamber has noted, "That status constitutes, according to recital 12 of that directive, a genuine instrument for the integration of long-term residents into society in which they live and therefore constitutes a strong indication of sufficient connections having been established by the requested person with the executing Member State in order to justify a refusal to execute a European arrest warrant", [54] and, ultimately, to increasing the chances of social rehabilitation where the requested person has established the centre of his or her family life after that sentence or detention order has been executed.

4. "*In a framework of constructive and loyal cooperation between various protection systems*": some concluding remarks

Beyond the substantive and procedural aspects of the European arrest warrant, order no. 217/2021 exemplifies the intersection between the various issues brought together under the Area of Freedom, Security and Justice in the current phase of the European integration process.

As the Court has observed, the automatic exclusion of third-country nationals permanently staying or residing in Italy from a possible application of the ground for refusal under Art. 4(6) of Framework Decision 2002/584/JHA, it is at odds with the objective of the integration of long-term residents guaranteed by EU immigration law. If it is true that enhanced protection against expulsion cannot disregard case-by-case assessments that must take the integration requirements into account, the same assessment will also be necessary to determine whether the requested third-country national has sufficient ties in the executing Member State to show that he or she would have a better chance of (re)integrating into society if the sentence were enforced on the territory of that Member State. [55]

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[54] ECJ, Grand Chamber, judgment 6.6.2023, *O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)*, case C-700/21, para. 67.

[55] As noted, these considerations become even more urgent in the case of those who were born in Italy or who have lived in the host country since childhood, but who must still be classified as third-country nationals according to the rules of Italian nationality. See S. MONTALDO, L. GROSSIO (2021), *La ri-*

In this context, the ECJ's contribution has seemed necessary, given that respect for fundamental rights is the unifying factor binding various and intersection issues in the Area of Freedom, Security and Justice.[56]

Meanwhile, order no. 217/2021 – the sixth preliminary reference from the Italian Constitutional Court to the ECJ – together with order no. 216,[57] represents a new step in the dialogue between these two courts following the *obiter dictum* contained in judgment no. 269/2017 and subsequent jurisprudential developments.[58]

If the Court of Appeal's decision to refer the case to the Italian Constitutional Court is in line with the consolidated approach adopted since the *Granital* judgment in light of the provisions of Framework Decision 2002/584/JHA, which do not have direct effect, and the impossibility of interpreting national law in conformity with EU law, but never *contra legem*,[59] then the Constitutional Court this time considered it necessary to seek the intervention of the Luxembourg Court. Contrary to Decision no. 227/2010, the Constitutional Court now considered that the question of whether refusal to surrender should also extend to a lawfully and effectively residing or staying third-country national raises new issues in the European arrest warrant case law, and as such, the need to refer to the ECJ to define a common level of protection of fundamental rights in an area subject to full harmonisation, such as Framework Decision 2002/584/JHA, in light of the *Melloni* judgment.[60]

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forma della disciplina di recepimento del mandato d'arresto europeo: il nuovo assetto dei limiti all'esecuzione della richiesta di consegna, in *FSJ*, 3, 95 ff., 127.

[56] K. LENAERTS (2010), *The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice*, in *ICLQ*, 2, 255 ff.

[57] Italian Constitutional Court, order 21.10.2021, no. 216.

[58] See, *inter alia*, N. ZANON (2022), *Ancora in tema di doppia pregiudizialità: le permanenti ragioni della "precisazione" contenuta nella sentenza n. 269 del 2017 rispetto alla "grande regola" Simmenthal-Granital*, in ITALIAN CONSTITUTIONAL COURT – COURT OF JUSTICE OF THE EUROPEAN UNION, *Study Meeting – Member States' National Identity, Primacy of European Union Law, Rule of Law and Independence of National Judges*, 79 ff., available online; R. PALLADINO (2020), *Rapporti tra ordinamenti e cooperazione tra Corti nella definizione di un "livello comune di tutela" dei diritti fondamentali. Riflessioni a seguito dell'ordinanza 182/2020 della Corte costituzionale*, in *FSJ*, 2, 74 ff.

[59] ECJ, judgment 29.6.2017, *Popławski*, case C-579/15, para. 43. For a different opinion, see S. BARBIERI (2021), *Il "cambio di pelle" della Consulta: la Corte Costituzionale fra diritti fondamentali e garanzia dei principi europei alla luce delle ordinanze nn. 216 e 217 del 2021*, in *Quaderni di SIDIBlog*, 65 ff.

[60] ECJ, Grand Chamber, judgment 26.2.2013, *Melloni*, case C-399/11.

Indeed, the solution adopted by the ECJ not only affects the Italian legal order but will also necessarily improve the implementation of the Framework Decision in the other member States.

While respecting the prerogatives of the ECJ, the Constitutional Court has acted as a qualified interlocutor of the Luxembourg Court. In fact, as expressly underlined in judgment no. 20/2019 and order no. 117/2019, the Italian Constitutional Court aims "to make its own contribution to rendering effective the possibility, discussed in Art. 6 of the Treaty on European Union (TEU) [...] that the corresponding fundamental rights guaranteed by European law, and in particular by the CFR, be interpreted in harmony with the constitutional traditions common to the Member States, also mentioned in Art. 52(4) of the CFR as relevant sources".[61] Therefore, "in a framework of constructive and sincere cooperation between the different systems of protection",[62] the Constitutional Court has asked these questions and at the same time has presented its observations, in this case, related to the protection of the interest of third-country nationals residing or staying legally in a Member State to not be uprooted, and in light of the consolidated EU principle that the strength of this protection is directly proportional to the degree to which the person is rooted in the State of residence or stay. This new stage of the renewed dialectic relationship between the two Courts regarding the relevance of the protection of fundamental rights in both the national and European dimensions is only just beginning.[63]

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[61] Italian Constitutional Court, judgment 23.1.2019, no. 20, point 2.3 of the Conclusions on points of law; judgment 6.3.2019, no. 117, point 2 of the Conclusions on points of law.

[62] Italian Constitutional Court, order 21.10.2021, no. 217, point 8 of the Conclusions on points of law.

[63] By its judgment no. 178/2023, the Italian Constitutional Court held that Article 18-bis(1)(c) of Law no. 69 of 22 April 2005 was unconstitutional to the extent that it did not allow Italian judicial authorities to refuse the surrender of third-country nationals legally and actually residing or staying in Italy and sufficiently integrated into Italian society, in accordance with the criteria set out by the ECJ in its *O.G.* judgment. Therefore, the current Article 18-bis(2), as amended by Law no. 103 of 10 August 2023, allows courts of appeal to deny surrender if the requested person is an Italian national or a "person" who has been legally and continuously resident in Italy for at least five years.

Chapter 12

NON-DISCRIMINATION IN ACCESSING THE WELFARE SYSTEM. THE EFFECTIVENESS AND PRIMACY OF EU LAW OVER ITALIAN LAW

Rossana Palladino

ABSTRACT: *In the "supranational" system, the objective of the fair treatment of third-country nationals residing legally in the territory of the European Union – coupled with a more rigorous integration policy based on guaranteeing the rights of migrants and obligations similar to those of European citizens – has led to the adoption of a series of secondary provisions granting specific categories of third-country nationals a plurality of rights that are progressively similar to those enjoyed by EU citizens. Focusing on non-discrimination in access to social services, this chapter examines the effectiveness of these provisions in the relationship between the European and the Italian legal systems.*

1. Introduction

The apparent uniformity of the legal condition of third-country nationals, as opposed to the *status civitatis*, finds in the Italian legal system permeated by European Union law factors that tend to homologate with this status.

Within the "supranational" legal system, the objective of the fair treatment of third-country nationals residing legally in the territory of EU member States,[1] combined with a more rigorous integration policy

[1] The European Council of Tampere (15-16 October 1999, Presidency

based on the guarantee of rights and obligations analogous to those provided to EU citizens, has led to the adoption of a series of secondary legislation establishing (for some specific categories of third-country nationals) a set of rights progressively similar to those enjoyed by EU citizens.

Of particular relevance in this regard are the Family Reunification Directive,[2] the EU Blue Card Directive,[3] the Long-Term Residents Directive,[4] and the Single Permit Directive.[5]

The EU's progressive action to ensure that third-country nationals can also fully enjoy these rights recently recognized by the European Pillar of Social Rights[6] is welded to the centrality of the value of social

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Conclusions, point 18) first defined the guidelines for the European Community immigration and asylum policy (1999-2003), see Art. 79, para. 1, Treaty on the Functioning of the European Union (TFEU).

[2] Council Directive 2003/86/EC, *on the right to family reunification*, 22.9.2003, OJ L251, 3.10.2003, 12 ff.

[3] Council Directive 2009/50/EC, *on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment*, 25.5.2009, as repealed by Directive 2021/1883/EU of the European Parliament and of the Council, 20.10.2021, OJ L382, 28.10.2021, 1 ff., following the "New Pact on Migration and Asylum" (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 23.9.2020, COM/2020/609 final, which also envisaged some reforms in the regular migration field. On this theme, see the monographic issue *FSJ*, 2021, no. 2, *Towards a Common European Framework and a New Governance of Migration and Asylum*.

[4] Council Directive 2003/109/EC, *concerning the status of third-country nationals who are long-term residents*, 25.11.2003, OJ L16, 23.1.2004, 44 ff. On the announced, indeed "minimal", reform of the directive on long-term residents, see A. DI STASI (2021), *L'(in)effettività dello statuto del soggiornante di lungo periodo. Verso la riforma della direttiva 2003/109/CE fra criticità applicative e prassi giurisprudenziale*, in *Pap. dir. eur.*, 3, 9 ff.

[5] Directive 2011/98/EU, *on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State*, OJ L343, 23.12.2011, 1 ff. A proposal from the Commission aims at amending the 'Single Permit Directive': see COM/2022/655 final, Brussels, 27.4.2022.

[6] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, *Establishing a European Pillar of Social Rights*, Brussels, 26.4.2017, COM/2017/250 final. A non-binding instrument essentially recognizing the

inclusion in the light of the constitutional principles of solidarity and substantive equality.

They are expressed in the prohibition of discrimination on the grounds of race, colour, national or ethnic origin, as laid down in the Italian Consolidated Immigration Act.[7] This Act prohibits behaviour that has the effect of eliminating or limiting human rights and fundamental freedoms, including in the social field. Finally, Art. 41 of this Act expressly establishes fairness between citizens and third-country nationals with regard to social security and social assistance, including economic assistance, requiring a residence permit of at least one year.

For these declarations to be effective, as laid down by both European and national law, the action of "common judges" is essential, an issue this chapter will address by taking into account the context of the renewed dialogue with the Court of Justice of the European Union (CJEU) following the renowned obiter dictum contained in Judgment no. 269/2017 of the Italian Constitutional Court.[8] Following a prelimi-

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European social *acquis*, the Pillar – proclaimed and signed by the Council of the EU, the European Parliament, and the Commission at the Social Summit in Gothenburg on 17.11.2017 – sets out 20 principles revolving around 3 Chapters: "Equal opportunities and access to the labour market", "Fair working conditions", "Social protection and inclusion". It reaffirms several rights and principles already enshrined in the EU Charter of Fundamental Rights (CFR), which is instead binding due to its equiordination to the Treaties (Art. 6(1) TEU), also enshrining a general principle of non-discrimination (Art. 21) based, *inter alia*, on race, colour, ethnic, or social origin. On this theme, see M. MANFREDI (2022), *La promozione e la tutela dei diritti economici e sociali nell'Unione europea*, Bari.

[7] Legislative decree 25.7.1998, no. 286, Art. 43.

[8] Italian Constitutional Court, judgment 7.11.2017, no. 269 stating that when a domestic law presents doubts of non-compliance, both with reference to the rights protected by the Italian Constitution and in relation to those guaranteed by the CFR in the context of EU relevance, a question of constitutionality "must be raised", without prejudice to a preliminary ruling pursuant to Art. 267 TFEU. For a broader doctrinal debate, see A. RUGGERI (2017), *Svolta della Consulta sulle questioni di diritto eurounitario assiologicamente pregnanti, attratte nell'orbita del sindacato accentrato di costituzionalità, pur se riguardanti norme dell'Unione* self-executing *(a margine di Corte cost. n. 269 del 2017)*, in *Riv. dir. comp.*, 3, 234 ff.; C. SCHEPISI (2017), *La Corte costituzionale e il dopo Taricco. Un altro colpo al primato e all'efficacia diretta?*, in *DUE – Osservatorio europeo*; V. SCIARABBA (2019), *Metodi di tutela dei diritti fondamentali e corti nazionali e europee: uno schema cartesiano nella prospettiva dell'avvocato*, in *Consulta Online*, Studi, 1, 211 ff.

nary reference to the CJEU, the Italian Court's Decree no. 182/2020[9] concerning the extension of childbirth and maternity allowances to third-country nationals holding a single permit, pursuant to Art. 2(c) of Directive 2011/98/EC – is emblematic, since it is based on the recognition that the prohibition of arbitrary discrimination and the protection of motherhood and childhood, as guaranteed by the Italian Constitution, must also be interpreted in light of the binding indications provided by EU law. Indeed, the scope and depth of these EU guarantees have implications "for the constant evolution of constitutional principles, as part of a dynamic of mutual implication and fruitful supplementation".[10]

2. The guarantee of fair treatment of long-term residents through the (questionable) direct effect of Art. 11 of Directive 2003/109/EC

According to aforementioned Judgment no. 269/17, in the event of an antinomy between EU law and domestic law – both with regard to the EU Charter of Fundamental Rights (CFR) and the Italian Constitution – national judges are faced with the "choice" of either disapplying national law[11] or raising a question regarding the constitutionality of the law.[12] A choice that arises, for example, when national judges review the provisions imposing stricter residence requirements than those pro-

[9] Answered with ECJ, Grand Chamber, judgment 2.9.2021, *O.D. and others*, case C-350/20. See D. GALLO, A. NATO (2021), *Cittadini di Paesi terzi titolari di permesso unico di lavoro e accesso ai benefici sociali di natalità e maternità alla luce della sentenza O.D. et altri c. INPS*, in *Lav. Dir. Eur.*, 4, 1 ff.

[10] See Italian Constitutional Court, order 8.7.2020, no. 182, point 3.2. of the *Conclusions on points of law*.

[11] Contrary to the EU law provisions that have direct effect and potentially prevent reference to the CJEU for a preliminary ruling pursuant to Art. 267 TFEU.

[12] The absence of a strict obligation of priority, which determines the duty to consult the Constitutional Court in any case. For an in-depth analysis of this issue, see C. AMALFITANO (2020), *Il rapporto tra rinvio pregiudiziale alla Corte di giustizia e rimessione alla Consulta e tra disapplicazione e rimessione alla luce della giurisprudenza "comunitaria" e costituzionale*, in *Rivista AIC*, 1, 296 ff.; see also R. PALLADINO (2020), *Rapporti tra ordinamenti e cooperazione tra Corti nella definizione di un "livello comune di tutela" dei diritti fondamentali. Riflessioni a seguito dell'ordinanza 182/2020 della Corte costituzionale*, in *FSJ*, 3, 74 ff.

vided for by Legislative Decree 3/2007 and transposing Directive 2003/109/EC on long-term residents. Several common judges have followed the first path, respecting the principle of primacy that allows the immediate application of European rules, as in the case of the Court of Appeal of Trento.[13] By virtue of the primacy of EU law, Arts. 5(2*bis*) and 3(2*bis*) of Provincial Law 15/2005 were disapplied insofar as they did not comply with the principle of equal treatment between long-term residents and national citizens, as laid down in Art. 11(1)(f)(d) of Directive 2003/109/EC, making eligibility for applying for affordable housing subject to the requirement of ten years' residence in the national territory (thereby imposing an additional and discriminatory requirement on long-term residents compared to national citizens).

To note is that the Court of Justice case law has not unequivocally assessed the direct effect of Art. 11 of Directive 2003/109/EC, whereas the Italian Court of Cassation initially recognized it by clarifying its nature as a sufficiently precise and unconditional rule.[14] This provision, in particular para. 1(f), enshrines fair treatment in relation to "access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing", namely the issue before the Court of Trento.

While it is true that the general rule established by Art. 11 of Directive 2003/109/EC is subject to derogations,[15] these must be expressly invoked when member States transpose the Directive into national law and within the limits and for the purposes permitted. The Court of Appeal of Trento rightly pointed out that this is in line with the settled case law of the Court of Justice, which, since the leading *Kamberaj* case, has held that derogations can only be invoked if the competent authori-

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[13] Court of Appeal of Trento, judgment 23.6.2021, no. 56.

[14] Italian Court of Cassation, judgment 7.11.2019, no. 28745. The direct applicability of Art. 11(1) of Directive 2003/109/EC can also be inferred from CJEU case law, especially ECJ, Grand Chamber, judgment 24.4.2012, *Kamberaj*, case C-571/109, on discrimination against long-term residents in respect of housing allowances provided by the Autonomous Province of Bolzano; see A. DI STASI, R. PALLADINO (2012), *La perdurante frammentarietà dello "statuto" europeo del soggiornante di lungo periodo tra integrazione dei mercati ed integrazione politico-sociale*, in *Studi integr. eur.*, 2-3, 375 ff.

[15] Pursuant to Art. 11(2), since member States "may restrict equal treatment to cases where the registered or usual place of residence of the long-term resident, or that of family members for whom he/she claims benefits, lies within the territory of the Member State concerned".

ties of the member State responsible for implementing the Directive have clearly stated that they intend to rely on those derogations,[16] which was not the case in Italy.

The Court of Appeal of Trento has thus built on the extensive case law of the CJEU, which, by limiting the discretion of member States, gives effect to the rights of long-term residents, in particular the right to equal treatment enshrined in Directive 2003/109/EC. Specifically in the area of housing assistance, the case law has emphasised the recognition (and respect) of the right to social and housing assistance, as enshrined in the EU legal order, and in Art. 34 CFR, aimed at ensuring the dignified existence of all those who do not have sufficient resources.

It follows that if a national service fulfils the purposes set out in Art. 34 CFR – an assessment that is any event for the national court to make – it cannot be considered under EU law as excluded from the category of "essential benefits" (which help to meet the basic needs of the individual concerned, such as food, accommodation, and health) under Art. 11(4) of Directive 2003/109/EC, and therefore not subject to restrictions in order to ensure equal treatment, even if a member State has invoked the derogation.[17]

In many other cases, the direct effect has been questioned, and the National Social Security Institute (INPS) has therefore challenged the judgments that directly applied the principle of equal treatment to holders of long-term permits in the context of social benefits. For example, in the case of Legislative Decree 69 of 1988, Art. 2(6*bis*), which makes family allowance for third-country nationals residing in Italy on a long-terms basis subject to the requirement that their family members reside in Italy.

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[16] See ECJ, Grand Chamber, *Kamberaj*, cit., paras. 86 and 87; ECJ, judgment 21.6.2017, *Martinez Silva*, case C-449/16, para. 29. More recently, see ECJ, judgment 25.11.2020, *Istituto Nazionale della Previdenza Sociale (INPS) v. VR*, case C-303/19, para. 23, where, on referral from the Italian Court of Cassation, the CJEU criticized the Italian legislation, which in determining entitlement to a social security benefit, did not consider family members of long-term residents not residing in the Italian territory.

[17] See ECJ, judgment 10.6.2021, *Land Oberösterreich v. KV*, case C-94/20, which the CJEU held that it was not permissible for the legislation of a member State to make the grant of a housing allowance to third-country nationals who are long-term residents subject to the condition that they prove that they have a basic knowledge of the language of that member State, in accordance with the detailed rules laid down by that legislation.

These questions were referred to the Italian Court of Cassation that with two orders in 2021[18] appealed to the Italian Constitutional Court, which ultimately[19] recognized the direct effect of Art. 11(1)(d) of Directive 2003/109/EC imposing the obligation of equal treatment between third-country nationals and nationals of the member State in which they reside.[20]

This means that the principle of fair treatment has only been effectively applied since it was "approved" by the Italian Constitutional Court, and that the Court of Cassation has consequently considered this principle to be a "general rule" with regard to social benefits, since exceptions must be interpreted "strictly".[21]

The road to effectiveness has therefore been a long one, even though the CJEU had already ruled[22] that "a Member State may not refuse or reduce the social security benefit to the holder of a single permit on the grounds that some or all of his family members reside not in its territory, but in a third country, if it grants that benefit to its own nationals irrespective of the place of residence of their family members". A difference in treatment is also found where the allowance is not refused but reduced, and cannot be justified by "any difficulties in checking the situation of beneficiaries with regard to the conditions for granting the

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[18] Italian Court of Cassation, orders 8.4.2021, nos. 9378 and 9379.

[19] Italian Constitutional Court, judgment 11.3.2022, no. 67. See A. CORRERA (2022), *"Dialogo tra corti" sul diritto all'assegno per il nucleo familiare dei cittadini di Paesi terzi: riflessioni a margine dell'ordinanza della Corte costituzionale n. 67/2022*, in *Quaderni AISDUE*, 2, 185 ff.; A. RUGGERI (2022), *Alla Cassazione restia a far luogo all'applicazione diretta del diritto eurounitario la Consulta replica alimentando il fecondo "dialogo" tra le Corti (a prima lettura della sent. N. 67/2022)*, in *Consulta Online*, 1, 252 ff.; B. NASCIMBENE, I. ANRÒ (2022), *Primato del diritto dell'Unione europea e disapplicazione. Un confronto fra Corte costituzionale, Corte di Cassazione e Corte di giustizia in materia di sicurezza sociale*, in *Giust. Ins.*; A.O. COZZI, *Per un elogio del primato, con uno sguardo lontano. Note a Corte cost. n. 67 del 2022*, in *Consulta Online*, 2, 410 ff.

[20] Italian Constitutional Court, no. 67/2022, cit., point 12 of *Conclusions on points of law*.

[21] Italian Court of Cassation, judgment 9.11.2022, no. 33016; and judgments 18.01.2023, nos. 1420, 1421, 1422, 1423, 1424.

[22] ECJ, judgments 25.11.2020, *INPS v.WS*, case C-302/19, and *INPS v. VR*, case C-303/19, see L. GROSSIO (2021), *Who Is Entitled to Family Benefits? Lights and Shadows of the ECJ Rulings in* WS *and* VR, in *Maastricht JECL*, 28(4), 582 ff.

family unit allowance when the members of the family do not reside in the territory of the Member State concerned".[23]

3. The irrelevance of territorial roots for access to social benefits by third-country nationals who do not hold a long-term residence permit

The progressive effectiveness of the right of long-term residents to equal treatment with European citizens is sometimes counterbalanced by the difficulty of extending access to the welfare system to other categories of third-country nationals legally residing in the territory of EU member States.

In particular, several local authorities use the criterion of long-term territorial roots to implement restrictive policies on access to services. In fact, legal residence in Italy is rarely considered sufficient for access to social services, while it is usually "reinforced" either by applying for long-term resident status or the additional requirement of continuity of residence. Long-term resident status is also required by national legislation (Art. 80(19) of the Law 388 of 2000) as a general condition for access to a wide range of social benefits.[24]

Take the example of housing assistance, which is subject to the requirement of an EC residence permit for long-term residents. Its discriminatory nature has in some cases been recognised by national courts,[25] as it excludes precisely those categories of people who are most in need and who have not been able to achieve the income and housing standards foreseen in the legislation in force. Therefore, restricting access to holders of an EC residence permit to long-term residents only is not based on a criterion of reasonableness.

Worth recalling is that the Italian Constitutional Court has already examined the requirement of 5 years' residence in the territory of the Region in relation to the rental assistance fund pursuant to Legislative

[23] ECJ, *INPS v. WS*, cit., paras. 39 and 44.

[24] Cfr. S. MABELLINI (2022), *Il "radicamento territoriale": chiave d'accesso e unità di misura dei diritti sociali?*, in *Consulta Online*, 2, 918 ff.

[25] See, for example, Tribunal of Turin (order *ex* art. 702 *ter* c.p.c., 22.6.2021), the 2018 resolution of the Regional Council of Valle d'Aosta, and the related call for the assignment of contributions for the payment of a portion of the rent, addressed exclusively to ISEE for certain incomes.

Decree 112/2008, finding the basis of this requirement to be manifestly unreasonable and disproportionate, given that the funds were established by the legislator in a regulatory context that also aimed to promote mobility in the rental sector by providing accommodation to be rented for fixed periods, and therefore also for temporary needs.[26] The Italian Constitutional Court has pointed out that, since this is a measure reserved for cases of genuine poverty, there is no reasonable correlation between meeting the primary housing needs of a person living in poverty and settled in the regional territory, and the duration of such territorial roots. Therefore, the principle of equality under Art. 3 of the Constitution, which does not tolerate any distinction based on nationality when it comes to the protection of fundamental rights, such as the right to health or the right to life, is not limited to mere survival but extends to the dignity of the person.[27]

In the same way, the requirement of territorial roots must be considered discriminatory in the case of contributions for purchasing basic necessities, within the framework of the extraordinary measures adopted to deal with the socio-economic crisis caused by Covid-19 and the consequent provisions adopted by the State and the Regions to protect health safety. By way of an example, the Court of Pescara[28] stated this in relation to the Regional Council of Abruzzo, which established the criteria for the allocation of these contributions. In defining the conditions for access to the contribution, the regional resolution went beyond the regional provisions by limiting the possibility of application to only third-country nationals holding an EC residence permit for long-term residents, or third-country nationals holding at least a two-year residence permit and engaged in regular secondary or self-employed activities. In such cases, Art. 2 of the Italian Consolidated Immigration Act is relevant: it recognises the fundamental rights of the human person, as provided for by national law, by the international conventions in force, and by the generally recognised principles of international law, for third-country nationals "in any case present at the border or in the territory of the State". On the basis of this provision, it is clear that any intervention aimed at protecting fundamental rights is also aimed at third-

[26] Italian Constitutional Court, judgment 20.6.2018, no. 166.

[27] Italian Constitutional Court, no. 166/2018, cit. and judgment 28.1.2020, no. 44.

[28] Court of Pescara, order 4.6.2021.

country nationals as human persons, regardless of the duration of their presence on national territory.

3.1. Recognition of the "nursery", "baby", and "maternity" allowances: a 'quadrangulation' among the Courts

Of particular importance is access to, on equal terms, the so-called "nursery", "baby", and "maternity" allowances (or bonuses), which are reserved for national citizens and long-term residents only, excluding third-country nationals legally residing in Italy who hold a single work permit obtained under Italian legislation transposing Directive 2011/98/EU.

What stands out is Art. 12(e) of this Directive, which prohibits discrimination on the grounds of nationality between European citizens and third-country nationals as regards family and maternity benefits, and provides for the right of workers under Art. 3(1)(b)(c) to the same treatment as that reserved to citizens of the member State in which they reside in the field of – inter alia – social security within the meaning of Regulation no. 883/2004.

Given the direct effect of this provision, it is the common judges themselves who can grant protection to third-country nationals excluded from the benefit, overruling national law by virtue of the primacy of EU law.[29]

This direction was followed, for example, by the Milan Court of Appeal[30] with regard to the "nursery" bonus, after ascertaining discriminatory content in the Prime Ministerial Decree of 17.2.2017 implementing Art. 1(355) of Law 232/16 – which introduced the benefit to support the income of families for the payment of fees related to the attendance of public and private nursery schools and support forms of family assistance in favour of children under the age of three suffering from serious chronic pathologies[31] – and INPS Circular no. 27/2020 confirming the requirement for third-country nationals to hold an EU residence permit

[29] Even based on previous CJEU case-law related to Art. 12 of Directive 2011/98/EU. See, for example, ECJ, *Martinez Silva*, cit.

[30] Court of Appeal of Milan, judgment 15.6.2021, *INPS v. Presidency of the Council of Ministers*.

[31] The Prime Minister's Decree and the INPS circular have discriminatory content also in terms of contrast with the founding law. In fact, they introduce limitations based on nationality that are not foreseen in Art. 1(355) of Law 232/2016.

for long-term residents, while extending the scope of the benefit in question to political refugees and those enjoying subsidiary protection.

In particular, the Milan Court of Appeal rejected the argument that the bonus in question was intended as a kind of "reimbursement of expenses aimed at supporting families by rewarding the expenses incurred, limiting the intervention to the national territory" and that it did not fall within the scope of social security benefits under Regulation no. 883/2004 or the social assistance benefits. Instead, the Milan Court of Appeal pointed out that Regulation no. 883/2004 – to which Art. 12 of Directive 2011/98/EU refers in defining the branches of "social security"– covers the "contributory and non-contributory" branches included in the list referred to in the first paragraph of the same Art. 3 that in letter (j) refers to "family benefits".

Art. 1 of the Regulation defines family benefits as "all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I", where the expression "to meet family expenses" is to be interpreted, in line with CJEU case law,[32] as a public contribution to a family's budget to alleviate the financial burden of raising children.

In light of the aforementioned provisions, the Milan Court of Appeal firmly considered that the benefit falls within the category of family benefits, since it presupposes the existence of a family consisting of at least one parent and a minor under the age of 3, is paid during the first three years of the child's life when the family balance clearly deteriorates, is correlated with the family economic situation indicator that measures the family's wealth, and can be claimed by either the mother or father on behalf of the family as a whole. Nor did it consider that the service related to a specific item of expenditure, such as nursery school fees, could be relevant. Finally, the CJEU judgment stands out in support of this reconstruction,[33] stating that the qualification of the individual benefit must be made in the context of the relative "constituent elements", such as "its purposes", and that "benefits that are granted automatically to families meeting the objective criteria relating in particular to their size, income, and capital resources, without any individual and discretionary assessment of personal needs, and in-

[32] Cfr. ECJ, judgment 19.9.2013, *Caisse nationale des prestations familiales*, joint cases C-216/12 and C-217/12.

[33] ECJ, judgment *Martinez Silva*, cit., paras. 20-22.

tended to meet family expenses must therefore be regarded as social security benefits".

Worth noting is that the Milan Court of Appeal decided, in line with the first instance judge, not to stay the proceedings – pending the preliminary question on the "baby" and "maternity" bonuses – because it did not see between the two disputes "any prejudicial nature such as to make the definition of this dispute dependent on the decision of the pending proceedings before to the Court of Justice relating to two distinct provisions".

In this respect, most trial judges[34] have taken steps to grant protection to third-country nationals through the disapplication of national law. However, after passing the questions to the Court of Cassation – not recognizing the conditions for the non-application of domestic law due to the conflict with EU law – the latter, through a series of orders of June 2019, raised the question of the constitutionality of Art. 1(125) of Law 190/14 (childbirth allowance) and Art. 74 Legislative Decree 151/01 (basic maternity allowance) insofar as they provide for the payment of the respective benefits only in favour of third-country nationals holding a long-term residence permit, to the exclusion of third-country nationals holding a permit of at least one year pursuant to Art. 41 of the Italian Consolidated Immigration Act. The Supreme Court deemed it

[34] Especially in relation to the baby bonus, among the first, the Court of Bergamo, order 30.11.2017, no. 6422; Court of Milan, order 12.12.2017. See W. CHIAROMONTE (2017), *I requisiti dell'assegno di natalità alla prova del diritto antidiscriminatorio*, in *Riv. dir. sic. soc.*, 3, 527 ff. In particular, the Court of Bergamo observed that Art. 12 of Directive 2011/98/EU, which has not yet been transposed into the Italian legal system despite the issuance of Legislative Decree no. 40/2014 and the expiry of the terms, establishes that the subjects referred to in Art. 3(1)(b)(c) (i.e. "third-country nationals who have been admitted to a member State for purposes other than work under Union or national law, who are allowed to work and who hold a residence permit in accordance with Regulation (EC) No 1030/2002" and "third-country nationals who have been admitted to a member State for the purpose of work under Union or national law") should enjoy the same treatment as nationals of the member State in which they reside as regards, *inter alia*, the social security branches as defined in Regulation no. 883/2004/EC. The Tribunal pointed out that those branches include the social benefits provided for in Art. 1(353) Law no. 232/2016, qualifiable as "family benefits" referred to in Art. 3(1)(j) of the same regulation, and considered Art. 12 of the Directive producing direct effects as clear and unconditional, and therefore immediately applicable. See also Tribunal of Padua, order 13.7.2021.

necessary to verify the constitutional legitimacy of the internal provisions in relation to Arts. 3, 31, and 117(1) of the Constitution, the latter in relation to Arts. 20, 21, 24, 31, and 34 of the EU Charter of Fundamental Rights.[35]

Given that it was the referring judge who raised the question of constitutional legitimacy, which also affects the CFR provisions, the Italian Constitutional Court pointed out that it could not exempt itself "from assessing whether the contested provision at the same time violates both the principles of Italian constitutional law and the guarantees enshrined in the Charter", thereby expressly referring to the principles already expressed in Judgment no. 63/2019.[36] However, instead of "absorbing" the European parameter in the assessment of constitutional legitimacy, the Constitutional Court considered it appropriate to request a preliminary ruling from the CJEU.[37] In fact, the Luxembourg judges were asked for a precise interpretation of the relevant provisions of EU law that affect national law. In particular, the Italian Constitutional Court's request for a preliminary ruling sought to ascertain whether the childbirth allowance and the maternity allowance were covered by the guarantee under Art. 34 CFR, read in the light of secondary legislation, which aims to guarantee to all third-country nationals who reside and work regularly in the Member States "the same common set of rights, based on equal treatment with nationals of the Member State", and which binds the latter to that objective.

The CJEU[38] pointed out that Art. 12(1)(e) of Directive 2011/98 re-

[35] While acknowledging the "concrete possibility" of applying Directive 2011/98 and in particular Art. 12(1)(e), and to fulfil the national court's disapplication obligation in the event of a conflict between the national and European rules, the Court issued a preliminary ruling on constitutionality, especially in light of different effects resulting from the disapplication and the Constitutional Court's ruling of unlawfulness. In fact, the Court of Cassation pointed out that "the peculiar mechanism of operation of the non-application" of the provision contained in Art. 1(125) of Law 190/2014 "cannot achieve effects similar to those deriving from the ruling of unconstitutionality". Then, the Court clarified that "for these reasons linked to the different effects (...) the applicability to the case of EU Directive 2011/98 does not determine the irrelevance of the question of constitutionality that is immediately to be raised".

[36] Italian Constitutional Court, judgment 21.3.2019, no. 63, especially point 3.1.

[37] Italian Constitutional Court, order no. 182/2020, cit.

[38] ECJ, Grand Chamber, *O.D. and others*, cit.

ferred to by the applicants gives concrete expression to the right of access to social security benefits under Art. 34 CFR, and that when adopting measures falling within the scope of a directive that gives concrete expression to the rights enshrined in the Charter, member States are required to comply strictly with that Directive.[39]

In examining the question in the light of Directive 2011/98, the essence of the matter is the classification of the childbirth and the maternity allowances as social security benefits under Regulation no. 883/2004. In this respect, according to European case law, a benefit can be considered a social security benefit, and therefore within the scope of Regulation no. 883/2004, if it is granted to the beneficiaries on the basis of a situation defined by law, irrespective of any individual and discretionary assessment of their personal needs.[40] Furthermore, where a specific benefit is granted following an assessment of the recipient's income, the Court noted that this assessment is in any event made on the basis of an objective and legally defined criterion, regardless of the assessment of the applicant's personal needs.[41]

The childbirth allowance, which is granted automatically to households that meet the conditions laid down by the legislator on an objective basis (i.e., the economic situation indicator), has these characteristics, irrespective of any discretionary and individual assessment. Moreover, it can be classified as a "family benefit" in accordance with the criteria established by European case law, since it is intended to compensate for family expenses,[42] in this case the costs of raising a child.

Similarly, maternity allowance is also granted automatically to mothers who meet certain conditions laid down by law, without any individual assessment, taking into account, in addition to the non-receipt of maternity allowance, the resources of the family to which the mother belongs (always based on the economic situation indicator). According to this reconstruction by the European Court of Justice, the childbirth and maternity allowances are among the social security benefits referred to in Regulation no. 883/2004, which are subject to the application of

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[39] See ECJ, Grand Chamber, judgment 11.11.2014, *Schmitzer*, case C-530/13, para. 23.

[40] See ECJ, *Martinez Silva*, cit., para. 20; judgment 2.4.2020, *Caisse pour l'avenir des enfants*, case C-802/18, para. 35.

[41] See ECJ, judgment 12.3.2020, *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle*, case C-769/18, para. 28.

[42] See ECJ, *Caisse pour l'avenir des enfants*, cit., para. 38.

the principle of equal treatment laid down in Art. 12(1)(e) of Directive 2011/98, with which it contrasts the national legislation excluding third-country nationals.

Following the judgement of Court of Luxembourg, the Italian Constitutional Court re-examined the issue, and with Judgment no. 54/2022 declared unconstitutional the provisions requiring[43] an EU residence permit (pursuant to Art. 9 of Legislative Decree 286 of 25 July 1998) in order to benefit from these allowances.[44]

4. Final remarks: from judicial dialogue to…infringement procedure

The jurisprudence analysed shows a progressive convergence between the status of citizen and that of third-country national in the enjoyment of an increasingly wide range of rights, through exploiting the jurisprudential lines of both the CJEU and the Italian Constitutional Court.

Indeed, the latter has played a decisive role in recognising to third-country nationals access to benefits of a social nature – correlated to meeting the "essential needs" inherent in the protection of the human person (and their dignity) – and in eroding the relevance of the *status civitatis*, maintaining a *status personae*-based approach.[45] Furthermore,

[43] Before the amendments introduced with Law no. 238/2021, Art. 3(4).

[44] Italian Constitutional Court, judgment 11.1.2022, no. 54. Consequently, also the Italian Court of Cassation has finally recognized that the childbirth allowance (as well as the maternity allowance) is intended to help "remove economic and social obstacles which, by limiting freedom and equality of citizens, prevent the full development of the human person (Art. 3(2) of the Constitution)". In particular, the allowance represents the "implementation of article 31 of the Constitution, which commits the Republic to facilitating, through economic measures and other benefits, the creation of the family and the fulfilment of its duties, with special regard to large families, and to protecting mother, children and the youth, by adopting the necessary measures". See Italian Court of Cassation, judgment 4.4.2023, no. 9305.

[45] *Amplius*, see A. LAMBERTI (2022), *"Sostenere l'integrazione per società più inclusive": immigrazione e diritti sociali nella recente giurisprudenza costituzionale*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.), *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli, 451 ff. See also L. MONTANARI (2019), *La giurisprudenza costituzionale in materia di diritti degli stranieri*, in *Federalismi.it*, 2; A. RUGGERI (2019), *Cittadini, immigrati e migranti alla prova della solidarietà*, in *Dir. Imm. e Cittad.*, 2.

even if not functional to meeting essential needs, the restrictive requirements still need to satisfy the reasonableness criterion, since there must be a "reasonable correlation" between the request and the situation of need for which the benefit is intended.[46] Finally, the Italian Constitutional Court has recognised that the principle of equal treatment in the field of social security, as defined by the CFREU and secondary legislation, and reiterated by the CJEU, "is linked to the principles enshrined in Articles 3 and 31 of the Constitution and corroborates and illuminates their axiological content", with the aim of promoting the broader and more effective integration of third-country nationals.[47]

In this context, another decision of the Italian Constitutional Court is worth mentioning,[48] namely that the question of constitutional legitimacy raised by the Court of Bergamo was not well-founded,[49] since Art. 2(1)(a) of Legislative Decree 4 of 28 January 2019,[50] which, among the various requirements for obtaining the citizenship basic income, requires third-country nationals to hold an EU residence permit for long-term residents.

Contrary to the Court *a quo*, which considered citizenship basic income as an essential benefit aimed at meeting the primary needs of the human person,[51] the Italian Constitutional Court stated that although it has its own anti-poverty measure, it does not lead to a welfare provision aimed at satisfying a primary need of the individual, but pursues "other and more articulated objectives of active labour policy and social integration". The prevalence of these objectives, other than providing economic support to guarantee the primary needs of the person, is linked to the temporary and conditional nature of the benefit, i.e., the need for it to be accompanied by precise commitments on the part of the recipi-

[46] Italian Constitutional Court, judgment no. 166/2018, cit.

[47] Italian Constitutional Court, judgment no. 54/2022, cit.

[48] Italian Constitutional Court, judgment 25.1.2022, no. 19.

[49] Referring to Arts. 2, 3, 31, 38, and 117(1), Constitution, the latter in relation to Art. 14 ECHR and Arts. 20 and 21 CFR, insofar as it excludes from the citizenship income benefit holders of a single work permit under Art. 5(8.1) of Legislative Decree 286/1998 or a residence permit of at least one year under Art. 41 of Legislative Decree 286/1998.

[50] Converted into Law no. 26 of 28 March 2019.

[51] Relying on the explicit qualification of citizenship income as an "essential level of benefits" and constituting a "measure [...] to contrast poverty, inequality and social exclusion" (Art. 1(1) D.L. no. 4/2019).

ent, and the controversial requirement of a long-term residence permit is reasonable.

This ruling essentially neutralises the progressive "inclusionist" action of the CJEU, which in its judgment of 2 September 2021 (analysed in Section 3 above) assessed the question of the importance to be attached to the plurality of functions underlying the measure of access to social assistance, stating that if at least "one of those functions" falls within the objectives set out in Regulation no. 883/2004, there are sufficient requirements for the application of the guarantee of equal treatment.[52]

The Italian Constitutional Court decided not to refer the question to the CJEU for a preliminary ruling. Hearing a question of interpretation from the court of first instance, the Italian Constitutional Court defined *motu proprio* the scope of the relevant sources of EU law, even though the question referred to it was a problem of interpretation of national law in the light of the sources of EU law.[53] In particular, the judge *a quo* had expressed doubts as to the compatibility of the relevant national legislation with the prohibition laid down in Art. 21 CFREU.

Finally, the complexity of the legislation in force, and observing the link between national legislation and European Union law, led the national Court to enter into dialogue with the CJEU and the Italian Constitutional Court. In a regulatory framework that is more than ever articulated for the interaction of sources at different levels, the national

[52] This suggested non-compliance of the criteria relating to citizenship income with European legislation. See E. TRAVERSA (2020), *Reddito di cittadinanza: la condizione di residenza in Italia per dieci anni 'grida vendetta' al cospetto della Corte di giustizia dell'Unione europea*, in *Dir. com. scambi internaz.*, 2, 189 ff. On the Italian Constitutional Court Judgment see A. RIZZO (2022), *La sentenza della Corte costituzionale sul Reddito di cittadinanza: una critica di merito e "di metodo"*, in *I Post di AISDUE*, IV, 34 ff.; A. GARRILLI, S. BOLOGNA (2022), *Migranti e lotta alla povertà. La Corte costituzionale nega il reddito di cittadinanza ai titolari del permesso di soggiorno per ricerca di un'occupazione*, in *Riv. dir. sic. soc.*, 1, 75 ff.

[53] Therefore, it is questionable whether the Italian Constitutional Court will decide in the same way in addressing the question of constitutional legitimacy (raised by the Court of Cassation, order 8.3.2023, no. 6979) of Art. 80(19), law no. 388/2000 to the extent it requires the (former) residence card to correspond social allowance (*assegno sociale*) for non-EU citizens. The Italian Court of Cassation has called into question Art. 12 of Directive 2011/98/EU, even though – following the perspective outlined by the 269/17 judgment – has decided not to disapply the national provision not complying with EU law.

courts considered it necessary to eliminate any doubt in order to ensure the strict observance and uniform interpretation of the law in a field of primary importance, such as social benefits, which calls into question the guarantee of the rights of the individual (Art. 3(2), Arts. 31 and 38 of the Constitution), and at the same time, the respect of the limit of the available resources (Art. 81 of the Constitution).[54] However, this implies a partial waiver of the obligation to disapply national laws that conflict with EU law, an obligation that is however linked to the need to directly ensure the legal protection that the EU grants to the subjects of the legal system and to guarantee its full effectiveness.

However, the "last word" of the Italian Constitutional Court does not neutralise the primacy of EU law, and therefore common judges should respect the provisions of EU law, especially in view of the fact that the European Commission has decided to open an infringement procedure by sending a letter of formal notice to Italy.[55] This letter criticises, firstly, the requirement of 10 years' residence as one of the conditions for access to the citizenship income:[56] this is considered to be indirect discrimination, as non-Italian citizens are more likely to fail to meet this criterion. In addition, the residence requirement could discourage Italians from going abroad to work, as they would not be entitled to the minimum income upon their return. Secondly, the European Commission complaints that there is a conflict with Directives 109/2003 and 95/2011 insofar as they provide for "fair clauses" in access to this type of benefit for long-stay third-country nationals and beneficiaries of international protection, respectively.

[54] See Italian Court of Cassation, judgment no. 1420/2023, cit.

[55] INFR(2022)4024, 15.2.2023.

[56] The measure has been modified according to Law no. 197/2022, which includes the State budget for the financial year 2023 and multiannual budget for the three-year period 2023-2025, and it will be modified again to be replaced by the so-called "active inclusion measure".

Part III

THE ROLE OF INTERNATIONAL COURTS AND MONITORING BODIES IN PROTECTING MIGRANT INDIVIDUAL RIGHTS

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Chapter 13

HUMAN DIGNITY AS THE BASIS AND SOURCE OF RESPECT FOR THE RIGHTS AND FREEDOMS OF MIGRANTS: SOME ELEMENTS OF CONVERGENCE IN THE CASE LAW OF THE EUROPEAN COURTS (ECTHR AND ECJ)

Angela Di Stasi *

ABSTRACT: *This chapter examines some jurisprudential trends in the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (ECJ) on the issue of human dignity as the basis and source of respect for the rights and freedoms of migrants. With regard to the ECJ, reference is made to the application of the Charter of Fundamental Rights of the European Union. With regard to the ECtHR, reference is made to the various forms of dignity referred to therein, despite the absence of explicit normative wording on "respect for human dignity" in the European Convention on Human Rights and Fundamental Freedoms (ECHR). The chapter will also examine possible elements of convergence in the highly complex and contested use of the concept of (human) dignity, particularly in the light of the judicial practice of the ECtHR and ECJ on migrants in the so-called discontinuous "dialogue" between the two European Courts.*

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* I would like to express my gratitude to Dr CHIARA MARENGHI for her support with the jurisprudential review.

1. Human dignity and migrants in Europe: from semantic ambiguity towards a legal concept of human dignity in the case law of the ECtHR and ECJ?

The failed attempts at normative reform, both at the international (consider the two United Nations Global Compact on refugees and migrants) and the EU level (in particular, the New Pact on Migration and Asylum adopted on 23 September 2020), are common knowledge, as it is the general inadequacy of national legislative solutions concerning specific aspects of the migration phenomenon. [1]

In the face of such a flawed and fragmented normative framework, what role can international jurisprudence play in a complementary and even creative way? Can the two international jurisdictions operating in the European legal and judicial area (the Court of Justice of the European Union/ECJ and the European Court of Human Rights/ECtHR) act to strengthen the rights (fundamental and otherwise) of migrants?

These two Courts evidently enjoy organic and functional autonomy within their "respective systems": on one side, the ECJ, a judicial body of the European Union, which has long since substantially reduced its original mercantile vocation in favour of "an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external borders controls, asylum immigration and the prevention and combating of crime" (Art. 3(2) of the Treaty on European Union/TEU); on the other side, the ECtHR, by definition a court specialising in the protection of human rights and fundamental freedoms, attributing the role of *alter ego* to everyone within the jurisdiction of the High Contracting Parties (see Art. 1 of the European Convention on Human Rights and Fundamental Freedoms/ECHR).

Therefore, can the contributions of the two European Courts to strengthening migrants' rights (fundamental and otherwise) find a unifying element in their reference to human dignity as the basis and source of respect for the human rights and freedoms of migrants? [2] Moreover, in the context of the protection of refugees and asylum seek-

[1] See I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.) (2022), *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli.

[2] See, *inter alia*, P. GILABERT (2018), *Human Dignity and Human Rights*, Oxford; G. LE MOLI (2021), *Human Dignity in International Law*, Cambridge.

ers, is it possible to assign human dignity a normative value that allows it to be made justiciable?

As known, the concept of human dignity is increasingly being invoked in the international debate, but some commentators consider appeals to human dignity as little more than rhetoric, pointing to the risks of over-using or abusing this concept.[3]

From being an ethical and pre-juridical value, a principle that informs national catalogues[4] and deontological codes, a concept that is widely accepted in comparative constitutional law, human dignity seems to be increasingly capable of acquiring juridical value in (international and) European law[5] as the basis and source of the respect for all (or al-

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[3] See, among others, ECHR, judgment 25.1.2007, application no. 68354/01, *Vereinigung Bildender Künstler v. Austria*, Joint Dissenting Opinion of Judges Spielmann and Jebens, para. 9: "[T]he abstract or indeterminate concept of human dignity […] can in itself be dangerous since it may be used as justification for hastily placing unacceptable limitations on fundamental rights".

[4] See, above all, P.P. PORTINARO (2008), *La dignità dell'uomo messa a dura prova*, in A. ARGIROFFI, P. BECCHI, D. ANSELMO (eds.), *Colloqui sulla dignità umana. Atti del convegno internazionale*, Roma, 221 ff. The Author, by drawing on Häberle, affirms that human dignity is the anthropological-cultural basis for the Constitutional State. The idea of equal dignity *for* all human beings can be found, amongst others, in the French Constitution dating back to 1789. In the Italian Constitution, a reference to human dignity appears in the first paragraph of Art. 3 as "equal social dignity" of citizens, and in the second paragraph of Art. 41 as a limit to the freedom of private economic enterprises that "cannot be carried out in a way that may cause damage […] to human dignity". But the reference to human dignity as the fundamental value of the whole legal system appears in several other constitutions (see, e.g., the Canadian, Danish, Portuguese, Swedish, Swiss, and American Constitutions). Among these, noteworthy is the German Constitution that in Art. 1 states: "Human dignity is inviolable. To respect and protect it is a duty of each power of the State".

[5] There is an extensive body of legal literature on this subject that touches on several areas of the legal system. See the publications dating back to the '80s of O. SCHACTER (1983), *Human Dignity as a Normative Concept*, in *AJIL*, 77, 103 ff., and D. FELDMAN (1999), *Human Dignity as a Legal Value*, in *Pub. L.*, 682 ff. For additional references, see A. DI STASI (2019), *Human Dignity as a Normative Concept. "Dialogue" Between European Courts (ECtHR and CJEU)?*, in P. PINTO DE ALBUQUERQUE, K. WOJTYYCZEK (eds.), *Judicial Power in a Globalized World. Liber Amicorum Vincent de Gaetano*, Cham (Switzerland), 115 ff.; ID. (2011), *Human Dignity: From Cornerstone in International Human Rights to Cornerstone in International Biolaw?*, in S. NEGRI (ed.), *Self-*

most all) human rights of migrants, precisely through the action of judicial bodies. [6]

The familiar criticism of semantic ambiguity – in the sense that dignity remains somewhat indeterminate and elusive, a vague notion used to support even opposing opinions – is indeed accompanied by the difficulty of providing a full, and above all shared, justification for such notion. [7] This is why those who criticise the notion of dignity emphasise its inevitable normative weakness, which would invalidate the concrete possibility of making recourse to it.

In light of these considerations, we will attempt to identify some guidelines in the jurisprudence of the ECtHR and the ECJ. In particular, this chapter will highlight the similarities and differences in the jurisprudential use of dignity in the respective case law with specific regard to the rights of migrants. In so doing, worth recalling is that the indeterminate nature of the notion of dignity also appears to influence the legal reasoning of the two Courts, as some dissenting opinions in the ECtHR case law demonstrate. [8]

Determination, Dignity and End-of-Life Care, Leiden, 3 ff. Any attempt at a historical-philosophical reconstruction of the concept of human dignity is clearly beyond the scope of this chapter. On the relationship between dignity and freedom, we will limit ourselves to mentioning the perspectives outlined in KANT (see *Fondazione della metafisica dei costumi*, Italian translation by Mathieu, Milano, 1944, 144-145), according to whom human dignity lies in personal autonomy, and promoting and respecting the dignity of the individual is respecting the autonomy of the individual.

[6] F. HORÁK (2022), *Human Dignity in Legal Argumentation: A Functional Perspective*, in *ECLRev*, 237 ff. See also G. ALPA (1997), *Dignità. Usi giurisprudenziali e confini concettuali*, in *Nuova giurisprudenza civile commentata*, 13, 415 ff.

[7] Among the critics of this notion, see above all, R. MACKLIN (2003), *Dignity is a Useless Concept?*, in *British Medical Journal*, 327, 1419 ff. In the opposite direction, see R. ANDORNO (2005), *La notion de dignité humaine est-elle superflue en bioétique?*, in *Revue générale de droit medical*, 16, 95 ff.

[8] See ECHR, Grand Chamber, judgment 28.9.2015, application no. 23380/09, *Bouyid v. Belgium*, Joint Partly Dissenting Opinion of De Gaetano and Others. In particular, para. 4 reads "we are able to reach that conclusion without resorting to the detailed observations on human dignity set out both in the part of the Judgment dealing with international texts, instruments and documents (paragraphs 45-47) and in the "Law" part (paragraphs 89-90). Indeed, we wonder what practical purpose is served by these observations, given that the majority provide no indication of how the notion of human dignity is to be understood. The observations are presented as though they intend to establish

2. The multiple references to (human) dignity in the Charter of Fundamental Rights of the European Union as a *new generation bill of rights*

For reasons of parsimony, we will not dwell on the set of international instruments that vary in terms of their juridical *vis* (hard law instruments and those largely considered as soft law instruments), also constituting the context in which an attempt can be made to define human dignity as a normative concept.[9]

Indeed, the consolidation of human dignity as a "juridical good" protected by international human rights law is based on the Charter of the United Nations,[10] the founding inspiration of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Cultural Rights (ICESCR). The Preamble of both state "that […] the recognition of the *inherent dignity* and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and it is recognised "that these rights derive from the *inherent dignity* of the human person" (emphasis added). Worth noting is that the *Universal Declaration of Human Rights* makes several references to dignity, including *inherent dignity*.[11]

In the context of the European integration process, respect for human dignity is one of the founding values of the European Union (Art. 2 TEU), as part of a list that includes other very important values (namely "freedom, democracy, equality, the rule of law and respect for human rights including the rights of persons belonging to minorities"). It also acquires the role of a principle guiding in the Union's external action, considering that Art. 21(1) recalls "the principles which have inspired […] creation, development and enlargement" of the organization.

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a doctrine, but in reality they do not offer the reader much by way of enlightenment" (underline added).

[9] See A. DI STASI (2011), *Human Dignity: From Cornerstone in International Human Rights to Cornerstone in International Biolaw?*, cit.

[10] The Preamble affirms the "faith in fundamental human rights, in the *dignity* and worth of the human person, in the equal rights of men and women and of large and small nations" (emphasis added).

[11] It would be impossible to fully investigate the references to dignity in international conventions of universal application and in regional instruments. In this regard, see A. DI STASI (2011), *Human Dignity: From Cornerstone in International Human Rights to Cornerstone in International Biolaw?*, cit.

Moreover, the proclamation of the Charter of Fundamental Rights of the European Union as a "new generation (European) Bill of Rights" [12] is of paramount importance in the articulated (and still *in fieri*) process of placing human dignity at the centre of European constitutionalism as a "fully European concept". [13] The Charter, like national and international documents that mention the concept, does not define (human) dignity. [14] It does however contain multiple references to dignity, articulated in different ways: as a general clause protecting a legal right (in a way subsidiary to other provisions preceding it), as an intrinsic value of the human person, as a basis of fundamental rights, and as a "cornerstone" of the Charter. [15] As known, these various references acquire full normative status under Art. 6(1) TEU (substantially revised by the Lisbon Treaty), which provides that the Charter "shall have the same legal value as the Treaties".

Within the Charter, the protection of dignity is not only enshrined in a single Article (Art. 1), but also defines an entire Title of the same Charter, which comes before Title II "Freedoms" and Title III "Equality". [16] According to Art. 1, "*Human dignity* is inviolable. It must be respected and protected". This provision does not enshrine a right to dignity but is drafted as a general clause, implying the recognition of its nature as an inviolable and legally protected good. While Art. 1 contains a

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[12] See A. PACE (2001), *A che serve la Carta dei diritti fondamentali dell'Unione europea? Appunti preliminari*, in *Giur. cost.*, 193 ff.

[13] C. DUPRÉ (2015), *The Age of Dignity: Human Rights and Constitutionalism in Europe*, Oxford.

[14] See, for instance, M. OLIVETTI (2001), *Article 1. Human Dignity*, in W.B.T. MOCK, G. DEMURO (eds.), *Human Rights in Europe*, Durham, 3 ff.; J. JONES (2012), *Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice*, in *Liverp. Law Rev.*, 33, 281 ff.; C. DUPRÉ (2014), *Art. 1. Human Dignity*, in S. PEERS *et al.* (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, 3 ff.; G. ALPA, G. DE SIMONE (2017), *Dignità umana*, in AA.VV. *Carta dei diritti fondamentali dell'Unione europea*, Milano, 15 ff.; S. HESELHAUS (2019), *Human Dignity in the EU*, in P. BECCHI, K. MATHIS (eds.), *Handbook of Human Dignity in Europe*, Cham, 943 ff.; C. DUPRÉ (2021), *Art. 1. Human Dignity*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford, 3 ff.

[15] So, M. OLIVETTI (2001), *Article 1. Human Dignity*, cit., at 11.

[16] On the so-called "triangle of Constitutionalism" see S. BAER (2009), *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, in *UTLJ*, 59, 417 ff.

negative obligation, it also imposes a positive obligation on the European Union and member States to take protective measures to prevent the violation of human dignity by other natural persons, legal entities, or State bodies.

The question then is whether it is an independent subjective right or an objective right that underpins the values guaranteed by the Charter.

In the same Title I, dignity is embodied in Art. 2 ("Right to life"), Art. 3 ("Right to the integrity of the person"), Art. 4 ("Prohibition of torture and inhuman treatment or punishment") and Art. 5 ("Prohibition of slavery and forced labour"). The reference to dignity also appears in the Preamble, where human dignity is mentioned as the first value among the "indivisible (and) universal values" on which the EU is founded.

By devoting the heading of Title I to dignity in its broadest sense, and including Art. 1 as an incipit, the Charter clearly confers it an almost "sacred" character, a kind of "sanctuary", implying that the human being, as unique, unrepeatable, and capable of self-determination, is the bearer of a value that transcends any condition in which s/he may find her/himself.

But the Charter does not limit itself to assigning to dignity the rank of *character indelebilis*,[17] that is to say, as stated in the Explanations to Art. 1 of the Charter, recognizing it "not only [as] a fundamental right in itself but [as] …the real basis of fundamental rights".[18] In addition to the peculiar systematic choice of attributing it "the axiological presumption of fundamental rights"[19] (thus anticipating its provision, compared with the same "right to life" foreseen in Art. 2), and using the category of inviolability only for itself, it adds a specification of this value through the subsequent norms.

Finally, there are other references to dignity in the Charter in terms of its disciplined application with reference to specific categories of persons, such as, *inter alia*, Art. 25 on "the rights of the elderly" which also

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[17] For this definition, see G. PISTORIO (2009), *Art. 1. Dignità umana*, in G. BISOGNI, G. BRONZINI, V. PICCONE (eds.), *La Carta dei diritti. Casi e materiali*, Taranto, 39 ff.

[18] See *Official Journal of the European Union*, C-83/02 of 30 March 2010. On the explanations, see A. DI STASI (2010), *Brevi osservazioni intorno alle «spiegazioni» alla Carta dei diritti fondamentali dell'Unione europea*, in C. ZANGHÌ, L. PANELLA (eds.), *Il Trattato di Lisbona tra conferme e novità*, Torino, 425 ff.

[19] See G. SILVESTRI (2007), *Considerazioni sul valore costituzionale della dignità della persona. Intervention at the Trilateral Meeting of the Italian, Portuguese and Spanish Constitutions (Rome, 1 October 2007)*, available online, 2 ff., at 2.

provides for the right "to lead a life of *dignity*" or "the right to working conditions which respect his or her […] *dignity*" (Art. 31(1)).

However, the Charter makes no specific reference to the relationship between human dignity and the rights of migrants. Nevertheless, the specific nature of the notion of human dignity as it emerges from the Charter cannot fail to be extended to such categories of persons, as it will be seen *infra* in the ECJ case law, which contains multiple references to the provisions of the Charter and to secondary EU law, sometimes in combination.

3. The legal concept of dignity in the ECJ case law on migrants

Given the indeterminate nature of dignity, the meaning of which cannot be absolutely determined *ex ante* but must be contextualized, some guidance in determining its normative *status* may be found in the Court of Justice case law. [20]

Indeed, most references to dignity are to be found in the more discursive opinions of the Advocates General. Even if such references are sometimes not explicitly recalled in the judgements, it is not to be excluded that they influenced the Court's reasoning. [21] Certainly, the opinions of two Advocates General represent a milestone in defining the legal concept of human dignity within the EU legal order.

In particular, in her famous Opinion in the *Omega* case, Advocate General Stix-Hackl outlined the multiple facets of human dignity as: the "substance of mankind" based simply on humanity, which distinguishes human beings from other living creatures; [22] closely linked to the con-

[20] See, *inter alia*, D. PETRIĆ (2019), "*Different Faces of Dignity": A Functionalist Account of the Institutional Use of the Concept of Dignity the European Union*, in *Maastricht JECL*, 26(6), 792 ff.; C.-A. CHASSIN (2018), *La notion de dignité de la personne humaine dans la jurisprudence de la Cour de justice*, in A. BIAD, V. PARISOT (eds.), *La Carte des droits fondamentaux de l'Union européenne. Bilan d'application*, Bruxelles, 137 ff.

[21] In this regard, see, e.g., ECJ, judgment 9.10.2001, *Kingdom of the Netherlands v. European Parliament and Council of the European Union*, case C-377/98. Similarly, when referred to by the Court of First Instance, it often disappears from the grounds of the Court's ruling. See, e.g., ECJ, judgment 22.5.2008, *Evonik Degussa GmbH v. Commission of the European Communities*, case C-266/06 P.

[22] Opinion of Advocate General STIX-HACKL, delivered on 18.3.2004, in the case C-36/02, *Omega*, paras. 75-76.

cepts of self-determination, freedom, autonomy, personality, and identity, thus strongly opposing the idea of instrumentalising and objectifying human beings;[23] the highest expression of the equality of all;[24] "the underlying basis and starting point for all human rights distinguishable from it", and at the same time, a parameter for their interpretation.[25]

In the same vein, in his Opinion in the *Coleman* case, Advocate General Maduro focused on one of the above aspects, emphasising the inherent relationship between human dignity and the principle of equality. In fact, "[a]t its bare minimum, human dignity entails the recognition of the equal worth of every individual".[26] In other words, "one's life is valuable by virtue of the mere fact that one is human, and no life is more or less valuable than another".[27]

Since then, the concept of dignity has been invoked by Advocates General to substantiate their reasoning in very different areas. For example, at the beginning of his Opinion in *Coman*, Advocate General Wathelet stressed that the definition of the concept of "spouse" under Directive 2004/38/EC affects "not only the very identity of the men and women concerned, and therefore their dignity, but also the personal and social concept that citizens of the Union have of marriage, which may vary from one person to another and from one Member State to another".[28]

In the field of migration, an example of this tendency can be found in the *Abdida* case, which concerned the expulsion of a third-country national suffering from a serious illness. According to Advocate General Bot, "respect for human dignity and the right to life, integrity and health enshrined in Articles 1, 2, 3 and 35 of the Charter respectively, as well as the prohibition of inhuman or degrading treatment contained in Article 4 of that Charter, mean that, in a situation such as that in the main proceedings, an illegally staying third-country national whose removal has been de facto suspended must not be deprived of the means necessary to

[23] *Ivi*, paras. 77-79.

[24] *Ivi*, para. 80.

[25] *Ivi*, para. 76.

[26] Opinion of Advocate General POIARES MADURO, delivered on 31.1.2008, in the case C-303/06, *Coleman v. Attridge Law and Steve Law*, para. 9. This passage is recalled by Advocate General SHARPSTON in her Opinion delivered on 13.7.2016, in the case C-188/15, *Bougnaoui*, para. 71.

[27] *Ibidem*.

[28] Opinion of Advocate General WATHELET, delivered on 11.1.2018, in the case C-673/16, *Coman*, para. 2.

meet his basic needs pending the examination of his appeal".[29] In fact, "[t]o have one's most basic needs catered for is […] an essential right which cannot depend on the legal status of the person concerned".[30] Therefore, "[a]lthough the extent of the provision for basic needs must be determined by each of the Member States, […] such provision must be sufficient to ensure the subsistence needs of the person concerned are catered for as well as a decent standard of living adequate for that person's health, by enabling him, inter alia, to secure accommodation and by taking into account any special needs that he may have".[31]

Very recently, an Austrian Court asked (*inter alia*) the ECJ whether the various discriminatory measures imposed on Afghan women amounted to acts of persecution for the purposes of Directive 2011/95/EU. In his opinion, delivered in November 2023, Advocate General de la Tour considered that the accumulation of discriminatory acts and measures adopted against girls and women by the Taliban constitutes persecution, in so far as such measures have the "effect of depriving those women and girls of their most basic rights in society and thus undermine full respect for human dignity, as enshrined in Article 2 TEU and Article 1 of the Charter".[32]

From a general point of view, migration is an area in which human dignity acquires increasing importance in the Court's reasoning.[33] Considering the case law in this field, the references to this concept are heterogeneous, but at least three lines of dignity-oriented jurisprudence emerge.

In the first, the ECJ invoked human dignity to reinforce the guaran-

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[29] Opinion of Advocate General BOT, delivered on 4.9.2014, in the case C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida*, para. 155. For another example see, very recently, Opinion of Advocate General EMILIOU, delivered on 4.5.2023, in the case C-294/22, *Office français de protection des réfugiés et apatrides (OFPRA) v. SW*, paras. 75 and 83.

[30] *Ivi*, para. 156.

[31] *Ivi*, para. 157. The French version refers to "un niveau de vie *digne* et adéquat" [a *dignified* and adequate standard of living] (emphasis added).

[32] Opinion of Advocate General DE LA TOUR, delivered on 9.11.2023, in the joined cases C-608/22 and C-609/22, *AH and FN*, para. 59. For another recent example regarding Directive 2011/95/EU see, Opinion of Advocate General EMILIOU, delivered on 4.5.2023, in the case C-294/22, *Office français de protection des réfugiés et apatrides (OFPRA) v. SW*, paras. 75 and 83.

[33] In this sense see, for instance, N. BAČIĆ SELANEC, D. PETRIĆ (2021), *Migrating with Dignity: Conceptualising Human Dignity through EU Migration Law*, in *ECLRev*, 17, 498 ff.; C. DUPRÉ (2021), *Art. 1. Human Dignity*, cit., 3.

tees that member States must grant to asylum-seekers in relation to reception conditions. In the *Cimade* judgement, the ECJ relied on the Preamble of Directive 2003/9/EC (recital 5),[34] which states that "the directive aims in particular to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter",[35] concluding that "further to the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter, under which human dignity must be respected and protected, the asylum seeker may not […] be deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive".[36]

Some years later, in the *Haqbin* case, the ECJ interpreted the requirement to ensure asylum-seekers "a dignified standard of living" in accordance with the purpose of Directive 2013/33/EU,[37] which "seeks to ensure full respect for human dignity and to promote the application, inter alia, of Article 1 of the Charter of Fundamental Rights and has to be implemented accordingly".[38] In the Court's view, "respect for human dignity within the meaning of that article requires the person concerned not finding himself or herself in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place

[34] Directive 2003/9/EC, *laying down minimum standards for the reception of asylum seekers*, 27.1.2003, OJ L31, 6.2.2003, 18 ff.

[35] ECJ, judgment 27.9.2012, *Cimade and GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, case C-179/11, para. 42.

[36] ECJ, *Cimade*, cit., para. 56. In the subsequent *Saciri* case, the Court confirmed its *Cimade* case law (see para. 35) and clarified that financial allowances to asylum seekers under Directive 2003/9 must be sufficient "to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence, enabling them in particular to find housing, having regard, if necessary, to the preservation of the interests of persons having specific needs" (para. 46). Accordingly, financial aid must be sufficient to house a family of asylum seekers (with three minor children) in dignity, that is, *inter alia*, preserving their family unity. ECJ, judgment 27.2.2014, *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and others*, case C-79/13.

[37] Directive 2013/33/EU, *laying down standards for the reception of applicants for international protection (recast)*, 26.6.2013, OJ L180, 29.6.2013, 96 ff.

[38] ECJ, Grand Chamber, judgment 12.11.2019, *Zubair Haqbin v. Federaal Agentschap voor de opvang van asielzoekers*, case C-233/18, para. 46.

to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity".[39] This means that even in case of serious breaches of the rules of the accommodation centres and/or seriously violent behaviour, member States have the obligation to ensure a dignified standard of living "continuously and without interruption",[40] in full respect of asylum-seekers' human dignity.

More recently, in *Ministero dell'Interno v. TO*, the ECJ had the opportunity to clarify that the considerations set out in *Haqbin* refer "to any applicant for international protection and not only to those applicants who are 'vulnerable persons' within the meaning of Article 21 of Directive 2013/33",[41] further strengthening asylum seekers' guarantees.

Another practical expression of member States' obligation to ensure asylum seekers a "dignified standard of living" under Directive 2013/33/EU is highlighted in the *K.S.* case where the ECJ recalled its *Cimade* judgment and endorsed the Advocate General's observation, according to which "work clearly contributes to the preservation of the applicant's dignity, since the income from employment enables him or her not only to provide for his or her own needs, but also to obtain housing outside the reception facilities in which he or she can, where necessary, accommodate his or her family".[42] As a consequence, "Article 15 of Directive 2013/33 must be interpreted as precluding national legislation which excludes an applicant for international protection from access to the labour market on the sole ground that a transfer decision has been taken in his or her regard under the Dublin III Regulation".[43]

In a second line of jurisprudence, the ECJ based its reasoning on Art. 1 in conjunction with Art. 7 of the Charter, which enshrines the right to private and family life. At issue was the assessment of the credibility of asylum seekers' statements on sexual orientation as grounds for persecution under the Qualification Directive, which touches on very sensitive

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[39] ECJ, Grand Chamber, *Zubair Haqbin*, cit., para. 46.

[40] ECJ, Grand Chamber, *Zubair Haqbin*, cit., para. 50.

[41] ECJ, judgment 1.8.2022, *Ministero dell'Interno v. TO*, case C-422/21, para. 46.

[42] ECJ, judgment 14.1.2021, *K.S. and others v. The International Protection Appeals Tribunal and others*, joined cases C-322/19 and C-385/19, para. 69.

[43] ECJ, *K.S. and others*, cit., para. 73.

aspects of applicants' private lives. Thus, in *A, B and C*, the ECJ found that Art. 4 of Directive 2004/83,[44] "read in the light of Article 1 of the Charter, must be interpreted as precluding, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to 'tests' with a view to establishing his homosexuality or, yet, the production by him of films of such acts".[45] In fact, this particularly intrusive activity "would of its nature infringe human dignity".[46]

Some years later, in the *F.* case, the ECJ went further, stating that "the procedures, should recourse be had, in that context, to an expert's report, must be consistent with other relevant EU law provisions, and in particular with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity, enshrined in Article 1 of the Charter, and the right to respect for private and family life guaranteed by Article 7 thereof".[47]

Finally, in a third (paramount) series of judgements, drawing on the concept of dignity, the ECJ embraced an evolutionary interpretation of the notion of "inhuman and degrading treatments" laid down in Art. 4 of the Charter. Much of this case law concerns the transfer of asylum seekers under the Dublin system.[48] Indeed, since the seminal *NS* judgment,[49] the ECJ progressively introduced exceptions to the application

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[44] Directive 2004/83/EC, *on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 29.4.2004, OJ L304, 30.9.2004, 12 ff.

[45] ECJ, Grand Chamber, judgment 2.12.2014, *A, B, C v. Staatssecretaris van Veiligheid en Justitie*, joined cases C-148/13 to C-150/13, para. 72.

[46] ECJ, Grand Chamber, *A, B, C*, cit., para. 65.

[47] ECJ, judgment 25.1.2018, *F v. Bevándorlási és Állampolgársági Hivatal*, case C-473/16, para. 35.

[48] See Regulation 343/2003/EC, *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, so-called Dublin II Regulation*, 18.2.2003, OJ L50, 25.2.2003, 1 ff.; and Regulation 604/2013/EU, *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), so-called Dublin III Regulation*, 26.6.2013, OJ L180, 29.6.2013, 31 ff.

[49] ECJ, Grand Chamber, judgment 21.12.2011, *NS v. Secretary of State for the Home Department & others*, joined cases C-411/10 and C-493/10, paras. 15 and 109.

of the principle of mutual trust, relying on the close link between Art. 4 and Art. 1 of the Charter.

In *C.K.*, the ECJ stressed that "[t]he prohibition of inhuman or degrading treatment or punishment, laid down in Article 4 of the Charter, is, in that regard, of fundamental importance, to the extent that it is absolute in that it is closely linked to respect for human dignity, which is the subject of Article 1 of the Charter".[50] Accordingly, the ECJ accepted that the transfer of asylum seekers could lead to a real risk of inhuman or degrading treatment due to their individual circumstances (and not only the systemic deficiencies in the responsible member State).

Building on the same premises, the ECJ concluded in *Jawo* that "it is immaterial, for the purposes of applying Article 4 of the Charter, whether it is at the very moment of the transfer, during the asylum procedure or following it that the person concerned would be exposed, because of his transfer to the Member State that is responsible within the meaning of the Dublin III Regulation, to a substantial risk of suffering inhuman or degrading treatment".[51]

Turning from asylum to illegal migration, worth recalling is the recent Grand Chamber judgment in case *X* in which the ECJ interpreted the Return Directive[52] in light of the Charter.[53] After emphasising the

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[50] ECJ, judgment 16.2.2017, *C.K., H.F., A.S. v. Republika Slovenija*, case C-578/16 PPU, para. 59. In the subsequent *MP* case on subsidiary protection for a former victim of torture (ECJ, Grand Chamber, judgment 24.4.2018, *MP v. Secretary of State for the Home Department*, case C-353/16), the Grand Chamber stressed that "Article 15(b) of Directive 2004/83 must be interpreted and applied in a manner that is consistent with the rights guaranteed by Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter'), which enshrines one of the fundamental values of the Union and its Member States and is absolute in that that value is closely linked to respect for human dignity, the subject of Article 1 of the Charter" (para. 36). Nonetheless, the ECJ concluded that the concept of serious harm referred to in Art. 15(b) of Directive 2004/83 "cannot simply be the result of general shortcomings in the health system of the country of origin" (para. 51) but requires a situation where the applicant is intentionally deprived of necessary medical treatment (para. 58).

[51] ECJ, Grand Chamber, judgment 19.3.2019, *Abubacarr Jawo v. Bundesrepublik Deutschland*, case C-163/17, paras. 78 and 88. Similar considerations are at the heart of the *Ibrahim* ruling delivered by the Grand Chamber the same day (joined cases C-297/17, C-318/17, C-319/17 and C-438/17).

[52] Directive 2008/115/EC, *on common standards and procedures in member States for returning illegally staying third-country nationals*, 16.12.2008, OJ L 348, 24.12.2008, 98 ff.

[53] ECJ, Grand Chamber, judgment 22.11.2022, *X v. Staatssecretaris van*

absolute nature of the prohibition in Art. 4 and its close connection with human dignity,[54] the Court stated "that there are substantial grounds for believing that a third-country national risks, if he or she is returned, being exposed to a significant and permanent increase in the pain caused by his or her illness, in particular, where it is established that (i) in the receiving country, the only effective analgesic treatment cannot be lawfully administered to him or her and (ii) the absence of such treatment would expose him or her to pain of such intensity that it would be contrary to human dignity in that it could cause him or her serious and irreversible psychological consequences, or even lead him or her to commit suicide, which is a matter for the referring court to determine in the light of all of the relevant information, in particular the medical information".[55]

In this last series of judgments, the ECJ referred extensively to ECtHR case law with regard to Art. 3 ECHR to determine the meaning and scope of Art. 4 of the Charter[56] under the so-called conformity clause set out in Art. 52(3) of the Charter itself.[57] As it will be analysed below, such judicial interaction can be seen as highly positive, even if weaknesses remain.[58]

Justitie en Veiligheidcase, case C-69/21. As far as the Return Directive is concerned, see also the famous *El Dridi* case, where the ECJ stressed that "[i]t must be borne in mind in that regard that recital 2 in the preamble to Directive 2008/115 states that it pursues the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and also their dignity" (para. 31). ECJ, judgment 28.4.2011, *Hassen El Dridi, alias Karim Soufi*, case C-61/11. In the same vein, see *inter alia* ECJ, Grand Chamber, judgment 17.7.2014, *Thi Ly Pham*, case C-474/13, para. 20; ECJ, Grand Chamber, judgment 19.6.2018, *Sadikou Gnandi*, case C-181/16, para. 48; ECJ, Grand Chamber, judgment 8.5.2018, *K.A. & others*, case C-82/16, para. 100.

[54] ECJ, Grand Chamber, *X*, cit., para. 57.

[55] ECJ, Grand Chamber, *X*, cit., para. 71.

[56] ECJ, Grand Chamber, *NS*, cit., paras. 88-90 and 111-112; ECJ, *C.K.*, cit., paras. 67-69; ECJ, Grand Chamber, *MP*, paras. 37-40; ECJ, Grand Chamber, *Abubacarr Jawo*, cit., paras. 91-93; ECJ, Grand Chamber, *X*, cit., paras. 60-65.

[57] Art. 52(3) of the Charter reads: "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 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".

[58] See *infra*, para. 5.

4. Human dignity: from the lack of explicit normative wording in the European Convention on Human Rights to increasing its relevance in the ECtHR case law with reference to migrants

Although the ECHR is explicitly based on the Universal Declaration of Human Rights, only since 2002 its text has included a reference to "dignity",[59] with the adoption of protocols, such as No. 13, ratified by 44 Council of Europe member States, which describes the abolition of the death penalty as "essential" for the protection of the right to life and "the full recognition of the *inherent dignity* of all human beings".[60]

Nonetheless, "respect for human dignity" has acquired utmost importance in the ECtHR jurisprudence, linked to the "very essence of the Convention", alongside human freedoms,[61] and permeates the Convention as a principle-value guiding its interpretation and application so as to ensure the safeguards are practical and effective.

In the ECtHR jurisprudence, the concept of dignity has mostly been used to reinforce the reasoning leading to a violation of specific rights guaranteed by the Convention,[62] such as the prohibition of torture, inhuman and degrading treatment enshrined in Art. 3, which is particularly relevant to the scope of this chapter.

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[59] A. KUTEYNIKOV, A. BOYASHOV (2017), *Dignity Before the European Court of Human Rights*, in E. SIEH, J. MCGREGOR (eds.), *Human Dignity: Establishing Worth and Seeking Solutions*, London, 83 ff.; E. WEBSTER (2018), *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights*, Abingdon.

[60] Protocol no. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, Vilnius, 3.V.2002.

[61] This statement, for example in *Pretty v. U.K.* (ECHR, judgment 29.4.2002, application no. 2346/02, *Pretty v. United Kingdom*, para. 65), and reiterated in several other judgments of the Strasbourg Court, links "respect for human dignity" to the object and purpose of the Convention as a whole. In this regard, see the critical remarks of V. FIKFAK, L. IZVOROVA (2022), *Language and Persuasion: Human Dignity at the European Court of Human Rights*, in *HRLR*, 1 ff. The authors underline that "although the Court may be seeking to persuade states in the legitimacy and authority of its judgments, the use of dignity does not appear to be a successful strategy if the Court's ultimate goal is to teach states how to better comply with the Convention", at 2.

[62] See J.P. COSTA (2013), *Human Dignity in the Jurisprudence of the European Court of Human Rights*, in C. MCCRUDDEN (ed.), *Understanding Human Dignity*, Oxford, 665 ff.; V. FIKFAK, L. IZVOROVA, *Language and Persuasion*, cit.

In this regard, the European Commission of Human Rights (which no longer exists) stressed in 1973 that the expression "degrading treatment" demonstrated that the general purpose of such a provision was to prevent particularly serious interferences with human dignity.[63] A few years later, in *Tyrer v. U.K.*, the Court explicitly referred to dignity to determine whether a punishment was "degrading" within the meaning of Art. 3.[64] In the Court's view, the fact that the applicant had been treated "as an object in the power of the authorities" constituted "an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity".[65] Again, in *Kudla v. Poland* the Court held that "[t]reatment is considered to be "degrading" when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance".[66]

More recently, an in-depth analysis of the implications for dignity can be found in *Bouyid v. Belgium*, where the Grand Chamber was asked to consider whether the beating of a minor and an adult in police custody violated Art. 3.[67] After recalling its established case law on the absolute nature of Art. 3, which enshrines one of the most fundamental values of democratic societies,[68] the ECtHR stressed the importance of human dignity within the Convention system and concluded that "[a]ny interference with human dignity strikes at the very essence of the Convention".[69] Accordingly, "any conduct by law-enforcement officers vis-à-vis

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[63] ECHR, *East African Asians v. UK*, decision 14.12.1973, applications nos. 4403/70 and 30 others, para. 192.

[64] ECHR, judgment 25.4.1978, application no. 5856/72, *Tyrer v. UK*, para. 33.

[65] *Ibidem*.

[66] ECHR, judgment 26.10.2000, application no. 30210/96, *Kudla v. Poland*, para. 92. See also e.g. ECHR, *Pretty*, cit., para. 52.

[67] ECHR, Grand Chamber, judgment 28.9.2015, application no. 23380/09, *Bouyid v. Belgium*. See paras. 81 ff.

[68] "Indeed, the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilization closely bound up with respect for human dignity". *Ivi*, para. 81. In fact, according to Art. 15(2) ECHR, no derogation from it is permissible, even in the event of a public emergency threatening the life of the nation. See, among others, E. WEBSTER, *Dignity, Degrading Treatment and Torture in Human Rights Law*, cit.

[69] *Ivi*, para. 101.

an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention. That applies in particular to their use of physical force against an individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question".[70]

In light of the above, it is not surprising that several references to dignity are made in cases of persons deprived of their liberty generally considered to be in a vulnerable situation. Although there is an inevitable element of suffering and humiliation in custodial measures, this does not in itself constitute a violation of Art. 3. According to the Court's settled case law on this provision, States must ensure that a person is detained in conditions "compatible with respect for human dignity", meaning that the manner and method of the execution of the measure must not expose them to distress or hardship of a degree exceeding the unavoidable level of suffering inherent in detention, and that their health and well-being are adequately safeguarded, having regard to the practical requirements of detention.[71]

These findings are *a fortiori* confirmed in relation to the detention of asylum seekers. For example, the ECtHR held that the detention of an asylum seeker for six days in a confined space, without the possibility of taking a walk, without a recreational area, sleeping on dirty mattresses and without free access to a toilet, is unacceptable under Art. 3.[72] Similarly, the detention of an asylum-seeker for three months at police premises pending the application of an administrative measure, without access to any recreational activities and without proper meals, was also considered as degrading treatment under Art. 3.[73]

In the landmark *M.S.S. v. Belgium and Greece* judgment, the Grand Chamber confirmed its previous case law on the conditions of detention of asylum-seekers, stressing that the increasing influx of migrants to which a State is subject does not absolve it from its obligations under

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[70] *Ibidem*.

[71] See, for instance, ECHR, *Kudła*, cit., paras. 92-94. Moreover, even the absence of an intention to humiliate or debase a detainee by placing him or her in poor conditions, while a factor to be taken into account, does not conclusively rule out a finding of a violation of Art. 3 of the Convention. See, *inter alia*, ECHR, judgment 19.4.2011, application no. 28524/95, *Peers v. Greece*, para. 74.

[72] ECHR, judgment 11.5.2009, application no. 53541/07, *S.D. v. Greece*, para. 51. Reference to dignity at para. 47.

[73] ECHR, judgment 26.11.2009, application no. 8256/07, *Tabesh v. Greece*, paras. 38-44. Reference to dignity at para. 36.

Art. 3.[74] Moreover, the ECtHR broke new ground in finding that the general living conditions to which the applicant in Greece was subjected amounted to a violation of the same provision. First, the Court took into account the fact that Greece was bound by legal obligations under the Reception Directive.[75] Moreover, it attached "considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection".[76] Accordingly, although Art. 3 does not contain a general obligation to provide asylum seekers with housing or financial assistance, the situation in which the applicant had "found himself for several months, living on the streets, with no resources or access to sanitary facilities, and without any means of providing for his essential needs" constituted "humiliating treatment showing a lack of respect for his dignity" and "aroused in him feelings of fear, anguish or inferiority capable of inducing desperation", which amounted to a violation of the provision in question.

In the same vein, in *N.H. & others v. France*, the ECtHR found that French authorities "must be held responsible for the conditions in which the applicants lived for months – on the streets, with no resources or access to sanitary facilities, lacking any means of providing for their essential needs and in constant fear of being attacked and robbed".[77] Indeed, the Court ruled that "the applicants were victims of degrading treatment that showed a lack of respect for their dignity and that this state of affairs undoubtedly aroused in them feelings of fear, anguish or inferiority capable of inducing despair".[78] In the Court's view, "the level of severity required for the purposes of Article 3 of the Convention was met by such living conditions, together with the lack of an appropriate response from the French authorities".[79] In fact, after submitting their asylum applications, due to administrative delays, the applicants were unable to receive the support

[74] ECHR, Grand Chamber, judgment 21.1.2011, application no. 30696/09, *M.S.S. v. Belgium and Greece*, paras. 220-234.

[75] *Ivi*, para. 263.

[76] *Ivi*, para. 251.

[77] ECHR, judgment 2.7.2020, application nos. 28820/13, 75547/13 and 13114/15, *N.H. and others v. France*, para. 184.

[78] *Ibidem*.

[79] *Ibidem*.

provided for by law and were therefore forced into homelessness.[80]

Turning to the post-*M.S.S.* case law on the material conditions of migrants detained by State authorities, worth recalling are a number of judgments that well illustrate the Court's reasoning as well as its ambiguities.

In *Rahimi v. Greece*, the ECtHR had to rule on the detention of a fifteen-year-old unaccompanied minor (asylum-seeker) from Afghanistan.[81] First, it emphasised that the applicant was in an extremely vulnerable position due to his age and personal circumstances, and that the authorities had failed to take into account his individual circumstances when detaining him.[82] The Court then pointed out that the conditions of detention in the centre, particularly the accommodation, hygiene and infrastructure, had been so bad as to undermine the very meaning of human dignity.[83] Accordingly, and notwithstanding the short duration of the detention, such conditions had in themselves amounted to degrading treatment in violation of Art. 3.

In the subsequent *Popov* case, which concerned the administrative detention of a Kazakh asylum-seeking couple with their two young children, the ECtHR found a violation of Art. 3 in relation to the children, but not their parents.[84] In this regard, Judge Power-Forde, in his Partly Dissenting Opinion, noted that "[t]his case raises an important question concerning the requisite threshold of suffering which an individual must endure before a violation of Article 3 will be found. The majority accept

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[80] The ECtHR reached a different conclusion in *N.T.P. and others v. France* (judgment 24.8.2018, application no. 68862/13) regarding the reception arrangements for a mother and her three young children waiting to lodge their asylum application. In this case, the ECtHR considered that the French authorities could not be accused of having remained indifferent to the situation faced by the applicants, who had been able to meet their most basic needs, namely food, hygiene, and a place to live.

[81] ECHR, judgment 5.4.2011, application no. 8687/08, *Rahimi v. Greece*. With regard to unaccompanied minors, see also ECHR, judgment 21.7.2022, application no. 5797/17, *Darboe and Camara v. Italy*, paras. 174-183. Very recently, see ECHR, judgment 17.10.2023, application no. 12427/22, *A.D. v. Malta* (reference to dignity at para. 112), concerning the detention in Malta of an Ivorian, allegedly being a minor, diagnosed with tuberculosis.

[82] *Ivi*, para. 86.

[83] *Ibidem*.

[84] ECHR, judgment 19.1.2012, applications nos. 39472/07 and 39474/07, *Popov v. France*.

that in view of their young age, the duration of their stay in a camp wholly unsuited to their needs and the conditions of their detention therein, the minor applicants were victims of a violation under Article 3. However, when it came to their parents, no such violation was found".[85] On the contrary, he took the view that "[t]he humiliating taunts that were levied against the young mother in this case, the menacing threats that were directed against her child and the overall treatment of these applicants in the conditions described at the Rouen-Oissel centre" amounted to a violation of Art. 3.[86] In conclusion, he stressed that "[p]ersons in the position of the first and second applicants are entitled to be treated with dignity and respect. They have committed no crime. They have exercised their right to seek asylum in a country governed by the rule of law. At every stage in the asylum process they retain the dignity that inheres in every human being. States may be entitled, in accordance with law, to detain illegal immigrants pending deportation but they are not entitled to forget that they are detaining human beings who have the absolute right not to be subjected to inhuman or degrading treatment".[87]

A few years later, the Grand Chamber delivered its well-known judgment in *Khlaifia and others v. Italy*, a case concerning the detention and expulsion of three Tunisian nationals attempting to reach Italian shores in the immediate aftermath of the Arab Spring. As a general rule, the Grand Chamber reiterated that, "having regard to the absolute character of Article 3, an increasing influx of migrants cannot absolve a State of its obligations under that provision […], which requires that persons deprived of their liberty must be guaranteed conditions that are compatible with respect for their human dignity".[88] However, "it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose", that is "the situation of extreme difficulty confronting the Italian authorities at the relevant time".[89] The Court also emphasised that the applicants had spent only a few days in the Lampedusa detention centre and were not in a vulnerable position.[90] On this basis, the

[85] ECHR, *Popov*, cit., Partly Dissenting Opinion of Judge Power-Forde.

[86] *Ibidem*.

[87] *Ibidem*.

[88] ECHR, Grand Chamber, judgment 15.12.2016, application no. 16483/12, *Khlaifia and others v. Greece*, para. 184.

[89] *Ivi*, para. 185.

[90] In the Grand Chamber's view, even if "the applicants were weakened

Grand Chamber overturned the conclusions of the Chamber[91] and found no violation of Art. 3.[92]

Subsequently, in *Z.A. and others v. Russia*, the Grand Chamber – reiterating that an increasing influx of migrants cannot relieve a State of its obligations under Art. 3 – held that the prolonged detention of four asylum-seekers in a Moscow airport transit zone violated Art. 3.[93] In its view, "a situation where a person not only has to sleep for months at a stretch on the floor in a constantly lit, crowded and noisy airport transit zone without unimpeded access to shower or cooking facilities and without outdoor exercise, but also has no access to medical or social assistance […] falls short of the minimum standards of respect for human dignity".[94]

To conclude this brief overview, three recent judgments are worth recalling, although they concern different situations. In *Safi and others v. Greece*, the ECtHR held that the conditions of body searches imposed on some survivors of a shipwreck were in breach of Art. 3. In fact, according to its well-established case law, such activity can consti-

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physically and psychologically because they had just made a dangerous crossing of the Mediterranean", they "were not asylum-seekers, did not have the specific vulnerability inherent in that status", "did not claim to have endured traumatic experiences in their country of origin", "they belonged neither to the category of elderly persons nor to that of minors", and "did not claim to be suffering from any particular medical condition". *Ibidem*, para. 194.

[91] The Chamber (Second Section, judgment 1.9.2015) "does not underestimate the problems encountered by the Contracting States when faced with exceptional waves of immigration" (para. 127). "Those factors cannot, however, exempt the respondent State from its obligation to guarantee conditions that are compatible with respect for *human dignity* to all individuals who, like the applicants, find themselves deprived of their liberty" (para. 128, emphasis added). Keeping this in mind, the Court noted that the available information "shows that the conditions of detention fell short of the standards prescribed by the international instruments in such matters and, in particular, of the requirements of Article 3" (para. 134). Accordingly, despite the short stay in the centre, the ECtHR does not "overlook the fact that the applicants, who had just undergone a dangerous journey on the high seas, were in a situation of vulnerability. Their confinement in conditions which impaired their *human dignity* thus constituted degrading treatment in breach of Article 3" (para. 135, emphasis added).

[92] In the same vein, see ECHR, judgment 28.1.2018, application no. 22696/16, *J.R. and others v. Greece*.

[93] ECHR, Grand Chamber, judgment 28.3.2017, applications nos. 61411/15, 61420/15, 61427/15 and 3028/16, *Z.A. and others v. Russia*, paras. 187-197.

[94] *Ivi*, para. 191.

tute an attack on human dignity.[95] Then, in the *J.A. and others v. Italy* judgment delivered in March 2023, the ECtHR had occasion to pronounce on issues very similar to those of *Khlaifia*, and after briefly recalling its previous case law (including references to dignity) partly departed from its 2016 reasoning and found a violation of Art. 3.[96] Finally, in *Camara v. Belgium* case, the Court was confronted with the situation of an applicant for international protection left without accommodation, despite the existence of a final decision ordering the Belgian Government to provide him urgently with housing and material assistance. In its judgment, delivered in July 2023, the ECtHR unanimously held that refusal by Belgian authorities to enforce a court order aimed at protecting asylum seeker's human dignity violated the very substance of the right to a fair trial, enshrined in Art. 6 ECHR.[97]

5. Embryonic expressions of "dialogue" between the European Courts (ECJ and ECtHR)

This brief examination has shown that both Courts (the ECtHR and the ECJ) recall the concept of dignity and interpret it in the light of the fundamental values (sometimes at least partially overlapping) that inspire both legal systems.

Are there elements of convergence in the jurisprudence of the two European Courts? Convergence is to some extent foreseeable *vis-à-vis* "corresponding" sources of law. In particular, reference is made to Art. 4 of the Charter, which according to Art. 52(3) corresponds to Art. 3 ECHR. This is a logical consequence of the fact that the Charter, as a new generation bill of rights, is largely open to pre-existing legal sources (*in primis*, ECHR) containing provisions "corresponding" to those of the Convention.

As seen,[98] the case law on Art. 4 of the Charter is a shining example of increasing judicial dialogue between the ECJ and ECtHR. In fact, in

[95] ECHR, judgment 7.7.2022, application no. 5418/15, *Safi and others v. Greece*, paras. 184-198.

[96] ECHR, judgment 30.3.2023, application no. 21329/18, *J.A. and others v. Italy*, paras. 58-67.

[97] ECHR, judgment 18.7.2023, application no. 49255/22, *Camara v. Belgium*, paras. 119 and 121.

[98] See *supra*, para. 3.

NS and *Jawo*, the Luxembourg Court based its interpretation on the *M.S.S.* judgment,[99] while in *C.K.*, *MP,* and *X* it referred mainly to *Paposhvili v. Belgium*[100] to define the scope of Art. 4.[101]

This does not mean that the ECJ passively transposes the reasoning of the ECtHR into its jurisprudence, but rather adapts it to the needs of the specific case, and more generally, to the particularities of the EU legal order. In *MP*, for example, the ECJ referred to dignity and ECtHR case law, but in the end upheld a restrictive interpretation of the concept of "inhuman or degrading treatment" in the Qualification Directive. On the contrary, in *X*, the same premises led to strengthening the protection afforded by EU Law. In other words, this cross-referencing seems to reflect elements of contradiction that connote the notion of dignity at the normative level, even if many questions on this point remain open.

In conclusion, as this chapter has shown, on the one hand, dignity is the guiding principle of old and new catalogues of rights and international instruments of various kinds, which find a common element in the respect of a value that does not deprive human dignity of semantic ambiguities that often invalidate its normative content. On the other hand, the persisting lack of a juridical definition of human dignity in international instruments is the logical consequence of the failure (if not the impossibility) of resolving what sometimes appear to be metajuridical issues.

Such circumstances are inevitably reflected in the persistent ambiguities that characterise the judicial reference to the notion of dignity as a unifying element in the affirmation of the indivisibility of human rights in relation to the rights of migrants. At the same time, they are reflected in the still embryonic nature of the aforementioned expressions of jurisprudential "dialogue" between the two Courts.

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[99] ECJ, Grand Chamber, *NS*, cit., paras. 88-90 and 112; ECJ, Grand Chamber, *Abubacarr Jawo*, cit., paras. 91-92.

[100] ECHR, Grand Chamber, judgment 13.12.2016, application no. 41738/10, *Paposhvili v. Belgium*.

[101] ECJ, *C.K.*, cit., para. 68; ECJ, Grand Chamber, *MP*, cit., paras. 38 and 40; ECJ, Grand Chamber, *X*, cit., paras. 61, 63 and 64.

Chapter 14

CRIMES AGAINST MIGRANTS AND REFUGEES, THE INTERNATIONAL CRIMINAL COURT, AND EU LEADERS' RESPONSIBILITY: A PERMANENTLY OPEN-ENDED RESPONSE AS TO SECURITY COUNCIL REFERRAL OF THE LIBYAN SITUATION?

Anna Oriolo

ABSTRACT: *The issue of crimes against migrants is a serious matter of global concern for States, international organizations and institutions, also involving the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) with regard to the abuses and ill-treatment of migrants and refugees in official and unofficial detention centres in Libya. In the context of continuing insecurity in Libya, the OTP collected and analysed information relating to serious and widespread crimes allegedly committed against migrants and refugees attempting to transit through Libya, including arbitrary detention, unlawful killing, enforced disappearance, torture, sexual and gender-based violence, abduction for ransom, extortion, and forced labour, potentially falling within the Court's jurisdiction. Without absolving human traffickers in Libya from their responsibilities, as extensively discussed by scholars, this study focuses on the more controversial and pioneering issue of the European Union (EU)'s role in the aforementioned acts and possible indictments of EU and EU member States' agents for crimes against migrants as a result of their personal involvement in the States' deterrence, criminalization, arrival prevention, and refoulement policies.*

> *"Those who seek to traffic and exploit migrants are targeting the most vulnerable members of society, those who have no ability to assert their core human rights"* [1]

[1] Statement of ICC Prosecutor K.A.A. KHAN, *Office of the Prosecutor joins national authorities in Joint Team on crimes against migrants in Libya*, 7.9.2022.

1. Introduction

Crimes against migrants, refugees, and asylum seekers is a serious matter of global concern for States, international organizations and institutions,[2] also involving the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) with regard to the abuse and ill-treatment of migrants and refugees in official and unofficial detention centres in Libya.[3]

Libya is in fact by far the preferred jumping-off point for refugees and migrants – especially from sub-Saharan Africa –[4] hoping to reach

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[2] I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.) (2022), *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli; R. DICKSON (ed.) (2022), *Migration Law, Policy and Human Rights*, London-New York; J.C. SIMON (ed.) (2022), *Serious International Crimes, Human Rights, and Forced Migration*, London-New York; C. DAUVERGNE (ed.) (2021), *Research Handbook on the Law and Politics of Migration*, Cheltenham-Northampton; J. MORITZ (ed.) (2021), *European Societies, Migration, and the Law*, Cambridge-New York-Port Melbourne-New Delhi-Singapore; G. CELLAMARE (2021), *La disciplina dell'immigrazione irregolare nell'Unione europea*, Torino; A. DI STASI (2021), *L'(in)effettività dello statuto del soggiornante di lungo periodo. Verso la riforma della direttiva 2003/109/CE fra criticità applicative e prassi giurisprudenziale*, in *Pap. dir. eur.*, 2, 9 ff.; I. CARACCIOLO (2017), *Migration and the Law of the Sea: Solutions and Limitations of a Fragmentary Regime*, in J. CRAWFORD, A.G. KOROMA, S. MAHMOUDI, A. PELLE (eds.) (2017), *The International Legal Order: Current Needs and Possible Responses*, Leiden-Boston, 274 ff.; P. GARGIULO (2018), *I diritti sociali dei migranti: il quadro normativo internazionale ed europeo*, in L. MONTANARI, C. SEVERINO (eds.) (2018), *I sistemi di welfare alla prova delle nuove dinamiche migratorie* (*Les systèmes de welfare à l'épreuve des nouvelles dynamiques migratoires*), Napoli, 31 ff.; M. CARTA (ed.) (2009), *Immigrazione, frontiere esterne e diritti umani: profili internazionali, europei e interni*, Roma; UN Security Council, for example, expressed concern that "the situation in Libya is exacerbated by the smuggling of migrants and human trafficking into, through and from the Libyan territory", which could provide support to other organised crime and terrorist networks in Libya, see S/RES/2240, 9.10.2015; S/RES/2380, 5.10.2017; S/RES/2388, 21.11.2018; S/RES/2486, 12.9.2019; S/RES/2542, 15.9.2020; S/RES/2510, 12.2.2020; S/RES/2570, 16.4.2021; S/RES/2656, 28.10.2022. In 2018, the United Nations Security Council imposed targeted sanctions on six men in Libya accused of leading brutal human trafficking networks across the Mediterranean and violence against migrants.

[3] ICC Prosecutor, *Twenty-third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)*, 21.4.2022, available online, para. 5.

[4] Most refugees and migrants arrive irregularly in Libya through Sudan (for those from East Africa), Niger (for those from West and Central Africa), or to

Europe since former leader Muammar Gaddafi's overthrow in 2011 when the country descended into factional conflict, widespread instability, and a humanitarian and economic crisis that made it particularly unsafe, namely a "marketplace for the trafficking of human beings". [5]

In the context of continuing insecurity in Libya, the OTP collected and analysed information relating to serious and widespread crimes allegedly committed against migrants and refugees attempting to transit through Libya, potentially falling within the ICC's jurisdiction, [6] including arbitrary detention, unlawful killing, enforced disappearance, torture, sexual and gender-based violence, abduction for ransom, extortion, and forced labour. [7]

The 2022 ICC Prosecutor Report to the United Nations (UN) Security Council (SC) confirmed the OTP's preliminary assessment that these crimes "may constitute crimes against humanity and war crimes". [8] These conclusions appear widely consistent with some Communications submitted to the ICC Prosecutor under Art. 15 of the Rome Statute [9]

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a lesser extent, Algeria (for those from West Africa). Routes through Sudan sometimes cross into Chad and routes through Niger in some cases pass through Algeria. See UNHCR, *Report on Mixed Migration Trends in Libya: Changing Dynamics and Protection Challenges Evolution of the Journey and Situations of Refugees and Migrants in Southern Libya*, 3.7.2017, available online.

[5] Statement of ICC Prosecutor to the UNSC *on the Situation in Libya*, 9.5.2017, available online, para. 27. The ICC Prosecutor clarified that "The situation is both dire and unacceptable, demanding a concerted response by the relevant actors to address these serious trends of criminality", id., para. 28.

[6] ICC Prosecutor, *Statement to the United Nations Security Council on the Situation in Libya*, cit.: "I take this opportunity before the Council to declare that my Office is carefully examining the feasibility of opening an investigation into migrant-related crimes in Libya should the Court's jurisdictional requirements be met" (para. 29). See also ICC Prosecutor, *Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)*, 8.11.2017, available online, para. 41.

[7] See the *Report of the UN Independent Fact-Finding Mission on Libya to the Human Rights Council*, 27.5.2022, A/HRC/50/6, available online.

[8] ICC Prosecutor, *Twenty-fourth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)*, 9.11.2022, available online, para. 68.

[9] Pursuant to Art. 15 of the Rome Statute, any individual, group, or organization can send information on alleged or potential crimes to the OTP of the ICC. Before an OTP investigation can open, the ICC Prosecutor is responsible for determining whether a situation meets the legal criteria laid out by the

alleging, *inter alia*, that abuses and horrific crimes against migrants in Libya had been committed following European Union (EU) States' *deterrence, criminalization, arrival prevention, and refoulement policies*, and as a consequence, individual criminal responsibility of EU officials before the ICC.[10]

Without absolving human traffickers in Libya from their responsibilities, as scholars have extensively discussed,[11] this study focuses on the more controversial and pioneering issue of the EU's role in these acts and the possible indictments of EU (and EU member States') agents[12]

Rome Statute. See e.g., the Communications submitted to the ICC Prosecutor under Art. 15 of the ICC Statute on *EU Migration Policies in the Central Mediterranean and Libya (2014-2019)*, 3.6.2019, available online ("2019 Communication"), and on *War Crimes and Crimes Against Humanity Committed Against Migrants and Asylum Seekers in Libya* (concerning, in particular, the involvement of Italian and Maltese authorities, available online ("2022 Communication").

[10] The Communications submit, *inter alia*, that through a complex mix of legislative acts, administrative decisions, and formal agreements, the EU and its Member States intentionally provided the Libyan Coast Guard with material and strategic support, including but not limited to vessels, training, and command & control capabilities to intercept migrants seeking to exit Libya and forcibly transfer them to detention facilities, where crimes were (and still are) committed (see 2019 Communication, cit., paras. 1-403).

[11] A. AZIANI, R.T. GUERETTE, E.U. SAVONA (eds.) (2022), *The Evolution of Illicit Flows: Displacement and Convergence Among Transnational Crime*, Cham.

[12] Including the EU Commission, EUNAVFOR MED, and Frontex. The list of alleged responsible includes: former and present Maltese Prime Ministers, the Armed Forces of Malta (AFM) Head of Plans and Intelligence, a former Special Envoy of the Office of the Prime Minister, and members of the Rescue Coordination Centre (RCC) Malta and the AFM; Italian former Ministers of the Interior, the former Chief of Staff of the Minister of the Interior, the Commander General of the Italian Coast Guard, the Commander of Maritime Rescue Coordination Centre (MRCC) Rome, and members of the Italian MRCC; the Operation Commander and the Force Commander of EUNAVFOR MED Operation Sophia, crew members of EUNAVFOR MED aerial and naval assets; Frontex former Executive Director, former Head of Surveillance Sector, former Head of Situation Center (FSC) and Head of Situational Awareness and Monitoring Division, and officials participating in Joint Operation Themis, the FSC, or Multipurpose Aerial Surveillance (MAS); former High Representative of the Union for Foreign Affairs and Security Policy, former European External Action Service (EEAS) Deputy Secretary General, former Chairperson of the EU Political and Security Committee (PSC); the former Prime Minister of the Libyan Government of National Accord (GNA), the Foreign Minister,

for crimes against migrants as a result of their personal involvement in the aforementioned policies. [13]

In this perspective, the purpose of this chapter is to offer a much wider legal basis for future international criminal investigations fighting impunity that attend to violations committed against refugees and migrants in irregular situations along their journey, addressing the (criminal) responsibilities of EU actors before the ICC with regard to their involvement in migratory policies as part of an intentional plan in the full and real-time knowledge of the lethal consequences.

2. State and non-State actors' responsibility for crimes against migrants

Around the world, migrants are victims of widespread and serious human rights violations, including torture, murder, enslavement, deportation, forcible transfer, arbitrary detention, rape, sexual slavery, forced prostitution, and other forms of sexual violence, persecution, enforced disappearance, apartheid, and other similar inhumane acts. [14]

These violations are often perpetrated by criminal groups, the aggressive behaviour of local populations, or the deliberate policies and practices of States aimed at deterring, punishing, or controlling irregular migration. [15]

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the Interior Minister, the Deputy Prime Minister, the former and present Ministers of Defence, former and current Head of the Directorate for Combating Illegal Migration (DCIM), members of the Libyan Coast Guard, and members of militias and armed groups operating nominally under the DCIM, and the crew of Libyan merchant vessels involved in interceptions. See European Center for Constitutional and Human Rights (ECCHR), *Situation in Libya Article 15 Communication to the ICC Prosecutor on the Commission of Crimes Against Migrants and Refugees: Interceptions at Sea and Return to and Detention in Libya are Crimes Against Humanity, Executive Summary*, 15.4.2022, available online, para. 24.

[13] See 2019 Communication, cit., para. 406: "As the European Union acts on behalf of its State Members, responsibility also extends to the heads of government, high-civil servants and political leaders involved in the decision-making of the organization".

[14] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 26.2.2018, A/HRC/37/50, available online; see also the 2022 Report, 3.10.2022, A/77/502, available online, para. 10.

[15] As explained by "To avoid mass migration across their borders, some States are relying on the policy of extraterritoriality to stop migrants before

In addition to the international responsibility of States for violating their obligation "not to put a person in a position where he will or may suffer [human rights abuses] at the hands of another State" or non-State actor within that State,[16] individual criminal responsibility of policymakers and other high-ranking officials, corporate managers, and private citizens may be attributed under applicable international customary and treaty law for their (personal) involvement in shaping, promoting, and implementing institutional policies and practices that may constitute co-perpetration, complicity, or other participation in crimes against humanity or war crimes.[17]

An assumption that is not entirely unfounded.

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they reach their territory or come within their jurisdiction or control. Such policies may include assisting, funding or training agencies in other countries to arrest, detain, process, rescue or disembark and return refugees or migrants. These policies raise serious concerns when the recipient agencies or States are alleged to be responsible for serious human rights violations, including violations of the right to life". See Human Rights Council, *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, unlawful death of refugees and migrants*, 15.8.2017, A/72/335, available online, para. 36.

[16] See ECHR, Plenary, judgment 7.7.1989, application no. 14038/88, *Soering v. The United Kingdom*, para. 82; ECHR, Grand Chamber, judgment 23.2.2012, application no. 27765/09, *Hirsi Jamaa and others v. Italy*, para. 131 (Italy "knew or should have known" migrants would receive no protection in Libya); United Nations Committee against Torture, *J.H.A. v. Spain*, Communication no. 323/2007, Decision 10.11.2008 (jurisdiction with State exercising control over person). More precisely "By financing and training the very agencies that commit these abuses, funding States are potentially aiding and assisting loss of life" and other human rights violations under Art. 15 of the International Law Commission Draft articles on the Responsibility of States for Internationally Wrongful Acts; this provision states that: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State" (see 2022 Report A/72/335, cit., para. 37).

[17] A. PASQUERO (2020), *La Comunicazione alla Corte Penale Internazionale sulle responsabilità dei leader europei per crimini contro l'umanità commessi nel Mediterraneo e in Libia. Una lettura critica*, in *Dir., Imm. e Cittad.*, 1, 51 ff.; C. MELONI, M. CRIPPA (2017), *Sullo stato delle indagini in Libia e la mancanza di cooperazione con la Corte penale internazionale*, in *Riv. it. dir. proc. pen.*, 3, 1228 ff.; M. MILANOVIC (2011), *Is the Rome Statute Binding on Individuals? (And Why We Should Care)*, in *J. Int. Crim. Justice*, 1, 25 ff.; I.B. BONAFÉ (2009), *The Relationship Between State and Individual Responsibility for International Crimes*, Leiden-Boston.

Focusing on the mass casualties of refugees and migrants in the course of their flight, the UN Special Rapporteur of the Human Rights Council on extrajudicial, summary, or arbitrary killings, Agnes Callamard, clarified in her 2017 Report to the UN General Assembly that the criminalization of migrants around the world and several documents concerning the management of external European Union borders [18] contributed to developing national policies of deterrence, militarization, and extraterritoriality, implicitly or explicitly tolerating the risk to migrants as part of effective entry control. [19] In addition, she reported that "non-governmental organizations are under increasing pressure from the European Union, which is undermining, if not preventing, their efforts", suggesting that should the jurisdictional requirements of the ICC be met, investigations into crimes by State officials and non-State actors against refugees and migrants ought to be opened. [20]

Similarly, the UN Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Nils Melzer, expressly noted in his 2018 Report that "States and the ICC-Prosecutor should examine whether investigations for crimes against humanity or war crimes are warranted in view of the scale, gravity and increasingly systematic nature of torture, ill-treatment and other serious human rights violations suffered by millions of migrants in all regions of the world, as a consequence of corruption and crime, but also as a direct or indirect

[18] In the Regional study on the management of the external borders of the European Union and its impact on the human rights of migrants, the UN Special Rapporteur on the human rights of migrants, F. Crépeau clarified that "numerous European Union migration policy documents, and especially Council conclusions and legislative acts, also continue to use the expressions 'illegal migration' and 'illegal migrants' and lamented the linking of irregular migration with crime and security concerns. Using incorrect terminology that negatively depicts individuals as 'illegal' contributes to the negative discourses on migration, and further reinforces negative stereotypes of irregular migrants as criminals" (see Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, Francois Crépeau*, 24.4.2013, A/HRC/23/46, available online, para. 35).

[19] United Nations General Assembly, *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Unlawful death of refugees and migrants*, 15.9.2017, A/72/335, available online, para. 10.

[20] *Ivi*, paras. 65, 55.

consequence of deliberate State policies and practices of deterrence, criminalization, arrival prevention, and refoulement".[21]

Finally, the 2019 Art. 15 Communication to the OTP provides evidence implicating EU and member States' officials and agents in crimes against humanity, committed as part of "premeditated" policies resulting in i) death by drowning of thousands of migrants, ii) the refoulement of tens of thousands of migrants attempting to flee Libya, and iii) complicity in the subsequent crimes of deportation, murder, imprisonment, enslavement, torture, rape, persecution, and other inhuman acts taking place in Libyan detention camps and torture houses.[22] Likewise, the 2022 Art. 15 Communication detailed that from 2016/2017, the EU and European States, including Italy and Malta, shifted their efforts from rescue activities to reducing arrivals along the Central Mediterranean Route while increasing the migrant population detained in Libya.

More precisely, the EU, Italian, and Maltese authorities allegedly adopted a series of measures to increase the Libyan Coast Guard's ability to intercept migrants at sea and co-opt local communities in Libya in anti-smuggling efforts that "contributed" to the commission of crimes suffered by migrants detained in Libya.[23]

If proven, the question remains as to whether high-ranking officials of EU member States and EU agencies could be prosecuted by the ICC for crimes committed in Libya as a result of these measures.

3. ICC jurisdiction in the Libyan situation

Libya is not State Party to the Rome Statute. However, on 26 February 2011, the UNSC unanimously referred the Libyan situation to the ICC with Resolution 1970.[24] A first legal basis of ICC jurisdiction over crimes against migrants can be found in the wording of the SC referral that

[21] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, cit., para. 64.

[22] 2019 Communication, cit., para. 1.

[23] 2022 Communication, cit., para. 448.

[24] Libya is not State Party to the Rome Statute. However, on 26 February 2011, the Security Council voted unanimously to impose sanctions against the Libyan authorities, slapping the country with an arms embargo and freezing the assets of its leaders, while referring the ongoing violent repression of civilian demonstrators to the International Criminal Court (ICC). See UN Security Council, *Resolution 1970 (2011)*, 26.2.2011, S/RES/1970.

condemned the violence and use of force against civilians, deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the death of civilians, and unequivocally rejecting the incitement to hostility and violence against the civilian population from the highest level of the Libyan government, then under Muammar Mohammed Abu Minyar Gaddafi.[25] In particular, the 1970 Resolution underlined that "the widespread and systematic attacks against the civilian population may amount to crimes against humanity", expressing concern at the plight of refugees forced to flee the violence and the reported shortages of medical supplies to treat the wounded.[26]

The investigation, which opened in March 2011, has thus far produced three cases (*Gaddafi*, *Khaled*, and *Al-Werfalli*)[27] involving crimes against humanity (i.e., murder, imprisonment, torture, persecution, and other inhumane acts) and war crimes (i.e., murder, torture, cruel treatment, and outrages upon personal dignity) committed in the context of the situation in Libya since 15 February 2011.[28]

To date, none of the Libyan cases pending before the ICC includes crimes against migrants and refugees. However, ICC jurisprudence established that "a referral cannot limit the Prosecutor to investigate only certain crimes, e.g. crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed

[25] S/RES/1970, preamble.

[26] *Ibidem*.

[27] ICC, Pre-Trial Chamber I, warrant of arrest 15.8.2017, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, ICC-01/11-01/17-2; ICC, Pre-Trial Chamber I, Second Warrant of Arrest 4.7.2018, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, ICC-01/11-01/17-13; ICC, Pre-Trial Chamber I, decision on the Prosecutor's application pursuant to Art. 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi 27.6.2011, *The Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11-1; ICC, Pre-Trial Chamber I, warrant of arrest 18.4.2013, *The Prosecutor v. Al-Tuhamy Mohamed Khaled*, ICC-01/11-01/13-1.

[28] The arrest warrant against Muammar Mohammed Abu Minyar Gaddafi was withdrawn, on 22 November 2011, due to his death. Case against Abdullah Al-Senussi was declared inadmissible on 11 October 2013. On 7 September 2022, proceedings against Al-Tuhamy Mohamed Khaled, terminated following his death. On 15 June 2022, ICC Pre-trial Chamber I terminated proceedings against Mahmoud Mustafa Busayf Al-Werfalli, following the Prosecution's notification of his passing and request to withdraw the arrest warrants.

within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated".[29]

Again, in the *Al-Werfalli* case, the ICC Pre-Trial Chamber found that there were reasonable grounds to believe that an armed conflict not of an international character had been taking place on the territory of Libya between government forces and various organised armed groups, or among various such armed groups, since at least the beginning of March 2011.[30] This direct link between the armed conflict in Libya and the commission of war crimes against migrants and refugees could therefore allow the ICC to extend its jurisdiction to these violations and include them in the situation under investigation by the OTP since 2011.

In this perspective, there are strong reasons to believe that the Prosecutor would not need to open a new investigation specifically into crimes against migrants, given the pending investigation of the situation in Libya and the possibility of conducting a preliminary examination of the events in question to complete it. If the Prosecutor were to find otherwise, preferring to open a new investigation to strengthen the legitimacy of action, in compliance with Art. 53 of the ICC Statute, he/she shall determine there are reasonable grounds to believe that: a) these offences fall within the Court's jurisdiction (personal, temporal, territorial, and material); b) the case is or would be admissible under Art. 17 of the ICC Statute; and c) taking into account the gravity of the crimes and the interests of victims, extending the investigation to serve the interests of justice.[31]

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[29] ICC, Pre-Trial Chamber I, decision on the "Defence Challenge to the Jurisdiction of the Court", 26.10.2011, *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-451, para. 27. See also the case of ICC, Pre-Trial Chamber I, decision on the prosecution's application for a warrant of arrest against Omar Hassan Ahmad Al Bashir 4.3.2009, *The Prosecutor v. Omar Al Bashir*, ICC-02/05-01/09-3, para. 45. O. TRIFFTERER (ed.) (2008), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., München/Oxford/Baden-Baden, 579.

[30] ICC, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Warrant of Arrest, cit., para. 25. See also ICC, *The Prosecutor v. Mustafa Busayf Al-Werfalli*, Second Warrant of Arrest, cit., para. 9. Similarly, the 2012 UN Commission of Inquiry Report stated that "By late February, an armed conflict had developed between armed opposition forces and Government forces" (para. 30). See Human Rights Council, *Report of the International Commission of Inquiry on Libya*, 28.1.2014, A/HRC/19/68, available online.

[31] See Art. 53, ICC Statute.

4. Offences against migrants and refugees in Libya as crimes under the ICC's jurisdiction

Art. 25(1) of the Rome Statute restricts ICC personal jurisdiction to natural persons. Therefore, the ICC cannot investigate or prosecute legal persons (i.e., governments, corporations, political parties, or rebel movements), but only nationals of a State or members of such legal persons due their potential involvement in the alleged crimes.

Concerning individual responsibility of EU and member States' agents under the general principles of international criminal law, the fact that the person who committed an act that constitutes a crime under international law acted as a Head of State or government official in charge does not relieve him/her from criminal responsibility.[32] International jurisprudence recently confirmed that neither State practice nor *opinio juris* would support the existence of immunity of a Head of State or high-ranking official under customary international law *vis-à-vis* an international court. To the contrary, as the ICC explained in the *Al Bashir* case, "such immunity has never been recognized in international law as a bar to the jurisdiction of an international court".[33] In addition, under Art. 12 of the cooperation and assistance agreement between the EU and the ICC, the EU is obliged to take all necessary measures to enable the Court to exercise its jurisdiction, in particular by waiving any

[32] See Art. 29, Council Regulation 2017/1939/EU, *implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO Regulation')*, 12.1.2017, in OJ L283, 31.10.2017, 1 ff.; Art. 27, Rome Statute of the International Criminal Court, 17.7.1998; Art. 6, Statute of the International Tribunal for Rwanda, United Nations Security Council 955, 8.11.1994 (and subsequent amendments); Art. 7, Statute of the International Criminal Tribunal for the former Yugoslavia, United Nations Security Council 827, 25.5.1993 (and subsequent amendments); Art. 6, Charter of the International Military Tribunal for the Far East, 19.1.1946 (and subsequent amendments); Art. 7, Charter of the International Military Tribunal, Annex 1 to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8.6.1945.

[33] ICC, Appeals Chamber 6.5.2019, judgment in the Jordan referral re Al-Bashir Appeal, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-397, para. 113. See ICC, Appeals Chamber 6.5.2019, joint concurring opinion of judges Eboe-Osuji, Morrison, Hofmański and Bossa, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC02/05-01/09-397-Anx1, paras. 52-174.

privileges and immunities in accordance with all relevant rules of international law.[34]

The only limit to ICC jurisdiction *ratione personarum* in the Libyan situation concerns nationals, current or former officials, or personnel from a State outside Libya that is not party to the Rome Statute, subject to the exclusive jurisdiction of that State (unless expressly waived by the State).[35]

Against this background, crimes against migrants and refugees committed by EU and EU member State officials in the Libyan situation may fall under ICC personal jurisdiction.

In terms of the ICC's temporal jurisdiction, the alleged crimes are certainly deemed subject to the Court's jurisdiction, as they were committed after entry into force of the Rome Statute for each EU member State in line with Art. 11 of the Statute. In addition, the 1970 SC Resolution does not limit ICC jurisdiction *ratione temporis*, as it covers crimes committed from 15 February 2011 onwards if linked to the situation referred to by the SC.

More arduous is assessing the ICC's *ratione loci* jurisdiction over the alleged crimes.[36] A first difficulty relating to the Court's territorial jurisdiction could depend on, for example, the wording of Art. 12(a) of the ICC Statute, limiting the Court's jurisdiction to crimes committed in the territory of a State Party to the Rome Statute, and Libya, as mentioned, is not. However, the territorial scope of Art. 12(2)(a) refers to Art. 13(a) or (c) of the Rome Statute (i.e., referral to the ICC by a State Party or ICC Prosecutors' *motu proprio* investigation, respectively), and does not apply if "a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations", under Art. 13(b), as in the Libyan situation.

The additional and prevailing perplexities on the territorial scope of the Court's jurisdiction for crimes against migrants and refugees in detention facilities could refer to the circumstance that certain material and mental elements of these crimes, such as EU agents' decision-

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[34] ICC, *Agreement between the International Criminal Court and the European Union on Cooperation and Assistance*, 10.4.2006, ICC-PRES/01-01-06.

[35] S/RES/1970, cit., para. 6.

[36] M. VAGIAS (2014), *The Territorial Jurisdiction of the International Criminal Court*, Cambridge.

making processes,[37] took place outside the Libyan territory (i.e., mainland and territorial waters), for example, in Brussels or other EU institutional seats.

Therefore, the question at hand is whether and how the territorial principle ought to be applied to offences connected to more than one State,[38] and whether the ICC's jurisdiction encompasses only those present in the territory of Libya or all those involved who may have ordered, aided, or tolerated the commission of crimes on Libyan soil while situated abroad.

Customary international law governing the extraterritorial jurisdiction of States in criminal matters, as well as the general principles of the interpretation of treaties as applied by international jurisprudence, may help in answering this question.

In the *Bangladesh/Myanmar* case, for example, the ICC looked at State practice to establish under which circumstances it may exercise jurisdiction over transboundary crimes on the basis of the territoriality principle.[39]

With regard to situations allowing domestic prosecuting authorities to assert territorial jurisdiction in transboundary criminal matters, the ICC State Practice Survey highlighted a number of principles and theories, including:

a) the principle of "objective territoriality" whereby a State may assert territorial jurisdiction if the crime was initiated abroad but completed in the State's territory;
b) the principle of "subjective territoriality" whereby a State may assert territorial jurisdiction if the crime was initiated in the State's territory but completed abroad;
c) the principle of "ubiquity" whereby a State may assert territorial jurisdiction if the crime took place in whole or in part on the territory of the State, irrespective of whether the part occurring on the territory is a constitutive element of the crime;

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[37] See, for example, Communication 2019, cit., para. 909 ff.

[38] C. RYNGAERT (2009), *Territorial Jurisdiction over Cross-frontier Offences: Revisiting a Classic Problem of International Criminal Law*, in *Int. Crim. Law Rev.*, 1, 187 ff.

[39] Decision Pursuant to Art. 15 of the Rome Statute *on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar*, 14.11.2019, para. 55 ff.

d) the "constitutive element theory" whereby a State may assert territorial jurisdiction if at least one constitutive element of the crime occurred on the territory of the State;
e) the "effects doctrine" whereby a State may assert territorial jurisdiction if the crime took place outside the State territory but produced effects within the territory. [40]

In accordance with this assessment, customary international law governing *locus commissi delicti* (the place where the crime was committed) enables States to assert territorial criminal jurisdiction over cross-boundary conduct as long as there is a link with their territory.

By analogy, ICC territorial jurisdiction over crimes committed in part outside the Libyan territory by EU agents could also be considered in conformity with international law.

Furthermore, this approach would also seem consistent with the principle of good faith (including the effective) interpretation of treaties [41] (*ut res magis valeat quam pereat*), rejecting any interpretation that would nullify or render a provision of the Statute inoperative. [42]

It follows that a restrictive reading of the Rome Statute, which would deny the Court's jurisdiction on the basis that one or more elements of a crime within the Court's jurisdiction or part of such a crime was committed on the territory of a State not party to the Statute (in the case of Art.13(a) or (c)), or not expressly covered by SC deferral (in the case of Art. 13(b)), would not be in keeping with such object and purpose.

Accordingly, in compliance with the relevant rules of international law and in light of the object and purpose of the Statute, the Court may assert its territorial jurisdiction if at least one element or part of a crime within its jurisdiction has been committed on the territory of Libya.

Regarding the ICC's material competence, Art. 5 of the Statute limits

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[40] *Ivi*, para. 56.

[41] *Ivi*, para. 59 ff.

[42] In the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III noted in fact that: "[A] teleological interpretation which is mirrored in the principle of effectiveness and based on the object and purpose of a treaty means that the provisions of the treaty are to be 'interpreted so as to give it its full meaning and to enable the system [...] to attain its appropriate effects', while preventing any restrictions of interpretation that would render the provisions of the treaty 'inoperative'". ICC, Pre-Trial Chamber III, Decision adjourning the hearing pursuant to Art. 61(7)(c)(ii) of the Rome Statute 3.3.2009, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-388, para. 36.

the Court's jurisdiction "to the most serious crimes of concern to the international community as a whole", namely genocide, war crimes, crimes against humanity, and the crime of aggression.

As confirmed by the ICC Prosecutor in his last report to the UN Security Council, the OTP's work in this area has yielded a wide range of credible information pointing to large-scale violent crimes committed against migrants and refugees on the route between the Horn of Africa, Libya, and Europe,[43] leading to a (preliminary) assessment that offences against migrants and refugees in Libya may constitute crimes against humanity and war crimes,[44] thus falling within the ICC's *ratione materiae* jurisdiction.

As for the admissibility requirement, it comprises the complementarity test and the gravity standard.

The complementarity test is case-specific and relates to whether genuine investigations and prosecutions have been or are being conducted in the State concerned in respect of the case(s) identified by the Office. To date, with the exception of some national criminal proceedings against human smugglers, no high-ranking official has been prosecuted by EU member States or the Libyan authorities for the crimes in question[45] (i.e., in connection with EU and member States' migratory policies) since the 2012 European Court of Human Rights *Hirsi* decision regarding Italy's "push-back" policy towards Libya during the Gaddafi regime,[46] the latest relevant judicial proceeding implying an assessment of the legality of institutional migratory policies. As the ICC noted in the *Katanga* case, such domestic inaction is sufficient to make the case admissible, as the question of unwillingness or inability does not arise, and the Office does not need to consider the other factors set out in Art. 17 of the Statute.[47]

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[43] ICC Prosecutor, *Twenty-fourth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)*, 9.11.2022, para. 37.

[44] *Ivi*, para. 68.

[45] The UN Fact-Finding Mission on Libya confirmed the "absence of accountability" for such abuses in Libya. See Human Rights Council, *Report of the UN Independent Fact-Finding Mission on Libya,* 1.10.2021, A/HRC/48/83, para. 60.

[46] ECHR, *Hirsi Jamaa and others v. Italy*, cit.

[47] ICC, Appeals Chamber, judgment on the appeal of Mr Germain Katanga against the oral decision of Trial Chamber II of 12 June 2009 on the admissibil-

In deciding whether to open an investigation, the ICC Prosecutor must also consider if the alleged crimes are of sufficient gravity under Arts. 17 and 53 of the ICC Statute to warrant further action by the Court. Given the documented scale, nature, manner of commission of the crimes and their impact,[48] it appears very difficult to argue that the gravity threshold has not been met in the case of crimes against migrants in Libya.

Specifically, the scale of the crimes was extremely broad both in time (2013-2018) and space, spreading across Libyan soil and territorial waters, the high seas of the Mediterranean, and the territories of frontline EU member States, with tens of thousands of victims (direct and indirect) from all over Africa, i.e., vulnerable civilians due to their migrant status, including many women and children, with no political power or legal standing, indefinitely detained, abused, and trafficked.

As for the nature and method, various crimes, such as sexual violence, physical and psychological abuse and intimidation, inhumane treatment, as well as the deprivation of adequate water and food, were common abuses systematically perpetrated in Libyan detention centres that seriously impacted the migrants and their families, causing long-term suffering for the victims, suicides, and attempted suicides.[49]

In light of these considerations, it is inconceivable that the interests of victims would be served by a decision to not pursue and prosecute acts and omissions that led to considerable casualties and are within the Court's jurisdiction. Moreover, the interests of justice are a "negative" requirement, as there is a presumption in favour of investigations, and only in exceptional circumstances will the ICC Prosecutor conclude that an investigation or a prosecution may not serve these interests.[50]

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ity of the case 25.9.2009, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1497, para. 78. See also ICC, Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, 2013, para. 47.

[48] ICC, Pre-Trial Chamber I, Decision on the Confirmation of Charges 8.2.2010, *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, para. 3. See also ICC, *Policy Paper on Preliminary Examinations*, cit., para. 47. On the crimes against migrants in the Libyan detention centres see, *inter alia*, Human Rights Council, *Report of the UN Independent Fact-Finding Mission on Libya*, cit., paras. 57-58.

[49] 2022 Communication, cit., para. 547.

[50] ICC, Office of the Prosecutor, *Policy Paper on the Interests of Justice*, 9.2007, available online.

5. Conclusions

The above observations would seem to confirm that there are no legal impediments to the potential responsibility of EU and member States officials for crimes committed in Libya against migrants and refugees.

Moreover, the recent arrest warrant issued by the ICC against the President of the Russian Federation, Vladimir Putin, confirms *the immateriality of official capacity* for the prosecution of *crimina juris gentium*.[51] Indeed, since the Nuremberg Trials, the high-ranking position of alleged perpetrators of international crimes has been a determining element of the precise *ratione personarum* jurisdiction of international criminal tribunals, focusing on the "major war criminals" of the European Axis in the Nuremberg Charter, the "most senior leaders" suspected of responsibility for crimes within the jurisdiction of the ICTY and ICTR in the Tribunals' Completion Strategy, and "those most responsible for the identified crimes" in the OTP Policy on ICC Case Selection and Prioritization.[52]

The only remaining legal questions may concern the potential and alternative forms of liability for the commission of the alleged crimes, such as individual responsibility for having committed the acts directly, jointly and/or through others (under Art. 25(3)(a) of the Rome Statute), and/or superior responsibility for failing to exercise proper control over civilian and military subordinates who committed or permitted the commission of the acts, and who were under their effective authority and control (under Art. 28(b) of the Rome Statute).

Of course, we cannot fail to mention that Art. 54 of the Rome Statute requires the Prosecutor to investigate both incriminating and exculpatory circumstances in order to establish the truth. However, we be-

[51] On 17 March 2023, Pre-Trial Chamber issued two arrest warrants for Mr. Vladimir Vladimirovich Putin and Ms. Maria Alekseyevna Lvova-Belova, allegedly responsible for the war crimes of unlawful deportation of a population (children) and unlawful transfer of a population (children) from the occupied territories of Ukraine to the Russian Federation. The Chamber kept these arrest warrants secret in order to protect victims and witnesses, and to safeguard the investigation.

[52] While the notion of the "most responsible does not necessarily equate with the *de jure* hierarchical status of an individual within a structure", any abuse of power or official capacity is a relevant criterion in assessing the degree of responsibility of alleged perpetrators. See ICC, Office of the Prosecutor, *Policy on Case Selection and Prioritization*, 15.9.2016, paras. 42-43.

lieve that any investigation of such high-level personalities of the EU and its member States is destined to remain an open question, as it would expose the ICC to the potential vulnerability of political legitimacy, given that European countries are currently among its most ardent supporters, and above all at a time when the Court's authority is strongly questioned by the growing discontent (and withdrawal) of African States and the low number of ratifications in the last decade.

Chapter 15

REFUGEE STATUS, TERRORISM, AND PUBLIC SECURITY: THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND EUROPEAN UNION LAW IN LIGHT OF RECENT EU COURT OF JUSTICE CASE LAW

Michele Nino

ABSTRACT: *This chapter examines the relationship between the fight against terrorism and the recognition of international refugee status in light of the relevant international and European Union legislation and European Court of Justice case law. In particular, the first part analyses the 1951 Refugee Convention and related EU legislation containing similar clauses excluding those who have committed certain crimes from obtaining refugee status. The analysis also considers whether acts of terrorism fall within the scope of these exclusion clauses. The second part examines some decisions of the CJEU that define the criteria for classifying acts of terrorism in the context of the exclusion clauses in question. Finally, the third part highlights the important role of the Luxembourg Court in clarifying international law on refugee matters through the interpretation of EU law.*

status. – 4.1. The *B and D* case: the exclusion of automatism between membership of a terrorist organization and the application of the exclusion clauses of refugee status; the importance of a case-by-case assessment. – 4.2. The *Lounani* case: the evolution of the principles affirmed in the *B and D* decision. The extension of the scope of the exclusion clauses of refugee status to activities of assistance, organisation, and financing terrorist groups. – 5. Conclusions: the EU Court's remarkable approach to developing and clarifying the content of international law through the interpretation of EU law.

1. The international legal regime on the exclusion of refugee status: the 1951 Geneva Convention on the Status of Refugees

The 1951 UN Convention relating to the Status of Refugees ("Refugee Convention" or "Geneva Convention") is the main international instrument governing the recognition, denial, and revocation of refugee status.[1] Signed by 149 States parties, the Convention, together with the 1967 Protocol, defines the concept of "refugee" and sets out the rights of refugees and the legal obligations of States to protect them.[2] The Convention is based on Art. 14 of the Universal Declaration of Human Rights, which recognises the right of everyone to seek and enjoy asylum from persecution in other countries. To ensure its correct application in national legal systems, States parties are required to cooperate with the Office of the United Nations High Commissioner for Refugees (UNHCR),[3] and notify the UN Secretary-General of the refugee legislation adopted.[4]

Important in this context is Art. 1F of the Convention which, on the one hand, defines the requirements for a person to be granted refugee status, and on the other, specifies the cases in which refugee status can be denied, even if the individual fulfils the requirements and is at risk of persecution in his or her country of origin.[5]

Specifically, this provision contains some clauses for the exclusion of refugee status, establishing its inapplicability "to any person with re-

[1] UN Convention Relating to the Status of Refugees, 28 July 1951.

[2] UNHCR, *The 1951 UN Convention* Refugee Convention, www.unhcr.org/1951-refugee-convention.html.

[3] Art. 35, Refugee Convention, cit.

[4] *Ivi*, Art. 36.

[5] V. ZAMBRANO (2017), *Lotta al terrorismo e riconoscimento dello status di rifugiato nel quadro normativo e giurisprudenziale europeo: un rapporto problematico*, in *FSJ*, (3), 71 ff., 74.

spect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations".[6]

The origins of Art. 1F of the Convention trace back to the post-World War II period when the international community determined that those who had committed certain crimes could not benefit from international protection as refugees.[7] In particular, as also indicated in the travaux preparatoires of the Convention, the aims of the provision are twofold: first, depriving those responsible for atrocious and heinous acts and other crimes of the benefits of refugee status; second, preventing the asylum institution from being exploited and used in a distorted way to escape responsibility and avoid being subjected to criminal justice.[8]

In particular, the provision contains a list of exclusion clauses which must be applied "scrupulously" in order to protect the integrity of the asylum institution.[9] At the same time, as the UNHCR has also stressed,

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[6] Art. 1F(a)(b)(c), Refugee Convention, cit.

[7] O. LACHACZ (2017), *The Application and the Scope of the Refugee Status Exclusion Clause in the Court of Justice of the EU Judgment in the "Lounani" Case*, in *European Journal of Public Matters*, (1), 97 ff., 100-101.

[8] UNHCR, *Statement on Article 1F of the 1951 Convention*, 2009, 6. In this regard, some scholars highlight other reasons underlying the provision of the exclusion clauses in Art. 1F of the Convention, namely: the attempt by the international community to foster international morality through refugee law; the willingness of States to find a compromise solution between their obligations to protect refugees and obligations under extradition treaties (J. SIMENTIĆ (2019), *To Exclude or not to Exclude, that is the Question. Developments Regarding Bases for Exclusion from Refugee Status in the EU*, in *Germ. Law J.*, 20, 111 ff., 113 (the willingness to protect the receiving country from potential danger provoked by a criminal refugee in light of the evolution of transnational crime over the last twenty years (M.P. BOLHUIS, J. VAN WIJK (2016), *Alleged Terrorists and Other Perpetrators of Serious Non-Political Crimes: The Application of Article 1F(b) of the Refugee Convention in the Netherlands*, in *Journal of Refugee Studies*, 29, 19 ff., 21).

[9] UNHCR (2009), *Conclusion n. 82 of Executive Committee on Safeguarding Asylum*, 1997, par. (d) (v), in *Conclusions adopted by the Executive Committee on the International Protection of Refugees*, www.unhcr.org/en-my/57837 1524.pdf.

these clauses must always be interpreted carefully and restrictively, after a detailed assessment of the individual circumstances of the case and in light of the potentially serious consequences that exclusion can have. [10]

1.1. Application requirements under Art. 1F of the Geneva Convention

With regard to the application of Art. 1F of the 1951 Convention, the identification of the categories of persons excluded from international protection has raised several legal concerns. This is due to the fact that the way in which this provision is drafted is based on general and non-uniform definitions in international law, hence conducive to legal uncertainty, subject to different and conflicting interpretations by the courts of States parties, and not guaranteeing the uniform application of the Convention in the national legal systems of these States.

In fact, the only category that is easily identifiable and that poses fewer legal issues is that provided in Art. 1F(a) referring to crimes against peace, war crimes, and crimes against humanity. Art. 1 is based on unambiguously defined legal notions in the relevant international human rights, humanitarian, and criminal law instruments, reflecting general international law in this field. Since these are crimes that can be committed in times of peace and in times of war, it follows that this category is also the broadest of those referred to in Art. 1F of the Convention.

On the other hand, the notion of "serious non-political crime" envisaged in Art. 1 F(b) is particularly complex and controversial, difficult to define with reasonable certainty, and easily subject to different interpretations by the authorities called upon to apply the Convention, with the risk of its incorrect and inconsistent implementation in national legal systems. [11]

In particular, according to the UNHCR, the concept of "serious crime", which may have different characteristics in countries with different legal cultures, does not include minor crimes, must be defined according to international standards and in the light of several elements, including: the nature of the conduct; the actual damage caused; the form of the procedure used to prosecute the crime; the nature of the

[10] UNHCR (2003), *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 2, para. 2; UNHCR, *Statement*, cit., 6.

[11] M.P. BOLHUIS, J. VAN WIJK (2016), *Alleged Terrorists*, cit., 19-20.

sanction for punishing such crime; whether the majority of national judicial authorities would consider the conduct at issue as a serious crime. [12] In addition, a serious crime could be considered non-political if it is committed mainly to pursue personal interests or benefits, has no clear connection with its alleged political objective, or proves disproportionate to the alleged political objective. [13]

Finally, Art. 1 F(c) of the Convention, which excludes from international protection individuals who have committed acts contrary to the purposes and principles of the United Nations, contains very vague and elastic wording, such that it includes a vast and unclear category of subjects. In fact, reconstructing this concept requires referring to Art. 1 and Art. 2 of the UN Charter, which set out in general terms the purposes and principles of the United Nations. [14] As can be seen from the preparatory work of the 1951 Convention, the intention of its drafters was to attribute this provision a residual function, i.e., applicable to repeated and systematic violations of human rights that did not qualify as crimes against humanity. [15] As a result, the scope of this provision is limited to exceptional acts of a transnational nature that meet a high threshold of gravity, both in terms of the duration and the extent of their consequences on individual rights and their negative effects on peace and international security. [16] It is therefore important that this provision be interpreted restrictively to prevent the instrumental denial of international

[12] Therefore, falling into this category are "murder, rape, arson and armed robbery", but not "petty theft" (UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 2003, 14, paras. 38-40; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 2019, 118, para. 14). Some scholars, also considering the relevant practice of States, have pointed out that among the crimes referred to in Art. 1F of the 1951 Convention are those committed "against physical integrity, life and liberty", as well as drug crimes or economic offenses (M.P. BOLHUIS, J. VAN WIJK (2016), *Alleged Terrorists*, cit., 21-22).

[13] UNHCR, *Guidelines*, cit., 5, para. 15.

[14] These provisions concern the maintenance of international peace and security, the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and the observance and development of human rights and fundamental freedoms.

[15] UNHCR, *Statement*, cit., 13.

[16] *Ivi*, 14.

protection to broad categories of individuals who could benefit from the status it confers. [17]

In addition, Art. 1 F(c) originally reflected the traditional Westphalian concept of international law, since it was originally intended to apply to State officials, on the assumption that only these officials were considered capable of committing acts contrary to the principles and purposes of the United Nations. [18] The evolution of the structure of the international community, the configuration of international individual responsibility, and the emergence of new phenomena and threats to international peace have rendered this restriction rationae personae anachronistic and led to considering the application of the provision in question to individuals who, while not performing public functions, carry out acts contrary to the purposes and principles of the United Nations. [19] This could be the case of individuals belonging to terrorist organizations, an issue that will be examined in the following sections. Finally, due to the lack of clarity regarding the concept of acts contrary to the purposes and principles of the United Nations, Art. 1 F(c) has scarcely been used over time as a refugee exclusion clause [20] or has been interpreted differently by national judicial authorities. [21]

With regard to the common elements of the criminal acts referred to in Art. 1F of the Convention, a number of considerations are warranted. First, this provision requires that all the types of conduct contemplated for exclusion from refugee status must be of high gravity. [22] Second, the applicability of the exclusion clauses presupposes the asylum seeker's individual responsibility if he/she has committed, or substantially contributed to the commission of, one of the criminal acts referred to in Art. 1F. Third, by requiring the existence of "serious grounds for believing" that the individual has committed or participated in the com-

[17] E. KWAKWA (2000), *Article 1F(c): Acts Contrary to the Purposes and Principles of the United Nations*, in *Int. J. Refug. Law*, 12, 79 ff., 86; O. LACHACZ (2017), *The Application*, cit., 101-102; V. ZAMBRANO (2017), *Lotta al terrorismo*, cit., 75-76.

[18] E. KWAKWA (2000), *Article 1F(c)*, cit., 85.

[19] V. ZAMBRANO (2017), *Lotta al terrorismo,* cit., 76; O. LACHACZ (2017), *The Application*, cit., 102; UNHCR, *Background Note*, cit., 18, para. 48.

[20] N. BHAT (2014), *"My Name is Khan" and I am not a Terrorist: InterSections of Counter Terrorism Measures and the International Framework for Refugee Protection*, in *San Diego International Law Journal*, 15, 299 ff., 321-322.

[21] J. SIMENTIĆ (2019), *To Exclude*, cit., 113.

[22] UNHCR, *Statement*, cit., 9.

mission of the acts contemplated, this provision establishes a high standard of proof. This standard implies convincing, credible, and reliable proof beyond mere suspicion or allegation, and demonstrating the individual's responsibility for the commission of such acts.[23] Fourth, Art. 1F must be implemented in accordance with the principle of proportionality, namely the application of exclusion clauses must be applied in a manner proportionate to their objective, i.e., assessing the seriousness of the offenses and the consequences of exclusion.[24]

2. European Union legislation on refugees: the obligation to comply with the 1951 Convention and the reproduction of the exclusion clauses of refugee status provided therein

European Union legislation on the recognition and denial of refugee status is fully inspired by the 1951 Convention, adopted as a reference model and essentially reproducing its rationale, content, and application requirements.

More precisely, with regard to primary legislation, Art. 18 of the Charter of Fundamental Rights of the European Union and Art. 78(1) of the Treaty on the Functioning of the European Union reaffirm the obligation for EU legislation on asylum to comply with the provisions of the Geneva Convention and its 1967 Protocol.[25] The recognition of this obligation confirms the subordination of EU law to the international legal regime on asylum and consolidates the binding nature of the Convention and its Protocol. Indeed, EU member States are required to comply with the Convention and the Protocol both as States ratifying them and as States bound by European law.[26]

As to the relevant secondary legislation, the EU first adopted Directive 2004/83 (Qualification Directive), subsequently replaced by Di-

[23] *Ibidem*.

[24] UNHCR, *Guidelines*, cit., 7, para. 24; UNHCR, *Handbook*, cit., 120, para. 24.

[25] L. KLIMANOVA (2018), *CJEU and Qualification Directive*, dspace.lu.lv/dspace/bitstream/handle/7/46501/Klimanova_Linda.pdf?sequence=1, 17-18; N. COLACINO (2019), *La Corte di giustizia UE afferma l'irrevocabilità della qualità di rifugiato e il carattere assoluto del divieto di respingimento. Quali indicazioni per il giudice nazionale?*, in *FSJ*, (3), 83 ff., 85.

[26] O. LACHACZ (2017), *The Application*, cit., 98.

rective 2011/95.[27] Considering the 1951 Convention the "cornerstone of the international legal regime for the protection of refugees",[28] this Directive aims to ensure full respect for the right to asylum by not only ensuring compliance with the Convention but also making an important contribution to its full implementation.[29]

Art. 12(2) of both Directives reproduces Art. 1F of the 1951 Convention, which excludes a third-country national or a stateless person from being awarded refugee status if there are serious reasons to believe that he or she or any other person has committed: "(a) a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) serious non-political crime outside the country of refuge prior to his or her admission as a refugee…; (c) acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations".

Unfortunately, by introducing provisions identical to those of the Geneva Convention, EU legislation on the right of asylum suffers from the aforementioned problems of interpretation and application due to the ambiguous and unclear wording leading to legal uncertainty.[30] The next section examines these problems in relation to some acts, particularly those committed by individuals allegedly associated with terrorist organizations.

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[27] Directive 2004/83/EC, *on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 29.04.2004, OJ L 304, 30.9.2004, 12 ff.; Directive 2011/95/EU, *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*, 13.12.2011, OJ L 337, 20.12.2011, 9 ff.

[28] Directive 2011/95/EU, cit., whereas 4.

[29] UNHCR, *Statement*, cit., 4.

[30] J. SIMENTIĆ (2019), *To Exclude*, cit., 113.

3. Whether acts of terrorism fall within one of the exclusion clauses for refugee status set out in Art. 1F of the Geneva Convention

3.1. The relationship between terrorism and asylum: the growing concern that the 1951 Convention could be exploited by terrorists to benefit from refugee status

The relationship between terrorism, individuals acting in the name of the principle of self-determination against dictatorial governments, and asylum has been at the centre of the doctrinal and political debate since the first attempts to regulate the terrorism phenomenon through the League of Nations drafting a specific Convention in 1937.[31] However, it was only after the attack of September 11 that the need to better define this relationship became urgent. The reason for this is that having establishing a close link between refugees and terrorists, the international community increasingly criticized the formulation of Art. 1F of the 1951 Convention, which does not expressly exclude terrorists, thus potentially allowing them to benefit from international protection through a distorted and illegal use of the asylum institution.[32] Consequently, the question has arisen as to whether and under what conditions acts of terrorism are included among one or more of the criminal acts envisaged by this Article as grounds for exclusion from refugee status.

3.2. Whether acts of terrorism fall within the notion of crimes against humanity under Art. 1F(a) of the Refugee Convention

The classification of acts of terrorism within the scope of the core crimes foreseen in Art. 1F(a) of the Geneva Convention is very difficult given the lack of a definition of terrorism among the international community.[33] Between the 1960s and the 1990s, through the work of the United

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[31] International Convention for the Prevention and Punishment of Terrorism, 16 November 1937; see: S. SINGH (2006), *Will Acceptance of a Universally Approved Definition of Terrorism Make Article 1 F of the 1951 Refugee Convention More Effective in Excluding Terrorists*, in *Journal of Migration and Refugee Issues*, (2), 91 ff., 94.

[32] S. SINGH (2006), *Will Acceptance*, cit., 94-95.

[33] M.C. BASSIOUNI (1974), *Methodological Options for International Legal Control of Terrorism*, in *Akron Law Review*, (3), 388 ff., 388; A. CASSESE

Nations and its Specialized Agencies (IMO and ICAO), numerous important conventions were drawn up, but did not contain a general definition of terrorism. Inspired by a sectoral approach, these conventions are aimed to criminalise and punish specific and particular forms of terrorism, specifically air, sea, and nuclear terrorism, hostage-taking, and crimes against internationally protected persons.[34] The 1999 Convention on the Financing of Terrorism contains the first general definition of terrorism, but only indirectly, through the qualification of terrorist financing.[35] Moreover, the UN General Assembly and the Security Council, despite their important role in the fight against this criminal phenomenon, and repeatedly condemning the commission of terrorist acts in their numerous resolutions, have never provided a general definition of terrorism.[36] In addition, the Lebanon Tribunal in 2011 qualified terrorism as an autonomous international crime in light of the alleged existence of a generally-agreed definition of international terrorism resulting from the analysis of international treaties on terrorism, the relevant United Nations resolutions, and the judicial and normative practices of States.[37] Although the Tribunal's approach is recognized as the first attempt by an international criminal court to provide a definition of international terrorism under international law, it has been rightly criticized for not being based on consistent United Nations and State practice.[38]

The difficulty of qualifying terrorism as a core crime is also confirmed by the fact that according to Art. 5 of the Rome Statute, the International Criminal Court exercises its jurisdiction over certain and

(2004), *Terrorism as an International Crime*, in A. BIANCHI (ed.), *Enforcing International Law Norms Against Terrorism*, Oxford, 213 ff., 214.

[34] Conventions on Terrorism, *Text and Status of the United Nations*, treaties.un.org/Pages/DB.aspx? path=DB/studies/page2_en.xml.

[35] International Convention for the Suppression of the Financing of Terrorism, 9 December 1999.

[36] S/RES/1368, 12 September 2001; S/RES/1373, 28 September 2001; S/RES/1566, 8 October 2004; S/RES/1624,14 September 2005; A/RES/3034, 18 December 1972; A/RES/49/60, 9 December 1994; A/RES/51/210, 17 December 1996.

[37] Special Tribunal for Lebanon (Appeals Chamber), Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case no. STL-II-01/I, 16 February 2011.

[38] B. SAUL (2011), *Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism*, in *Leiden Journal of International Law*, 677 ff., 691.

specific international crimes, namely genocide, crimes against humanity, war crimes, and the crime of aggression. The decision of 1998 Rome Conference of Plenipotentiaries to exclude terrorism from the list of crimes under the Court's jurisdiction – later implicitly confirmed in the 2010 Kampala Review Conference of the ICC Statute – was due to, inter alia, the lack of an agreed definition of international terrorism in the international community and the fear that the inclusion of the crime of terrorism in the Court's Statute would in a sense politicise the Court itself.[39] Therefore, also taking into account that not all acts of terrorism reach the level of gravity and seriousness inherent in the core crimes, it is very difficult to include acts of terrorism within the scope of the crimes foreseen in Art. 1 F(a) of the Geneva Convention. Moreover, only if it is proven that an act of terrorism fulfils the conditions for constituting a crime against humanity or a war crime under respectively Art. 7 and Art. 8 of ICC Statute can it be subject to the application of Art. 1F(a) of the Geneva Convention.[40]

3.3. Whether acts of terrorism fall within the notion of serious non-political crimes envisaged in Art. 1F(b) of the Geneva Convention

As to the exclusion clause in Art. 1F(b) of the Refugee Convention, the question has been raised whether acts of terrorism can be included in the notion of a serious non-political crime.

Several extradition treaties foresee the prohibition of extradition for crimes of a political nature, including terrorism. Although extradition treaties have played a fundamental role in cooperation in the fight against organized crime and terrorism, their effectiveness has been jeopardised by the inclusion of the so-called political offense exception.[41] The crux of the matter is therefore assessing the relationship between the extradition institution and the political nature of the offences.[42] In this respect,

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[39] M.H. ARSANJANI (1999), *The Rome Statute of the International Criminal Court*, in *AJIL*, 22 ff., 25.

[40] S. SINGH (2006), *Will Acceptance*, cit., 100-115; G. GILBERT (2020), *Terrorism and International Refugee Law*, in B. SAUL (ed.), *Research Handbook on International Law and Terrorism*, 2nd ed., Cheltenham-Northampton, 423 ff., 429.

[41] A.C. PETERSEN (1992), *Extradition and the Political Offense Exception in the Suppression of Terrorism*, in *Indiana Law Journal*, 67, 767 ff., 767.

[42] M. CHIAVARIO (1986), *Reati politici, terrorismo, estradizione: sviluppi e prospettive*, in *Foro it.*, 109, 267 ff., 268.

worth noting is that the approach of international extradition treaties and the international community as a whole has changed over time. In particular, these treaties were originally applied in such a way as to cover a range of political opponents and primarily intended to provide guarantees for the person extradited. Subsequently, they have been characterised by self-restraint aimed at reducing the broad scope of the prohibition of extradition contained therein with reference to crimes of a political nature. [43]

In light of the evolution of the international community in this sense, as also underlined by the UNHCR, serious non-political crimes may be considered as egregious acts of terrorism when they are disproportionate to any alleged political objective and assessed on a case-by-case basis. [44] Hence, for a crime to be considered political in nature, its political objectives must be compatible with human rights principles, and therefore the commission of terrorist acts with political objectives that do not respect these principles may constitute grounds for exclusion from refugee status under Art. 1 F(b) of the 1951 Convention. [45]

3.4. Whether acts of terrorism may fall within the notion of acts contrary to the purposes and principles of the United Nations foreseen in Art. 1F(c) of the Refugee Convention

Although the tendency of several States was to include acts of terrorism in the category of acts referred to in Art. 1F(b) of the Geneva Convention (e.g., the United Kingdom), in recent years, there has been a gradual shift towards a different orientation aimed at bringing acts of terrorism within the scope of Art. 1F(c) of the Convention (e.g., Belgium). [46]

This orientation has been confirmed in some important Security Council resolutions adopted in the aftermath of the September 11 attacks. In these resolutions, in addition to ruling out the possibility of terrorists benefiting from international protection as refugees, the Security Council held that "acts, methods, and practices of terrorism are

[43] *Ivi*, 268.

[44] UNHCR, *Guidelines*, cit., 8, para. 26.

[45] UNHCR, *Handbook*, cit., 118, para. 15.

[46] S. SIVAKUMARAN (2014), *Exclusion from Refugee Status: The Purposes and Principles of the United Nations and Article 1F(c) of the Refugee Convention*, in *Int. J. Refug. Law*, 26, 350 ff., 353-354.

contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations".[47] This approach has been reproduced in the Qualification Directive, which in its preamble affirms the equivalence between acts of terrorism and acts contrary to the purposes and principles of the United Nations by referring to such resolutions.[48]

As also emphasised by the UNHCR, this equivalence does not allow the automatic application of both Art. 1F(c) of the Convention and Art. 12(2)(c) of the Qualification Directive to acts of terrorism.[49] Indeed, applying Art. 1F of the Convention requires an individual case-by-case assessment to determine whether the acts in question "meet the threshold required, in terms of gravity, international impact, and implications for the maintenance of international peace and security".[50]

The impossibility of a direct and automatic application of Art. 1F(c) of the Convention to acts of terrorism is also due to the fact that, on the one hand, the aforementioned Security Council resolutions do not contain a definition of terrorism, and on the other hand, as in the 1951 Convention, they do not provide an exhaustive list of criminal acts identifiable as acts contrary to the purposes and principles of the United Nations.[51]

Due to this lacuna, the international community has raised the question as to whether some activities related to the terrorism phenomenon, but not linked to the material commission of criminal acts – such as membership of a terrorist organization or the inclusion of the names of suspected or alleged terrorists in UN or EU blacklists – could be comparable to acts contrary to the purposes and principles of the United Nations, thus justifying the application of the exclusion clauses envisaged in Art. 1 F(c) of the Convention or Art. 12(2)(c) of the Qualification Directive. The EU Court of Justice has developed a significant

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[47] S/RES/1373, cit., para. 5; S/RES/1377, 12 November 2001, preamble; S/RES/1624, 14 September 2005, preamble.

[48] S. SIVAKUMARAN (2014), *Exclusion*, cit., 354.

[49] UNHCR, *Background Note*, cit., 19, para. 49; UNHCR, *Statement*, cit., 14-15.

[50] UNHCR, *Statement*, cit., 14-15.

[51] N. BHAT (2014), *"My Name is Khan"*, cit., 322; S. SINGER (2014), *Terrorism and Article 1F(c) of the Refugee Convention*, in *Journal of International Criminal Justice*, 12, 1075 ff., 1078.

body of case-law in this area, which has also contributed to clarifying the relevant provisions of the Geneva Convention through the interpretation and application of EU law.

4. EU Court of Justice case-law on the classification of terrorist activities in the context of the exclusion clauses of refugee status

4.1. The *B and D* case: the exclusion of automatism between membership of a terrorist organization and the application of the exclusion clauses of refugee status; the importance of a case-by-case assessment

The first decision in which the EU Court dealt with the profiles in question is the 2010 decision in the *B and D* case concerning some preliminary questions on the interpretation of Art. 12 (2)(b)(c) of Directive 2004/83.[52] These questions were raised in the context of proceedings before the German Federal Office for Migration and Refugees and two Turkish nationals of Kurdish origin. After having been involved in the organization of terrorist acts in the past, the two individuals then applied for recognition of refugee status in Germany under this Directive.

In this case, the Court helped clarify some important concepts concerning the relationship between international and EU refugee law and international and EU counter-terrorism regimes.

On the one hand, the Court affirmed the important principle of the possible equivalence between acts of terrorism and the crimes referred to in Art. 12(2)(b)(c) of the Qualification Directive, establishing that terrorist acts can be classified as: (a) serious non-political crimes, since they are "characterized by their violence towards civilian populations, even if committed with a purportedly political objective";[53] (b) acts contrary to the purposes and principles of the United Nations based on Recital 22 of the Directive, Art. 1 and Art. 2 of the UN Charter, and SC Resolutions 1373 and 1377.[54]

On the other hand, the fact that an individual has been a member of

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[52] ECJ, Grand Chamber, judgment 9.10.2010, *Bundesrepublik Deutschland v. B and D*, joined cases C-57/09 and C-101/09.

[53] *Ivi*, para. 81.

[54] *Ivi*, paras. 82-83.

an organization included in the EU terrorist blacklist and actively supported the aims and action pursued and carried out by that organization "does not automatically constitute a serious reason for considering that this individual has committed 'a serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations'".[55]

The exclusion of automatism between membership to (or support of) a terrorist organisation and the application of the exclusion clauses provided for in the Qualification Directive led the Court to reaffirm the importance of a case-by-case assessment. The exclusion by a national court of the international protection of an individual who is a member of a terrorist organization must in fact be based on: (a) an "individual assessment of the specific facts" in order to determine whether there are serious grounds for believing that, in the context of the activities carried out within such organization, the individual was involved in some way in the commission or participation of serious non-political crimes or acts contrary to the purposes and principles of the United Nations under Art. 12 (2)(b)(c) of Directive 2004/83;[56] (b) an assessment of the seriousness of the acts committed, which must be to "such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status under Article 2(d) of that directive".[57]

On the one hand, the Court's decision is to be welcomed because: (a) it has begun to fill some gaps in the Qualification Directive, which reproduces the Geneva Convention and provides some important definitions of international terrorism relevant to the application of international and EU law on the recognition and exclusion of refugee status; (b) it has reaffirmed the need to establish the actual responsibility of an asylum seeker within a terrorist organization, rejecting any automatism.[58] However, the approach to qualifying membership (or support) of a terrorist organization as a terrorist act, and at the same time requir-

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[55] *Ivi*, para. 99.

[56] *Ivi*, paras. 94, 99. In this way, it is also implicitly admitted that the application of the exclusion clauses is not conditional on the fact that the individual concerned constitutes a real threat to the receiving State (A.M. KOSINSKA (2017), *The Problem of Exclusion from Refugee Status on the Grounds of Being Guilty of Terrorist Acts in the CJEU Case-Law*, in *Eur. J. Migr. Law*, 19, 425 ff., 432).

[57] ECJ, Grand Chamber, *B and D*, cit., para. 108.

[58] C. MORVIDUCCI (2019), *Terrorismo e clausole di esclusione nella giurisprudenza della Corte di giustizia*, in A. DI BLASE, G. BARTOLINI, M. SOSSAI (eds.), *Diritto internazionale e valori umanitari*, Roma, 113 ff., 133.

ing proof of the commission of, or participation in, acts of particular seriousness is contradictory and difficult to understand on a logical level. [59]

Finally, the cautious approach adopted by the Court in this decision was confirmed in the 2015 judgment delivered in the *H.T.* case. This case concerned the request for a preliminary ruling on the compatibility with Art. 21(2)(3) and Art. 24 of Directive 2004/83 of the decision of the Federal Republic of Germany to expel and revoke the residence permit of a Turkish national of Kurdish origin. This decision stated, *inter alia*, that participation in legal meetings and rallies of a terrorist organization, and the collection of funds for that organization, do not necessarily constitute acts supporting the legitimacy of terrorist activities and do not constitute terrorist acts. [60]

4.2. The *Lounani* case: the evolution of the principles affirmed in the *B and D* decision. The extension of the scope of the exclusion clauses of refugee status to activities of assistance, organisation, and financing terrorist groups

In 2017, the EU Court adopted a decision in the *Lounani* case that represents a significant development of the judgment issued in the *B and D* case. [61] The decision concerned conformity with EU law of the refusal to recognise refugee status adopted by the Belgian national authorities against Mr. Lounani, a Moroccan national, on the basis that he was guilty of acts contrary to the purposes and principles of the United Nations, having been convicted for participating in the activities of a terrorist group. Specifically, he was convicted by the Belgian authorities not for having materially committed acts of terrorism, but for providing "logistical support to a terrorist group" through "material resources or information, forgery of passports and fraudulent transfer of passports, active participation in the organization of a network for sending volunteers to Iraq". [62]

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[59] *Ibidem*.

[60] ECJ, judgment 24.06.2015, *H.T. v. Land Baden-Württemberg*, case C-373/13, para. 91.

[61] ECJ, Grand Chamber, judgment 31.1.2017, *Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani*, case C-573/14.

[62] *Ivi*, para. 30; on this decision, see: V. NARDONE (2017), *Il supporto logistico al terrorismo e le cause di esclusione dello status di rifugiato nel diritto UE. La*

The Court affirmed some important principles that have contributed to identifying relevant elements for the classification of acts of terrorism within the scope of the application of the exclusion clauses of refugee status envisaged by the Qualification Directive and the Geneva Convention. It did so by first clarifying the need that, in view of the fact that this Convention constitutes the cornerstone of the international legal regime for the protection of refugees, Directive 2004/83 must be interpreted in accordance with the Convention and the relevant treaties referred to in Art. 78(1) TFEU. [63]

First, the Court, taking into account some important Security Council resolutions, [64] held that the concept of "acts contrary to the purposes and principles of the United Nations", as defined in Art. 1F(c) of the Geneva Convention and Art. 12(2)(c) of Directive 2004/83, is not limited to the commission of terrorist acts. This notion includes others activities, such as supporting, facilitating, participating or attempting to participate in the financing, planning, preparation or commission of terrorist acts. [65] Second, it held that, for the purposes of exclusion from refugee status under Art. 12(2)(c) of Directive 2004/83, a criminal conviction of the asylum seeker for one of the terrorist offences listed in Art. 1(1) of Framework Decision 2002/475 [66] was not necessary. In this regard, the Court's reasoning in the *B and D* decision was confirmed and expanded in the context of the individual assessment of the case, while stressing that the final conviction of the asylum seeker on a charge of participating in the activities of a terrorist group is "of particular importance". [67]

Therefore, with regard to its previous case-law, the Court of Justice significantly extended the scope of application of the exclusion clauses contained in Art. 12(2)(c) of the Qualification Directive by: (a) stating that refugee status should be denied not only to those who commit terrorist acts, but also to those who support or assist terrorist acts in any

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CGUE sviluppa la sua interpretazione nel caso Lounani, in *Osservatorio costituzionale*, 3, www.osservatorioaic.it.

[63] ECJ, Grand Chamber, *Lounani*, cit., para. 41.

[64] S/RES/1377, cit.; S/RES/1624, cit.; S/RES/2178, 24 September 2014.

[65] *Ivi*, paras. 47-49, 67, 76; see: V. ZAMBRANO (2017), *Lotta al terrorismo,* cit., 82.

[66] ECJ, Grand Chamber, *Lounani*, cit., para. 54.

[67] *Ivi*, para. 78; see: S. COUTTS (2017), *Terror and Exclusion in EU Asylum Law Case - C-573/14 Lounani*, www.europeanlawblog.eu.

way, in accordance with the Security Council approach, which since 2001 has tended to qualify an increasingly wide range of activities as acts contrary to the purposes and principles of the United Nations; (b) introducing new elements to be taken into account to establish the individual responsibility of an asylum seeker, such as a final conviction for criminal acts.[68] This broad approach has its origins in the evolution of terrorist threats in recent years and the consequent need to combat these effectively through a preventive method.[69] In this context, the Court has aligned international and EU asylum law with the international and EU counter-terrorism regime by constantly referring to the Geneva Convention and the SC Resolutions in order to punish not only acts of direct violence, but also acts aimed at organising and financing terrorist groups.[70]

5. Conclusions: the EU Court's remarkable approach to developing and clarifying the content of international law through the interpretation of EU law

The issue of the scope of refugee exclusion clauses of the Geneva Convention and the Qualification Directive and their application to acts of terrorism has become increasingly important in recent years with the spread of terrorism and the consequent instrumental use of the asylum institution by suspected terrorists.

As examined in this chapter, in addition to the UNHCR, the EU Court of Justice has contributed to clarifying these profiles, as it issued significant and innovative case-law aimed at bringing several manifestations of terrorist activities within the scope of the exclusion clauses provided for in Art. 12(2)(b)(c) of the Qualification Directive.[71]

Important to emphasise is that in the *B and D* and *Lounani* cases, the Court also indirectly contributed to the interpretation of the Refugee

[68] J. SIMENTIĆ (2019), *To Exclude*, cit., 120.

[69] G. MANTICA (2017), *Corte di Giustizia: la partecipazione alle attività di un gruppo terroristico diventa causa ostativa all'attribuzione dello status di rifugiato*, in *DPCE on line*, 2, www.dpceonline.it, 365 ff., 367.

[70] O. LACHACZ (2017), *The Application*, cit., 105-106; C. DI MAIO (2017), *La "qualifica" di rifugiato e le politiche anti-terrorismo. Nuovi sviluppi per il diritto d'asilo UE con il caso Lounani*, in *Diritti comparati*, www.diritticomparati.it, 4; V. ZAMBRANO (2017), *Lotta al terrorismo*, cit., 82.

[71] A.M. KOSINSKA (2017), *The Problem of Exclusion*, cit., 438-439.

Convention by interpreting the Qualification Directive in the way described above. While it is true that the interpretation of the Luxembourg Court is binding only on EU member States, it is also true that this interpretation is an important benchmark for States parties to the Geneva Convention, also in view of the fact that there is no international judicial body responsible for monitoring compliance with the Convention.[72] The approach adopted by the Court, aimed at clarifying the scope of an EU directive reproducing an international treaty, binding EU member States and indirectly influencing the implementation of the Geneva Convention by States parties, is a hermeneutical model to be welcomed. Indeed, this model is capable of avoiding divergent interpretations and allowing the more uniform, coherent, and comprehensive application of the 1951 Convention within the legal systems of these States parties.

This aspect is part of the complexity of the relationship between international law and European Union law as perceived and dealt with by the European Court of Justice over the years. As known, the *Van Gend en Loos* case confirmed the autonomy of EU law with respect to international law, stating "the Community constitutes a new legal order of international law".[73] This autonomy, based on a dualistic conception of the two branches of law, has been confirmed in important decisions of the Luxembourg Court, including the *Kadi* judgment.[74] This judgement affirmed that the primacy of the principles of the UN Charter over the obligations of any other international agreement enshrined in Art. 103 of the Charter cannot be applied in the EU legal system as it could prejudice the fundamental principles of the system.[75] On the other hand, in other decisions, such as *Hungary v. Slovakia* or *Diakité*,[76] the Court has

[72] S. PROGIN-THEUERKAUF (2018), *Introductory Note to Commissaire Général aux Réfugiés et aux Apatrides v. Mostafa Lounani*, in *ILM*, 57, 1080 ff., 1083.

[73] ECJ, judgment 5.2.1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, case C-26-62, 12.

[74] ECJ, Grand Chamber, judgment 3.9.2008, *Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council and Commission*, joined cases C-402/05 P and C-415/05 P.

[75] J. ODERMATT (2014), *The Court of Justice of the European Union: International or Domestic Court?*, in *Cambridge Journal of International and Comparative Law*, (3), 696 ff., 717.

[76] ECJ, judgment 16.10.2012, *Hungary v. Slovak Republic*, case C-364/10; judgment 30.01.2014, *Aboubacar Diakité v. Commissaire général aux réfugiés et*

taken a less stringent approach to the distinction between international law and EU law, applying EU law in light of international law, referring to international law to resolve disputes arising within the EU, and contributing to the development of international law by interpreting EU law.[77] The judgements in the *B and D* and *Lounani* cases therefore fall within this second approach, demonstrating the marked openness of the EU Court to international law in order to affirm important principles. These principles, which can be invoked and applied in the international legal order and in that of the European Union may be able to resolve the complex relationship between the anti-terrorism legal regime and asylum law.

Finally, it is to be hoped that the EU Court will also adopt this approach in the future and clarify some issues left open by international and European refugee law and not yet explored in its case-law, namely whether refugee status can be denied to an individual who engages in "provocative" or "glorifying" acts of terrorism, including in cyberspace or digital platforms.[78] In this regard, it would be very important to understand whether and within what limits exercising freedom of expression indirectly linked to terrorist activities could constitute an act contrary to the principles and purposes of the United Nations, and therefore valid grounds for denying refugee status according to the Refugee Convention and Directive 2011/95.[79]

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aux apatrides, case C-285/12; on these cases, see: J. ODERMATT (2014), *The Court of Justice*, cit., 717-718.

[77] J. ODERMATT (2014), *The Court of Justice*, cit., 717-718.

[78] S. PEERS (2017), *Foreign Fighters' Helpers Excluded From Refugee Status: the ECJ Clarifies the Law*, eulawanalysis.blogspot.com.

[79] *Ibidem*.

Chapter 16

THE ROLE OF ENVIRONMENTAL SEVERE DEGRADATION IN NATIONAL ASYLUM CASES: JURISPRUDENTIAL WAKE-UP CALLS FOR THE ASLEEP (EU) LEGISLATOR?

Concetta Maria Pontecorvo

ABSTRACT: *Following the important decision of the UN Human Rights Committee on the case Ioane* Teitiota v. New Zealand*, the recent rulings of some national Courts of EU Member States – i.e., Italy, France and Germany – seems to significantly contribute to laying the foundations for creating a new line of jurisprudence that has led to the recognition of forms of national protection for causes of migration of an environmental nature. The evolutionary and dynamic interpretation of the rules on human rights in the light of the effects of environmental and climate degradation and of atmospheric pollution recently operated by national Courts strongly and clearly contrasts with the persistent non-recognition, at the regulatory level, both in international and in EU (hard) law, of the category of "environmental/climate migrants". The paper is aimed at analysing the most relevant aspects of three recent pronouncements, adopted – respectively – by the Italian Court of Cassation, the Bordeaux Court of Appeal and the High Administrative Court of Baden-Württemberg, in order to underline the driving role that internal Courts seem to play in promoting such a dynamic and evolutionary interpretation of existing law to (better) respond to the current causes of forced migration.*

1. Introduction

This paper is aimed at analysing the most relevant aspects of three recent pronouncements in national asylum cases, adopted respectively by

the Italian Court of Cassation, the Bordeaux Court of Appeal and the High Administrative Court of Baden-Württemberg, in order to underline the *driving role* that internal Courts of three EU Member countries seem to play – after the important decision of the UN Human Rights Committee on the case *Ioane Teitiota vs. New Zealand*[1] – in promoting a dynamic and evolutionary interpretation of *existing human rights law* to (better) respond to the current causes of forced migration.

The judgments in question are characterised, particularly, by the recognition of the obstacles posed by *environmental* and *climatic* factors to the full exercise of fundamental rights. It is precisely on this point that the decision of the national Courts to provide protection on humanitarian grounds to applicants or to prevent their return to their country of origin is based.

Against this background and under the abovementioned perspective and aims, after briefly recalling the longstanding and persisting (both international and European) *legislative* stalemate in the field of "environmental/climate migration" (para. 2), the study will first examine the role played by environmental degradation as a violation of the right to life according to the Italian Supreme Court of Cassation (para. 3.1). It will then consider the emphasis accorded to humanitarian conditions and the principle of *non-refoulement* by the High Administrative Court of Baden-Württemberg (para. 3.2). Thirdly, it will discuss the recognised link between atmospheric pollution and the right to health according to the Court of Appeal of Bordeaux (para. 3.3). Finally, some concluding reflections will be devoted to highlighting the meaning and possible scope of the decisions examined, both *i)* in terms of recognition and protection of the category of "environmental/climate migrants" in the internal systems of European countries and *ii)* for stimulating the long-awaited (but hitherto disregarded) legislative developments at international and European level in the field of "environmental/climate migration" (para. 4).

2. The international and EU regulatory gap in the field of "environmental migration"

The recent action taken in the context of asylum rulings by the three mentioned national Courts, in the protection of fundamental rights in

[1] UN Human Rights Committee (HRC), *Ioane Teitiota vs. New Zealand*, decision adopted on 24.10.2016, CCPR/C/127/D/2728/2016, published on 7.1.2020.

the light of the severe effects of environmental degradation, takes on even greater significance when placed in the (international and European) regulatory context of relevance.

As well known, the heated debates of the early 1990s (aimed at exploring the interconnections between the environment and migration by investigating the nature, characteristics and legal implications of this phenomenon) came to a halt. Partly, due to the lack of data proving – at the time – the existence of an environmental background as the main cause of migration and also of studies verifying the (voluntary or forced) nature of such movements as well as their (internal or international) scope; partly, due to the political resistance of States. To date, more than 30 years after the United Nations Environmental Programme (UNEP)'s popularization of the notion of "environmental refugees", both international and EU law still do not include, as is equally well known, a (legal) definition of "environmental migrants"; nor do they provide for the granting of a status for this category.

The current regulatory stalemate in international and EU law on the subject takes on the one hand the form of a plethora of non-binding legal acts, which (merely) encourage recipient States to recognise the impact of environmental and climate change on the most vulnerable populations and to prevent environmental causes of migration.[2] On the other, this stalemate is confirmed by the fact that, over the past few years, at least three important opportunities have been missed, at the international and regional EU level, to adequately address such a regulatory gap by recognising – within the framework of *binding* legal acts – the profound connection between environmental threats, climate change and migration; namely, the Paris Agreement on climate change (2016),[3] the EU Green Deal (2019)[4] and the EU New Pact on Migration and Asylum (2020).[5]

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[2] On the content and (legal) scope of these acts, see (also for further bibliographical references), C.M. PONTECORVO (2022), *Towards Litigating Climate-Induced Migration? Current Limits and Emerging Trends for the Protection of "Climate-Induced Migrants" in International Law*, in *Rivista OIDU*, 1, 99 ff., 100-103; and *amplius* F. PERRINI (2018), *Cambiamenti climatici e migrazioni forzate: verso una tutela internazionale dei migranti ambientali*, Napoli, 83 ff.

[3] UN FCCC Conference of the Parties, Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12.12.2015.

[4] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Commit-

As to the Paris Agreement, it overcomes the distinction (hitherto made by most international treaties, including the environmental ones)[6] between environmental protection and human rights, explicitly recognising the impact of climate change on their full exercise.[7] According to the United Nations Migration Agency (IMO), the inclusion in the text of the Paris Agreement of specific language consolidating the respect, promotion and consideration of the human rights of migrants and people in vulnerable situations is an important step towards the full respect of their fundamental human rights.[8] However, the fact that this reference was *only* included in the Preamble (and not in its operative part) has not gone unnoticed and has raised significant criticism.[9] Moreover,

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tee and the Committee of the Regions, *The European Green Deal*, 11.12.2019, COM/2019/640 final.

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A New Pact on Migration and Asylum*, 23.9.2020, COM/2020/609 final.

[6] For example, no reference to the environment (from the point of view of the repercussions of its degradation on individual human rights) is contained either in the 1948 Universal Declaration of Human Rights adopted by the UN General Assembly or in the 1966 UN Covenant on Civil and Political Rights. The latter, as well known, in fact contains a reference to the environment – solely – as a component of the right to health, without therefore constituting an autonomous legal case. A first different approach to the relationship between the environment and individual human rights is contained instead in the 1998 Arhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters.

[7] Indeed, its Preamble states that "Acknowledging that climate change is a common concern of mankind, *Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights*, the right to health, *the rights of* indigenous peoples, local communities, *migrants*, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity…" (emphasis added).

[8] See L. DE BODE (2015), *"Climate migrants" Recognised in Paris Draft Agreement*, in *Al Jazeera*, 11.12.2015. The relevance of the abovementioned explicit reference included in the Paris Agreement's Preamble was also stressed by the UNHCR (see UNHCR, Press Release, *UNHCR and IOM call for improved safeguards for the displaced on the frontlines of climate emergency*, 4.2.2021, available online).

[9] See, *inter alia*, R. BRATSPIES (2017), *Claimed not Granted: Finding a Human Right to a Healthy Environment*, in *TLCP*, 26(2), 263 ff.

although the inclusion of the above-mentioned preambular paragraph is certainly to be welcomed, it must be remembered that it represents what remains of a *much broader* reflection that had led the *travaux préparatoires* of the Paris Agreement to explicitly recognise, for the first time in an international treaty, the existence of "climate migrants" and "climate displaced persons". [10]

[10] In the draft text prepared between 29 November and 5 December 2015 (Ad Hoc Working Group on the Durban Platform for enhanced Action, II session, part 12, 29 November to 5 December 2015, available online), in fact, the Preamble proposed by the Ad Hoc Working Group on the Durban Platform for Enhanced Action not only argued – rather like its final version – for the need to protect the human rights of migrants in the context of climate change, but Art. 5(3) (provisionally titled "Loss and Damage") concluded by emphasising the role of the Warsaw Mechanism's Executive Committee in the coordinating functions to manage, respectively, the "[…] *climate change induced displacement, migration* and planned relocation" (emphasis added). The provision, therefore, not only placed climatic factors and displacement in a dual relationship – both direct and indirect ("induced"); but also acknowledged both the internal (a typical element of the legal definition of displacement) and international (characteristic of broader migratory movements) scope of the phenomenon. The subsequent draft of 9 December (Draft text on COP21 agenda item 4b) Durban Platform for Enhanced Action, Decision 1/CP.17, Adoption of a Protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties, Version 1 of 9 December 2015 at 15.00, available online) retained all the above-mentioned references. The provisional version of 10 December (Draft Text of COP21 agenda item 4b) Durban Platform for Enhanced Action, Decision 1/CP.17 Adoption of a Protocol, another legal instrument, or an agreed outcome with legal force under the Convention applicable to all Parties, Version 2 of 10 December 2015 at 21.00, available online) then raised high expectations, both among human rights activists and the IMO. Indeed, it expanded the functions of the Warsaw International Mechanism (also called, in provisional Art. 51(b), to promote the acquisition of expertise on *climate change displacement*); while provisional Art. 5(2)(b) emphasised the duty of States, in the name of international cooperation and solidarity, to address loss and damage associated with the drastic effects of climate change, including those related to *climate change-induced displacement* and *migration* and planned relocation (see on the point K. WARNER (2018), *Coordinated Approaches to Large-Scale Movements of People: Contributions to the Paris Agreement and the Global Compacts for Migration and on Refugees*, in *Popul. Environ.*, 39, 384 ff., and P.D. WARREN (2016), *Forced Migration after Paris COP21: Evaluating the 'Climate Change Displacement Coordination Facility'*, in *Columbia Law Rev.*, 116, 2103 ff.). Such inclusion would have clearly paved the way for the effective recognition of "climate migrants" and for protection from what the Director-General of the IMO said was one of the root

On a regional level, the EU Commission Green Deal includes – hidden among the many innovative themes presented – the explicit recognition of the link between environmental factors and migration in the part where it states that environmental and climate challenges multiply the instability and vulnerability of individuals, hence renewing the European commitment to cooperation with third countries to prevent forced migration and population displacement.[11] Since then, however, the theme has unfortunately faded away without being re-proposed and adequately explored in any of the instrument subsequently proposed within the Green Deal implementation process.

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causes of migration (see IOM, Press Release, *IOM welcomes Inclusion of "Climate Migrants", "Climate Migration" in Draft Paris COP Agreement*, 11.12.2015, available online). It should also be noted that the same idea was also supported by many political leaders already at the opening of COP21. Among many, the then President of the French Republic Holland (who described global warming as follows "Le réchauffement annonce des conflits comme la nuée porte l'orage. Il provoque des migrations qui jettent sur les routes plus de réfugiée que n'en génèrent les guerres. Des Etats risquent de ne pas pouvoir satisfaire les besoins vitaux de leurs populations avec des risques de famine, d'exode rural massif et d'affrontement pour accéder à l'eau": see *Discours du Président de la République M. Francois Holland*, Ouverture du "Leaders' Event" COP21, 30.11.2015, emphasis added); the President of the Fiji Islands (who predicted the "extinction" of three nations – Kiribati, Tuvalu and the Marshall Islands – due to sea level rise and the subsequent relocation of many communities and who also declared to have started discussion with the Islands of Tuvalu and Kiribati to establish a "permanent refuge" for their citizens on the Fiji (see *Fiji's Statement at the COP21 UN Conference on Climate Change, H.E. Mr Josaia Voreque Bainimarama, Prime Minister of Fiji*, 30.11.2015, available online); and the Prime Minister of Papua New Guinea (urging States for immediate action and concrete commitment to avoid forced displacement of populations affected by climate change, as already happened in the case of the Carteret Island community, due to rising sea levels and drinking water shortages: see *Statement by Hon. Peter O'Neill CMG MP, Prime Minister*, UNFCCC, 21st Conference of the Parties (COP21), Session, 30.11.2015, available online). However, expectations were soon dashed by the latest version of the text, dated 12.12.2015, later adopted by COP21, which dropped all reference to "climate migrants" and climate displaced persons, due to strong opposition from Western countries and Australia. In particular, the latter feared it would encourage the influx of potentially large numbers of "climate migrants" from places particularly vulnerable to climate change – such as Pacific Islands, Indonesia and the Philippines (see D. WARREN (2015), *Forced Migration after Paris COP21*, cit., 2103 ff., and also H. WALIA (2015), *Why Migration Should Be Central to Paris COP21 Climate Talks*, 30.11.2015, available online).

[11] COM/2019/640 final, cit., 21.

Similarly, the EU New Pact on Migration and Asylum repeatedly mentions climate change as one of the major global challenges of present and future migration flows,[12] and in it the Commission seems to find development assistance as the way to counteract the structural causes of migration, although it then only mentions this in a non-binding act attached to the Pact.[13]

Thus, overall, although the Commission has (formally) recognised the multiple interconnections, direct and indirect, between climate change and migration, its approaches to combating climate change and managing both migration flows and those seeking international protection appear to be (in practice) at odds. While in the Green Deal the Commission promotes a comprehensive and innovative strategy to revolutionise Europe towards a new emission-free future – in which the ecological transition will only be successful if it is fair and inclusive in accordance with the principle "to leave no one behind" – in the New Pact it approaches (climate) migration quite in the opposite vein. In this regard, the doctrine seems to agree on the "securitarian approach" adopted by the Commission,[14] while copious analyses[15] of the New Pact ex-

[12] COM/2020/609 final, cit., 1 and 17.

[13] See M. BORRACETTI (2021), *Il nuovo Patto europeo sull'immigrazione e asilo: continuità o discontinuità con il passato?*, in *Dir., Imm. e Cittad.*, 1, 1 ff., 10, and F. PERRINI (2021), *Il Nuovo Patto sulla Migrazione e l'Asilo ed i migranti ambientali: una categoria "dimenticata"?*, in *FSJ*, 2, 245 ff., 254-260.

[14] See in this respect the (many) special issues on the New Pact, such as *ex multis: Il Nuovo Patto sulla migrazione asilo: novità e continuità* (2021), in *Dir. um. e dir. internaz.*, 1; *Verso un quadro comune europeo ed una nuova* governance *della migrazione e dell'asilo* (2021), in *FSJ*, 2; *Focus "La proposta di Patto su migrazione ed asilo"*, in *I Post di AISDUE*, I 2019-II 2020-III 2021; *Special Collection on the New Migration and Asylum Pact* (2021), in *EU Migration Law Blog*; *Il Nuovo Patto sulla migrazione e asilo* (2020), in *ADiM Blog*, 30.11.2020; and *Patto UE su migrazione e asilo* (2021), in *ASGI Special Focus*, available online.

[15] See, *inter alia*, P. DE BRUYCKER (2020), *The New Pact on Migration and Asylum: What Is Not and What It Could Have Been*, in *EU Migration Law Blog*; D. THYM (2020), *European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the New Pact on Migration and Asylum*, in *EU Migration Law Blog*; C. FAVILLI (2020), *Il Patto europeo sulla migrazione e l'asilo: "c'è qualcosa di nuovo anzi d'antico"*, in *Quest. Giust.*; M. BORRACETTI (2020), *Il Patto europeo sulla migrazione e asilo e la sua (solo) annunciata discontinuità*, in *Diritti Comparati*; P. DI PASQUALE (2020), *Il Patto per la migrazione e l'asilo: più luci che ombre*, in *I Post di AISDUE*, II-2020, *Focus* – "*La proposta di Patto su mi-*

press strong concern about the risk of excluding most third-State nationals from the guarantees of protection and reception and the *de jure* and *de facto* restrictions of their right to asylum, thereby violating the European rules designed to safeguard it.[16] This polarisation is clearly not consistent with either the global scale of the impact of climate change or the varying intensity to which countries will be exposed to it. The States most vulnerable to climate change coincide, as well known, with the socio-economically weakest, whose human and financial resources are insufficient to adopt mitigation and adaptation plans and to promote resilience strategies for their communities, thus driving the most vulnerable to flee elsewhere. A responsible (and coherent) EU policy clearly cannot promote *partial* solutions to global challenges by closing itself within an imaginary fortress (fuelled by political clashes between its Member States) and it should – rather – strive for the well-being of everyone, the protection of human rights and (also) the coherence of its choices with respect to its (various and many) international commitments (on both human rights and environmental protection).

3. The role of national Courts

As a preliminary remark it should be noted that, for some time, the importance of stemming the serious effects of climate change as well as the recognition of the obligations deriving from both environmental protection rules and standards and those on fundamental human rights have been significantly promoted by national Courts.

Recently, in the famous *Urgenda* case, the Dutch Supreme Court affirmed the obligation for the State to prevent the damage caused by climate change with particular attention to the right to life and to private and family life as established by the European Convention on Human Rights (ECHR).[17] In addition, in February 2021 the Administrative

grazione ed asilo"; A. DI PASCALE (2020), *Il Nuovo Patto per l'immigrazione e asilo: scontentare tutti per accontentare tutti*, in *Eurojus*; A. LIGUORI (2021), *Il Nuovo Patto sulla migrazione e l'asilo e la cooperazione dell'Unione europea con i Paesi terzi: niente di nuovo sotto il sole?*, in *Dir. um. e dir. internaz.*, 1, 67 ff.

[16] See also F. PERRINI (2021), *Il Nuovo Patto sulla Migrazione e l'Asilo*, cit., 254 ff.; ASGI (2020), *70 ONG sul Patto migrazione e asilo: necessario modificare gli aspetti problematici e ampliare gli aspetti positivi*, available online.

[17] Supreme Court of the Netherlands, *The State of The Netherlands vs. Urgenda Foundation*, 20.12.2019, case no. 19/00135. For a comment A. NOL-

Court of Paris also found the French State liable for environmental damage due, in part, to non-compliance with its environmental and climate obligations.[18] Finally, in a recent (innovative) ruling, the German Federal Constitutional Court[19] condemned the State because of the illegitimate burden for future generations of having to expose their lives to a wider loss of rights and freedoms, with a decision defined by many scholars as revolutionary as likely to determine a fundamental turning point for the protection of our current human rights in relation to climate change.[20]

Moving then from the level of the protection of fundamental human rights *tout court* to, more specifically, that of the protection of the fundamental human rights *of third-country nationals from environmental risks and threats*, we can further appreciate the very significant action carried out – once more – by domestic jurisprudence.

After the important decision of the UN Human Rights Committee on the case *Ioane Teitiota vs. New Zealand*,[21] three recent judgments

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LKAEMPER, L. BURGES (2020), *A Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *EJIL: Talk!*

[18] Administrative Court of Paris (TAP), judgment 3.2.2021, nos. 1904967, 1904968, 1904972, 1904976/4-1, *Association Oxfam France, Association Notre Affaire à Tous, Fondation pour la Nature et l'Homme, Association Greenpeace France v. France*.

[19] German Federal Constitutional Court (BVerfG), judgment 24.3.2021, nos. BvR 2656/18, BvR 288/20, BvR 96/29, BvR 78/20, *Neubauer et al. vs. Germany*.

[20] G. WINTER (2022), *The Intergenerational Effects of Fundamental Rights: A Contribution of the German Federal Constitutional Court to Climate Protection*, in *J. Environ. Law*, 1, 209 ff.; P. MINNEROP (2022), *The "Advance Interference-Like Effect" of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court*, in *J. Environ. Law*, 1, 135 ff.; J. BÄUMLER (2021), *Sustainable Development Made Justiciable: The German Constitutional Court's Climate Ruling on Intra- and Inter-Generational Equity*, in *EJIL: Talk!*

[21] For a comment on the scope of the Committee's decision see, *ex multis*, J. MCADAM (2020), *Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement*, in *AJIL*, 114, 708 ff.; S. BEHRMAN, A. KENT (2021), *Prospects for Protection in the Light of Human Rights Committee's Decision in Teitiota v. New Zealand*, in *Polish Migr. Rev.*, 8, 1 ff.; ID. (2020), *The Teitiota Case and Limitations of the Human Rights Framework*, in *QIL*, Zoom-in 75, 25 ff.; J. HAMZAH SENDUT (2020), *Climate Change as a Trigger of Non-Refoulement Obligations Under International Human Rights Law*, in *EJIL: Talk!*; F. MALETTO (2020), Non-

demonstrate, indeed, the *driving role* of certain European (Italian, German and French) internal Courts which, by promoting an *evolving* and full interpretation *of existing law* with regard to the fundamental rights of the individual, have recognised forms of national protection or annulled the return decision for environmental reasons, *despite the absence* – at international and European level – of legal concepts or *ad hoc* protection instruments to refer to.

The following paragraphs are intended to illustrate the most salient aspects of the mentioned three recent judgments in this regard, in order to highlight the type of response they offer to current cases of forced migration related to environmental degradation, in general, and to climate change, in particular.

3.1. Environmental and climate degradation as a violation of the right to life according to the Italian Court of Cassation

On 12 November 2020, the Italian Supreme Court of Cassation, second civil section, issued an order of considerable importance for the interpretation of domestic law on humanitarian protection in the light of *environmental* circumstances.[22]

The case originated from an appeal brought by an asylum seeker from the Niger Delta against the rejection of subsidiary protection or,

refoulement *e cambiamento climatico: il caso Teitiota c. Nuova Zelanda*, in *SIDIBlog*; A. MANEGGIA (2020), Non-refoulement *of Climate Change Migrants: Individual Human Rights Protection or "Responsibility to Protect?" The Teitiota Case Before the Human Rights Committee*, in *Dir. um. e dir. internaz.*, 2, 635 ff.; G. REEH (2020), *Climate Change in the Human Rights Committee*, in *EJIL: Talk!*; E. SOMMARIO (2021), *When Climate Change and Human Rights Meet: A Brief Comment on the UN Human Rights Committee's Teitiota Decision*, in *QIL*, Zoom-in 77, 51 ff.; and V. RIVE (2020), *Is an Enhanced* Non-refoulement *Regime under the ICCPR the Answer to Climate Change-Related Human Mobility Challenges in the Pacific? Reflections on Teitiota vs. New Zealand in the Human Rights Committee*, in *QIL*, Zoom-in 75, 7 ff.

[22] Italian Court of Cassation, judgment 12.11.2021, no. 5022. See, for a comment, F. PERRINI (2021), *Il riconoscimento della protezione umanitaria in caso di disastri ambientali nel recente orientamento della Corte di Cassazione*, in *Rivista OIDU*, 349 ff.; A. DEL GUERCIO (2021), *Migrazioni connesse con disastri naturali, degrado ambientale e cambiamento climatico; sull'ordinanza n. 5022/2020 della Cassazione italiana*, in *Dir. um. e dir. internaz.*, 521 ff.; F. VONA (2021), *Disasters and Humanitarian Protection: A Fertile Ground for Litigating Climate Change and Human Rights*, in *IRIC*, 146 ff.

alternatively, of humanitarian protection under Art. 5(6) of the Legislative Decree 286/1998 by the Court of Ancona. The appellant complained, particularly, the irrelevance attributed by the merit Court to the environmental and climatic situation of his place of origin. As is well known, the Niger Delta is rich in oil, a resource that has, however, made the area politically unstable and highly contaminated. Moreover, the local population of the region does not benefit at all from the proceeds of the exploitation of this resource, given the indiscriminate exploitation conducted by numerous oil companies and the presence of paramilitary groups vying for control of the underground oil resources. In addition, there are, on the one hand, ethno-political conflicts, thefts and sabotage, which have led to oil spills that have made the area highly polluted; on the other hand, kidnappings of public authorities and attacks against police forces that have long undermined the political stability of the entire area. Although these circumstances, widely documented, were recognised by the Ancona Judge himself, they were nevertheless not considered sufficient for subsidiary protection under Art. 14(c) of Legislative Decree 251/2007, as they did not reach the threshold of seriousness required to constitute a situation of generalised violence in contexts of armed conflict such as to constitute a serious and individual threat to life or person. Likewise, the presence of environmental disasters and widespread instability in the Niger Delta were not taken into account at all by the merit Court for the purposes of granting humanitarian protection.

The Supreme Court, before which the appellant has appealed, first recalls the pronouncement of the UN Human Rights Committee on the *Teitiota case*, in which the Committee affirmed the principle that States must protect the right to life even in the event of reasonably foreseeable threats and situations that may lead to a substantial worsening of conditions of existence, including climate change, environmental degradation and unsustainable development as well as their effects. These phenomena, which in the Committee's view constitute some of the most urgent threats to the lives of present and future generations,[23] can worsen the well-being of the individual and cause a violation of the right to life under Art. 6 of the UN Covenant on Political and Social Rights. On the basis of the analysis conducted by the Committee, *a quo* judges maintain that the risk of impairment of the right to life and to a dignified exist-

[23] UN Human Rights Committee, *Teitiota case*, cit., para. 9.4 and 9.5, also mentioned in the decision under review here (at p. 4).

ence must be interpreted *in the light of* the socio-environmental conditions of the context of origin of the appellant. The Court of Cassation notes, in fact, that the right to life is not only susceptible to violation in the case of armed conflicts *but also if* the socio-environmental conditions, however attributable to human conducts, are such as to seriously jeopardise the survival of the individual and his or her relatives. In that sense, the Court continues, "la guerra o in generale il conflitto armato rappresentano la più eclatante manifestazione dell'azione autodistruttiva dell'uomo, ma non esauriscono l'ambito dei comportamenti idonei a compromettere le condizioni di vita dignitosa dell'individuo".[24] The reference to personal dignity, in particular, includes the essential and unescapable core of fundamental rights – such as the right to life, liberty and self-determination – that can never be undermined.

So far, the Court's reasoning seems to lead to a new (and revolutionary) interpretation of Art. 14(c) of Legislative Decree 251/2007 whereby, for the purposes of subsidiary protection, the Court of merit *must take into account* serious and individual threats to life or person not only arising from an armed conflict, but all those circumstances that, likewise, put the life or dignity of the individual at risk. Moreover, this interpretation would have rectified the position taken by the same Court one year earlier,[25] in an order in which the judges excluded the environmental and climatic condition of the country of origin from the list of serious harm established in the above-mentioned Art. 14.

In the present case, however, the Court's reflection deviates towards the granting of humanitarian protection, emphasising *environmental degradation* as a violation of the above-mentioned core of rights, whose protection justifies the granting of a residence permit for humanitarian reasons. The order states indeed that this core not only refers to armed conflicts, but also to those "condizioni di degrado sociale, ambientale o climatico, ovvero a contesti di insostenibile sfruttamento delle risorse naturali che comportino un grave rischio per la sopravvivenza del singolo individuo".[26] Accordingly, the appeal is upheld, the decision of the Court of Ancona is reversed and the case is referred back for further consideration of the granting of humanitarian protection to the applicant's case.

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[24] Italian Court of Cassation, judgment no. 5022/2021, cit., 6.

[25] Italian Court of Cassation, judgment 20.3.2019, no. 7832.

[26] Italian Court of Cassation, judgment 5022/2021, cit., 6.

3.2. Humanitarian conditions and the principle of *non-refoulement* according to the High Administrative Court of Baden-Württemberg

In a recent ruling, the High Administrative Court of Baden-Württemberg annulled the repatriation decision issued against an Afghan national due to the *environmental* and *climatic* conditions in his home country.[27] To this the Court added the drastic deterioration of humanitarian conditions due to the spread of the Covid-19 pandemic.

According to Section 60(5) of the German Residence Act, which regulates the prohibition of repatriation, a foreigner may not be removed from the territory of the State if the possible repatriation measure constitutes a violation of the European Convention on Human Rights. As already in the past, the German Federal Constitutional Court has recently interpreted the humanitarian conditions in the country of origin as acts comparable to inhuman and degrading treatment, in violation of Art. 3 ECHR, by activating the above-mentioned clause of the German Residence Act.[28] The assessment of humanitarian conditions in the light of the latter provision of the ECHR, as specified by the German Federal Supreme Court, must take into account both the social and economic conditions of the country and the individual's particular situation.

Therefore, in its examination, the Baden-Württemberg Court considered the economic situation of the country and its general political instability, the effective access to food, housing and care, the impact of the Covid-19 health crisis and the *environmental* conditions.[29] Indeed, Afghanistan is one of the most vulnerable countries to climate change and, at the same time, one of the least equipped to cope with its im-

[27] Administrative Court (VGH) of Baden-Württemberg, judgment 17.12.2020, no. A 11 S 2042/20.

[28] German Federal Constitutional Court (BVerfG), judgment 9.2.2021, no. BvQ 8/21 – Rn. (1-10), available online (only in German).

[29] The Court's main argument was that the humanitarian conditions in Afghanistan have seriously deteriorated due to Covid-19 pandemic. It thereby explicitly mentioned "environmental condition, such as the climate and natural disasters" as relevant factors for determining the humanitarian conditions in Afghanistan (Administrative Court of Baden-Württemberg, judgment 17.12.2020, cit., para. 25). For a broader comment see C. SCHLOSS (2021), *Climate Migrants – How German Courts Take the Environment into Account when Considering Non-Refoulement*, in *Völkerrechtsblog*.

pacts. In fact, the United Nations Environment Programme (UNEP) estimates that 80 per cent of the ongoing conflicts on Afghan territory concern the control of natural resources, water and land.[30]

By including *environmental* factors among the motivations for considering the applicant's repatriation unlawful, the German Administrative Court thus promoted a *broad* interpretation of the concept of vulnerability, recognising the impact they have on fundamental human rights.

3.3. Air pollution and the right to health according to the Court of Appeal of Bordeaux

In a decision filed on 18 December 2020,[31] the Court of Appeal of Bordeaux, second section, ruled on the granting of a temporary residence permit (*carte de séjour temporaire*) for medical treatment to an asylum seeker from Bangladesh who, given the health and *environmental* conditions in the country, would not have had access to the essential medical treatment he needed.

According to the French Code on the Entry and Stay of Foreigners and the Right of Asylum, a foreigner habitually resident in France is fully entitled to a temporary residence permit if his state of health requires treatment, the lack of which could have exceptionally serious consequences, and if, by reference to the health offer and the characteristics of the health system of his country of origin, he would not have the effective chance of benefiting from appropriate treatment. Subject to an assessment made by a medical panel and verification of effective access to health care in his or her country of origin, the Prefect may issue a permit for medical treatment to the person concerned.[32]

In the case at stake by the French court, it was certified that the plaintiff suffered from a chronic respiratory disease associated with severe allergic asthma together with a sleep apnoea syndrome that required him to use an electric ventilator nightly. In assessing the adequacy of the Bengali health care system in treating the plaintiff's multiple

[30] UNEP (2013), *Natural Resource Management and Peacebuilding in Afghanistan*, May 2013.

[31] Administrative Court of Appeal of Bordeaux (CAA), judgment 18.12.2020, nos. 20BX02193, 20BX02195.

[32] *Ivi*, para. 4.

ailments, the judges found that both the prescribed drugs, which had benefited him during the observation period, and the ventilator components, which required monthly replacement, were unavailable in the country of origin.[33] The Court also points out that Bangladesh is one of the *most polluted* countries in the world, where the asthma mortality rate is 12.92% compared to 0.82% in France; and that, given the applicant's extremely poor state of health, this would have inevitably led to his early death. Lastly, the Court notes that access to health and the quality of health services in Bangladesh are not comparable to European standards, so that a return to the country would condemn the applicant to an undoubted worsening of his condition. The Court consequently orders the issue of a residence permit for medical treatment in view of the serious *environmental* and health conditions in the country of origin.

4. Concluding remarks

In light of the ever increasing and reliable scientific evidence on the impact of climate change on human rights and the growing awareness of the "ownership" of these rights by civil society in the most vulnerable countries to climate change, the recent emergence – in the domestic legal system of some European countries – of a jurisprudential orientation that substantiates the combination of environmental threats and migration but also the recognition of the existence of "environmental migrants" and their need for protection testifies to a further important trend whose content can no longer be ignored nor, due to its urgency, postponed.

This urgency, however, seems at odds, on the one hand, with the reluctance of States to take on new specific responsibilities to protect environmental migrants in the framework of both the climate change and migration management regulatory regimes; on the other hand, with the resulting regulatory immobility found in international climate change instruments as well as in the (exclusively) "securitarian approach" adopted at the European regional level by the recent New Pact on Migration and Asylum of 2020. These resistances will have to be overcome through the adoption of appropriate and comprehensive *regulatory* instruments aimed at regulating the phenomenon of climate change-

[33] *Ibidem*.

related migration beyond the current (inadequate) policy responses to migration and climate change that seem to be inspired, mainly, by discretionary interests and the political orientation of national governments in the absence of a new and comprehensive awareness of its relevance and urgency.

The three pronouncements reviewed here, instead, are emblematic of this awareness. Through an evolutionary interpretation of the (human right) law the national *Courts* have been promoting a process of (better) adapting the latter to the current needs of individuals, "updating" it in light of present condition of vulnerability related to environmental and/or climate degradation.

It is to be hoped that *States* will soon take the lead in a similar process at the level of international (or at least regional) cooperation, with a view to an adequate *legal regulation* of the phenomenon of environmental migration given the now compelling protection needs related to it. Under such a perspective, the above examined *jurisprudential* trend might, eventually, act as a "wake-up call" for the asleep (EU) legislator.

Chapter 17

DEVELOPING AND CONSOLIDATING THE PROTECTION OF UNACCOMPANIED MINOR MIGRANTS IN EUROPE: THE COURT OF JUSTICE'S ROLE

Angela Maria Romito

ABSTRACT: *With the analysis of some of the most recent decisions issued by the EU Court of Justice (CJEU), this chapter evaluates the protection offered to unaccompanied minor migrants (UMMs) in Europe in light of their right to family reunification. The analysis will highlight the legal lacunae, shortcomings, and problems that need to be remediated in recasting the current legislative system through the New Pact on Immigration and Asylum.*

1. Introduction

Although the pandemic decelerated the flow of migrants to Europe, the statistics show that migrant arrivals in Europe are again accelerating. As a result, irregular migration of unaccompanied (foreign) migrant minors (UMMs) has increased proportionally,[1] attracting the attention of European governments, non-governmental organizations (NGOs), the Courts, and academia.

The lack of *ad hoc* legislation tailored to child migrants in the EU legal system has created ambiguities and practical pitfalls, resulting in standards of protection that vary from State to State, depending on the

[1] According to Eurostat, in 2021, 31.2% of the total number of first-time asylum applicants recorded in the EU where children, see Statistics explained on Eurostat website. For detailed information up to December 2021, see *Refugee and Migrant Children in Europe: Accompanied, Unaccompanied and Separated. Overview of Trends*, January to December 2021, available online.

national approach.[2] As such, unaccompanied children are often afforded discretionary, time-limited, and otherwise uncertain status in the countries to which they migrated. While the specifics vary among the jurisdictions, a common outcome is the lack of unambiguous solutions and secure pathways to legal status. As a result, minors are often trapped in a protracted legal limbo.

Indeed, the legal framework is fragmentary, and the overlapping norms and multi-level guarantee systems do not always translate into adequate and uniform protection of minor migrants.[3] Unfortunately, the opportunity for reform has been missed even in the New Pact on Migration and Asylum, since child migrants are still subject to "special" rules within the legal framework established for adult migration flows.[4]

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[2] In some countries, the legal status (or simply protection from removal) afforded to UMMs expires when they become adults, exposing those transitioning to adulthood to new risks and uncertainties. In others, ambiguities, lacunae, or even intentional omissions in legal frameworks prevent them from applying for secure status at all, while the prolonged delays and inefficiencies in common systems cause them to live with no or uncertain legal status for years. J. ALLSOPP, E. CHASE (2019), *Best Interests, Durable Solutions and Belonging: Future Prospects for Unaccompanied Migrant Minors Coming of Age in Europe*, in *J. Ethn. Migr. Stud.*, 45(2), 293 ff.; see also M. SEDMAK, B. SAUER, B. GORNIK (eds.) (2019), *Unaccompanied Children in European Migration and Asylum Practices. In Whose Best Interests?*, Abingdon; G. ABEL, J. BHABHA (2020), *Children and Unsafe Migration*, in *World Migration Report*, IOM, 231 ff., available online; J. LELLIOTT (2022), *Unaccompanied Children in Limbo: The Causes and Consequences of Uncertain Legal Status*, in *Int. J. Refug. Law*, 34(1), 1 ff.

[3] For a comprehensive overview A.L. SCIACOVELLI (2022), *La protezione del minore migrante in Europa. Profili di diritto internazionale ed europeo*, Napoli.

[4] For critical remarks, see the ONG and civil society report, *Joint Statement on the impact of the Pact on Migration and Asylum on children in migration*, 14.12.2020, available online; specifically for Italy, ASGI (2021), *Unaccompanied Minors, Critical Conditions at Italian External and Internal Borders, Policy Paper, June 2021*, available online. Also see P. RINALDI (2019), *Unaccompanied Migrant Minors: Vulnerable and Voiceless,* in A. SUNGUROV (ed.), *Current Issues on Human Rights*, Madrid, 277 ff.; T. GAZI (2021), *The New Pact on Migration and Asylum: Supporting or Constraining Rights of Vulnerable Groups?*, in *European Papers*, 1, 167 ff.; R. O'DONNELL (2021), *Spotlight on the Interests of the Child in Returns of Unaccompanied Children. Reflections for the New Pact on Migration and Asylum*, in *EU Migration Law Blog*; A.M. ROMITO (2022), *I minori stranieri non accompagnati nell'Unione europea: lo stato dell'arte e le prospettive di riforma*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.), *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli, 634 ff.

The lack of a comprehensive legal framework for child migrants based on a "child rights approach" forced the CJEU to strengthen protection through the hermeneutic interpretation of existing provisions. In fact, the CJEU has sought to bring coherence to the patchwork of existing EU rules, taking into account changes and developments in the real lives of child migrants. This approach has been reiterated in recent decisions where the Court has implemented earlier landmark cases, contributing to defining a higher standard of protection for UMMs and granting them new rights.[5]

Therefore, this chapter analyses three cases as examples of how the new rules raise highly sensitive issues in relation to young migrants. The central element of all the arguments is that respect for family life, and particularly preserving family unity, is in principle in the best interests of the child.[6] In particular, the first case concerns the interpretation of

[5] Several recent decisions on minor refugees were delivered on 1 August 2022, such as ECJ, judgment 1.8.2022, *SW, BL & BC*, joined cases C-273/20 and C-355/20; ECJ, judgment 1.8.2022, *Germany v. XC*, case C-279/20; ECJ, Grand Chamber, judgment 1.8.2022, *RO*, case C-720/20; ECJ, Grand Chamber, judgment 1.8.2022, *I & S*, case C-19/21; see also ECJ, judgment 17.11.2022, *X*, case C-230/21. Still pending in March 2023, *CR*, case C-560/20.

[6] At the international level, the fundamental principle of family reunification has been given binding effect by Art. 23(1) of the International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR) to which all States of the European Union are party. Other international human rights instruments, such as the Convention on the Rights of the Child of 20 November 1989 (CRC), the Convention on Migrant Workers, and the International Covenant on Economic, Social and Cultural Rights of 18 December 1990 (ICESCR) contain similar provisions. Within Europe, it is expressly stated in Art. 8 of the European Convention on Human Rights (ECHR) and Art. 7 of European Union Charter of Fundamental Rights (CFR or Charter).

The best interests of the child is the cornerstone of child protection (together with the other guiding principles on children's rights: right to non-discrimination, the right to life, survival and development, the right to participation, or the right to express views and have them taken into account). It is enshrined in Art. 3(1) of the Convention on the Rights of the Child (CRC) and in Art. 24(2) CFR, also recalled in all the provisions referring to minors. For unaccompanied children, family reunification is normally considered as being in their best interests: UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child*, May 2021, available online.

In the EU legal system, the EU Charter as well as numerous secondary EU laws equally oblige Member States to take the best interests of the child into consideration and attached fundamental importance to the right to respect for

the Dublin III Regulation (RDIII),[7] and the other two the interpretation of Directive 2003/86/EC (FRD).[8] The novelty lies in the flexible interpretation of the protection of the family nucleus not limited to the immediate family but including close relatives outside the nucleus who play a role in, and contribute to, family life (the so-called extended family), thereby establishing a new legal remedy for family reunification and more favourable protection for underage spouses, as well as a new, pragmatic and evolutionary interpretation of family relationships.

2. The right to appeal the refusal of take-charge requests under the Dublin III Regulation

The protection of UMMs under the Dublin III Regulation is enshrined in several provisions: Arts. 8-11 and 16 promote family unity deriving from fundamental rights.[9] Art. 6 and Recital 13 state that the child's

family life. The CJEU in the *J. McB* judgment (ECJ, judgment 5.10.2010, *J. McB*, case C-400/10 PPU, para. 53) underlined that the provisions in the Charter correspond to those in the ECHR, but are not limited by them, and therefore may provide further protection. In the Dublin context, the European Court has found that "respect for family life and, more specifically, preserving the unity of the family group is, as a general rule, in the best interests of the child", see ECJ, judgment 23.1.2019, *M.A. and others*, case C-661/17, para. 89. For comments see S. IGLESIAS SÁNCHEZ, K. CARR (2017), *The Right to Family Life in the EU Charter of Fundamental Rights*, in M. GONZALEZ PASCUAL, A. TORRES PERRES (eds.) *The Right to Family in the European Union*, Abingdon, 40 ff.

[7] Regulation 604/2013/EU, *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*, 26.6.2013, OJ L180, 29.6.2013, 31 ff. C. HRUSCHKA, F. MAIANI (2022), *Dublin III Regulation (EU) n. 604/2013*, in K. HAILBRONNER, D. THYM (eds.), *EU Immigration and Asylum Law*, Munich, 1639 ff.

[8] Directive 2003/86/EC, *on the right to family reunification* (FRD), 22.9.2003, OJ L251, 3.10.2003, 18 ff. See R. PALLADINO (2012), *Il ricongiungimento familiare nell'ordinamento europeo*, Bari, 143 ff.; J. BORNEMANN, C. AREVALO, T. KLARMANN (2022), *Family Reunification Directive 2003/86/EC*, in K. HAILBRONNER, D. THYM (eds.), *EU Immigration and Asylum Law*, cit., 432 ff.

[9] The goals of Arts. 8-11 are further reinforced by Recitals 14 and 16-18 of the Regulation. These recitals comprehensively proclaim the importance of family unity in the Dublin system and provide detailed aims to ensure that the application of the Regulation leads to the processing of claims of family members together. This referencing is extensive, and the weight given to individual rights and family unity is considered to be even more substantial than that of-

best interests must be a primary consideration in all actions concerning children.

On 1 August 2022, the CJEU ruled on an important issue concerning unaccompanied minors: the right to appeal the refusal of the "take-charge" request of the receiving member State where a relative resides. [10] This is a novelty in EU asylum law.

The case concerned an Egyptian national who applied for international protection in Greece while still a minor. He wished to be reunited with his uncle legally residing in the Netherlands who was able to care for him. Based on Art. 8(2) RDIII, [11] the Greek authorities made a take-charge request to Dutch authorities. However, the Dutch Secretary of State rejected it because the child's identity and the alleged family relationship could not be confirmed. The asylum seeker and his uncle wanted to file a complaint against the refusal. Dutch authorities rejected it as manifestly inadmissible under Art. 27 RDIII, which did not allow contesting such administrative decisions. [12]

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fered in many human rights treaties. U. BRANDL (2016), *Family Unity and Family Reunification in the Dublin System: Still Utopia or Already Reality?*, in V. CHETAIL, P. DE BRUYCKER, F. MAIANI (eds.) *Reforming the Common European Asylum System: The New European Refugee Law*, Brill/Nijhoff, 143 ff., 150-151.

[10] ECJ, Grand Chamber, judgment 1.8.2022, *I.S.*, case C-19/21. See A. FAVI (2022), *Il diritto a un ricorso effettivo nell'ambito del "sistema Dublino" alla luce del (mancato) dialogo tra Corte di giustizia e legislatore dell'Unione: note a margine della sentenza C-19/21, I.S.*, in *BlogDUE*, 1 ff.; M. KLAASSEN (2022) *A Boost for Family Reunification through the Dublin III Regulation? The CJEU on the Right to Appeal Refusals of Take Charge Requests*, in *EU Law Analysis*; A. PERTSCH, R. NESTLER (2022) *Law Must Be Enforceable: Why the CJEU Confirms Remedies for Family Reunification within the EU and What It Implies*, in *VerfBlog*. See also the expert opinion on the case issued on September 2020 by the Migration Law Clinic of the VU University Amsterdam, *An Individual Legal Remedy against the Refusal of a Take Charge Request under the Dublin III Regulation*, available online.

[11] As known, the provision introduces a "binding responsibility criterion" aimed at establishing which member State shall examine an application for international protection lodged by an unaccompanied minor who has an adult relative lawfully residing in the European Union. That criterion prevails over all other criteria contained in the regulation. Provided the requirements listed in Art. 8(2) are fulfilled, the norm entails two clear, precise, and unconditional obligations for the member State where the relative lives: it "shall unite the minor with his or her relative" and it "shall be […] responsible" for the examination of the minor's asylum claim.

[12] Based on Art. 27(1) RDIII, an asylum seeker expressly has the right to appeal a transfer decision made by the sending State.

In the appeal against the rejection, the District Court of The Hague, under Art. 267 TFEU, asked the CJEU whether Art. 27(1) RDIII, in conjunction with Art. 47 CFR, is to be interpreted as obliging the member State that received the request based on Art. 8(2) of that regulation to grant the unaccompanied minor or their relative the right to judicial remedy against the decision rejecting the take-charge request. If this interpretation were not to be accepted, the referring court asked whether, in the case at hand, the right to judicial remedy could be derived from Art. 47 CFR in conjunction with Art. 7 and Art. 24(2) thereof.

Starting from a literal analysis of the regulation, the CJEU observed that the provision does not expressly grant the right to appeal the refusal of a take-charge request by the receiving State. However, it does not rule out the possibility of challenging the decision.

The CJEU, recalling its previous case law (namely *Ghezelbash*),[13] confirmed the comprehensive approach to the interpretation of the right to effective remedy under the Dublin system to conclude that RDIII constitutes not only an interstate instrument for examining a claim for international protection, but is also intended to afford rights to asylum seekers. It would undermine the integrity of the Dublin system to only grant a remedy against a decision to transfer, but not against the decision not to transfer: there would be a risk of losing practical effectiveness (*effet utile*) if there were no possibility of a judicial review of the take-charge request refusal within the framework of the family unity related criteria. The Court therefore concluded that, having regard to the right to effective remedy, an asylum seeker could appeal both the misapplication of the criteria set out in the regulation and the refusal of the take-charge request.[14]

However, such reasoning is a substantial novelty for European judges. The Court disregarded the hermeneutic criterion linked to the literal provision and the purposes of the legislative act that contains it. Instead, the Court stated for the first time that when dealing with UMMs, the right to appeal the refusal of a take-charge request must also be grounded in CFR, specifically considering the fundamental right to family unity and the best interests of the child – as protected by respectively Arts. 7 and 24(2) CFR – and the right to judicial remedy – enshrined in Art. 47. Although Art. 7 CFR does not clearly enshrine a

[13] ECJ, judgment 7.7.2016, *Mehrdad Ghezelbash*, case C-63/15.

[14] ECJ, Grand Chamber, *I.S.*, cit., para. 45.

right to extended family unity, the comprehensive interpretation of Arts. 24(2) CFR and 6(1) and 8(2) of RDIII, together with Recitals 14 and 16, and Art. 6(3)(a) and (4), leads to the conclusion that respect for family life and particularly the possibility for a UMM to be united with a caring relative during the processing of their application is generally in the best interests of the child.

In the Court's view, the RDIII reflects a further step towards the protection of individuals' rights, with family unity being valued as an equally important aim of the Dublin system as speedy responsibility allocation procedures. [15]

Consequently, the UMM asylum seeker (but not their relative) [16] has the right to invoke the protection of these fundamental rights before the national court. Therefore, a judicial remedy must be made available within the national legal system. [17]

In its reasoning, the Court noted that if the UMM applicant had applied for asylum in the Netherlands, and if the Greek authorities had agreed to take charge of them (Greece being the first arrival country and thus the member State responsible for examining the application for international protection), they would undoubtedly have been entitled to challenge the transfer decision of the Dutch authorities. In such situation, they could claim violation of the family unity right stemming from Art. 8(2) of the Regulation. It was therefore clear that a similar remedy should also be available to the applicant wishing to challenge the decision refusing the take-charge request. The Court then emphasised that such interpretation of Art. 27(1) allows full respect for the fundamental rights of the child that Art. 8(2) of the Regulation seeks to protect.

This decision is important for several reasons. First, it gives asylum seekers an additional tool to enforce the application of the Dublin crite-

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[15] Recitals 5 and 9 of the Dublin III Regulation both show that the Dublin system not only demands a 'swiftness and rapidity in the interest of States' and the 'effectiveness of the Dublin system', but also 'objective and fair criteria for the person concerned' and 'the protection granted to applicants under that system'. M. GARLICK (2016), *The Dublin System, Solidarity and Individual Rights* in V. CHETAIL, P. DE BRUYCKER, F. MAIANI (eds.), *Reforming the Common European Asylum System*, cit., 159 ff.

[16] Given that Art. 27 does not confer any right to the applicant's relatives.

[17] Paras. 47-49. The Court reasoned that Art. 27 does not grant appeal rights to the family member at all, who therefore also does not have the right to appeal the refusal of a take-charge request.

ria for family reunification. Indeed, based on Art. 8(2) RDIII, it requires the member State that received the take-charge request to grant UMM asylum seekers the right to appeal the refusal decision. Second, it mitigates the discrepancy of the interpretation of individual remedies under RDIII in EU member States and overcomes the lack of legal clarity.[18] Importantly, the extensive and generous interpretation of Art. 27 RDIII, which could not have been achieved through the literal reading of the provision, is bound to the EU's primary law, so that a newly "created" judicial remedy is perceived primarily as a tool ensuring the protection of fundamental rights.

Consequently, the precedent set in the *Ghezelbash* case is reinforced by a higher and more precise standard of protection for UMMs. In accordance with the current negotiations of the Dublin IV system,[19] the legislator cannot deviate from this standard. Specifically, Art. 33(1) of the Proposal for a Regulation on asylum and migration management[20] would need to be reconsidered in order to comply with the level of protection established by the Court.[21]

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[18] The situation varies among EU member States: contrary to the Dutch Council of State, courts in other member States, such as Germany and the United Kingdom (before Brexit), allowed a legal remedy in the requested member State against the refusal of a take-charge request. At the same time, in Sweden and Austria, an individual remedy has been refused.

[19] Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] Brussels, 23.9.2020, COM/2020/610 final.

[20] The Commission's proposal is an attempt to limit the effects of the Court's ruling in *Ghezelbash*: it provides for a limitation of the right to appeal, stating that the scope of the legal remedy shall be limited to the risk of ill-treatment within the meaning of Art. 4 of the Charter and the application of the criteria relating to family life.

[21] For critical remarks, see L. VAN ZELM (2108), *Dublin IV: Violating Unaccompanied Minor's Best Interests in the Allocation of Responsibility*, in *Leiden Law Blog*; see also ECRE, *Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270*, October 2016, available online. To note is that new Art. 33(2) directly provides for a short period of two weeks from the notification of a transfer decision within which the individual concerned may exercise the right to effective remedy, whereas Art. 27(2) of Dublin III leaves it to member States to determine the time-limit, requiring only that it be reasonable.

3. The right to family reunification and child marriage

With regard to the full recognition of the family reunification right of UMMs, worth noting is the decision issued on 17 November 2022 in which the CJEU clarified whether a refugee who is an unaccompanied minor residing in a member State must be unmarried under national law in order to enjoy the right to family reunification with relatives in the direct ascending line.[22] The request for a preliminary ruling concerns the interpretation of Art. 2(f) and Art. 10(3)(a) of Directive 2003/86/EC (FRD).

The European Court was asked to hear the case of the mother of a married minor refugee who together with her two younger sons wanted to join her daughter in Europe. Eight months after the child married in Lebanon, the young spouse moved to Belgium where her husband had a valid residence permit. On her arrival, the local authorities refused to recognize her marriage certificate because child marriage is against Belgian law. She was considered an unaccompanied minor and assigned a legal guardian. After applying for international protection, she was granted refugee status. A few months later, the girl's mother applied to the Belgian Embassy in Lebanon for a visa for family reunification with her daughter and humanitarian visas for her underage sons. Their applications were rejected because, according to domestic legislation on foreign nationals, the nuclear family consists of spouses and unmarried minors. Consequently, the Minister for Asylum Policy and Migration argued that family reunification could only apply to unmarried minors, not to those who had married in a jurisdiction where child marriage is legal. According to the Belgian authorities, the applicant's daughter was no longer considered a member of her parents' nuclear family following a marriage that was valid in the country in which it was contracted. The applicant challenged these decisions before the referring court. The main question was whether marriage prevented a minor from being considered "unaccompanied" and, consequently, excluding them from exercising the right to family reunification with their ascending relative.

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[22] ECJ, judgment 17.11.2022, *X,* case C-230/21. For a comment, see M. KLAASSEN (2022), *Op-Ed: "The Right to Family Reunification for Married Unaccompanied Minors: An Analysis of X. v Belgische staat (C-230/21)"*, in *EU Law Live*. More broadly, for a comment on the most recent decisions on the issue, see C. FRATEA (2023), *La tutela del diritto all'unità familiare dei minori migranti tra sistema europeo comune di asilo e direttiva sul ricongiungimento familiare: una lettura alla luce della giurisprudenza della Corte di giustizia dell'Unione europea*, in *Rivista OIDU*, 12 ff.

Before reaching its conclusion, the Luxembourg Court first considered the general scheme of the FRD, recalling that it lays down the conditions for the right to family reunification of third-country nationals and stateless persons residing lawfully in the territory of the member States and establishes more favourable conditions for refugees to exercise their right to family reunification, including the possibility of reuniting with first-degree relatives in the refugee's direct ascending line.[23] Under Art. 10(3)(a) of the Directive, the latter option is not discretionary for unaccompanied minors in order to guarantee the best interests of the child. According to the Court, this provision establishes a precise positive obligation that corresponds to a clearly defined right.[24] Next, the Court examined the UMM concept and its relevance to the right to family reunification. Based on settled case law, the Luxembourg Court applied the traditional hermeneutic approach, paying attention to the wording, general scheme, and objective of this Directive, taking into account the legal context in which it is found and the general principles of EU law. In this perspective, the Court established two cumulative conditions that must be met for an applicant to be considered a UMM: the person concerned must be under 18 years of age, and must be unaccompanied in accordance with Art. 2(f) FRD. There are no additional conditions referred to the marital status of the minor.[25]

In addition, the Court specified that the situation of a married minor applying for family reunification with their relative sponsor in the ascending line (referred to in Art. 4(1) of Directive 2003/86/EC) is not comparable to that of a married unaccompanied refugee minor whose first-degree relative in the direct ascending line applies for family reunification (under Art. 10(3) FRD). This is because the refugee minor residing alone in the territory of a State other than their country of origin is in a particularly vulnerable position, thus warranting enhanced pro-

[23] On the genesis of the Directive, see J. HARDY (2012), *The Objective of Directive 2003/86 is to Promote the Family Reunification of Third Country Nationals*, in *Eur. J. Migr. Law*, 14, 439 ff.; see also M. BALBONI (2015), *Il diritto al "ricongiungimento familiare" dei minori tra tutela del loro superiore interesse e dell'interesse generale in materia di politica migratoria*, in S. AMADEO, F. SPITALERI (ed.), *Le garanzie fondamentali dell'immigrato in Europa*, Torino, 165 ff.; M. CASTIGLIONE (2020), *L'interesse superiore del minore al ricongiungimento familiare tra sovranità statale e Regolamento Dublino III*, in *Dir., Imm. e Cittad.*, 109 ff.

[24] ECJ, *X*, cit., para. 28.

[25] *Ivi*, para. 29.

tection.[26] This different situation justifies the latter's right to family reunification, not subject to the conditions laid down in Art. 4(2)(a) but to those in Art. 10(3)(a). Therefore, according to the Court, the interpretation of the context of Art. 10(3)(a), in conjunction with Art. 2(f) FRD, justifies the promotion of family reunification with first-degree relatives in the direct ascending line outside the European Union without giving rise to unequal treatment.

Given that Art. 10(3)(a) seeks to provide additional protection to those refugees who are unaccompanied minors, it would be contrary to the objective of special protection to limit the benefit of the right to family reunification (with first-degree relatives in the direct ascending line) only to unmarried unaccompanied refugee minors. Therefore, the provision must mean that a UMM residing in a member State does not have to be unmarried to acquire the status of sponsor for family reunification with a first-degree relative in the direct ascending line.

In answering the question put to them, the judges could have confined themselves to the letter of the applicable provision: the condition of the absence of marriage is not laid down and is therefore not relevant. However, to strengthen its decisions, the CJEU further highlighted that the particular vulnerability of minors is not mitigated by marriage. On the contrary, it noted that the fact that an underage female is married can lead to serious forms of violence. Finally, the Court held that the marital status of an unaccompanied refugee minor might be challenging to establish, particularly in the case of refugees from countries that do not issue reliable official documents. Both of these considerations are very significant because the Court emphasised arguments that go beyond a normative interpretation, showing sensitivity to the reality of individuals to whom the European provisions are addressed, thus offering an evolutionary interpretation of existing law. It is expected that it will be applied to numerous other contexts with foreigners in a state of vulnerability as recipients.

In conclusion, the CJEU judges stated in the ruling that unaccompanied minors need special protection and should benefit from such protection regardless of marital status, compelling national authorities to primarily recognize the minor status of an applicant rather than their marital status.

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[26] See, to this effect, ECJ, judgment 12.4.2018, *A and S*, case C-550/16, para. 44.

4. The time limit and the evolution of the notion of family ties

Other important questions concern the time limit for exercising the right to family reunification and the concept of "family life". Two decisions issued by the CJEU on 1 August 2022[27] dwell on these questions (when children must be minors to claim the right to family reunification, the existence of actual family ties, and the duration of a residence permit after entry of the person joining the family). The request for a preliminary ruling relates to the interpretation of Art. 16 of Directive 2003/86/EC.

The cases concerned visa applications for family reunification of Syrian nationals with their minor children who had been granted refugee status in Germany. In both cases, the applications for family reunification had been submitted within three months of the sponsors' refugee status being recognized – when they were still children – so that in the applicants' point of view, they had submitted their applications on time.[28] However, the applications were rejected because the children had by then come of age.[29]

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[27] ECJ, judgment 1.8.2022, *Bundesrepublik Deutschland v. SW and others*, joined cases C-273/20 and C-355/20. See notes of F. GAZIN (2022), *Immigration - Regroupement familial des réfugiés*, in *Europe*, 11, comm. 367. On the same day, with judgment 1.8.2022, *Bundesrepublik Deutschland v. XC*, case C-279/20 the ECJ further states that the same principle applies if the application for family reunification is submitted by a minor with a father who was a refugee in Germany.

[28] The time limit for the introduction of the application by minors who reach the age of majority during the family unification procedure is not delved into in the decision, and FRD does not contain a time limit to exercise the right to family reunification. However, on the issue, the CJEU already clarified that while late application can lead to more restrictive requirements, it cannot, in itself, lead to the right to family reunification being denied altogether. In ECJ, judgment 7.11.2018, *K and B*, case C-380/17, the Court held that applications lodged beyond the three-month timeframe must still be processed under the ordinary rules that apply to all other third country nationals; late application alone is not a sufficient basis for rejection. The Luxemburg Court nevertheless indicated that in the case of children who reach the age of majority during the procedure, an application should be made "within a reasonable time" as allowing reliance on this right without any time limits would be incompatible with the FRD aims. For the purposes of determining a reasonable period, the Court held that the three-month period which Member States may apply in respect of the more favourable provisions for refugees under the third subparagraph of Art. 12(1) is of "indicative value". As a result, the aged-out youth must "in

The Federal Administrative Court asked several questions concerning the interpretation of Art. 16(1)(a) FRD and the compatibility of German legislation with the provisions of Art. 2(f) of Directive 2003/86/EC. The national court also asked whether these provisions are to be interpreted as not precluding national legislation under which the parents of an unaccompanied minor refugee residing lawfully in Germany are granted the right of residence only for as long as the refugee is still a minor, and what the requirements are in terms of a genuine family relationship within the meaning of Art. 16(1)(b) FRD.

The issue of children reaching the age of majority during the family reunification procedure is not new to the European Court. As already held in its precedents (*A, S*, and *État belge*),[30] the Court reaffirmed that the specific reference age of a refugee to be considered a minor and thus benefit from the right set out in Art. 10(3)(a) – whether it be the reunification of parents with minor children with refugee status, or the reunification of minor children with parents with refugee status –[31] must be established at the time of entry and asylum application of the reference person. Thus, the "ageing out" of the sponsor cannot be used to undermine the rights of unaccompanied children under this Directive.

Any other interpretation would be inconsistent with the objectives of the FRD, which include promoting family reunification and providing specific protection to refugees, in particular unaccompanied minors, and with the requirements of Arts. 7 and 24(2) of the Charter.[32] On the contrary, making the right to family reunification conditional on the date of the decision could, instead of incentivising States to process the

principle" submit the application within three months of being granted refugee status. See ECJ, *A and S*, cit., para. 61.

[29] According to national law, the ascendant who applies for reunification with his or her child who is legally resident in Germany has a right of residence limited in time to the period during which that child is a minor. As a consequence, if the minor reaches legal age before the decision on reunification is taken, the ascendant application is rejected. The CJEU's judgement overturned a German law on family reunification.

[30] ECJ, judgment 12.4.2018, *A, S*, case C-550/16, and ECJ, judgment 16.7.2020, *État belge*, joined cases C-133/19, C-136/19 and C-137/19.

[31] Specifically, case C-279/20 referred to the family reunification procedure of a minor with her father who was a refugee in Germany. The referring court asked the same question in the case at hand.

[32] ECJ, *Bundesrepublik Deutschland v. SW and others*, cit., para. 39.

applications of unaccompanied children expeditiously, have the opposite effect and frustrate the objective of ensuring that the best interests of the child are in practice a primary consideration of member States.[33] It would also be contrary to the principles of equal treatment and legal certainty, as it would make this fundamental right dependent on other random and unpredictable factors. It would also depend on arbitrary circumstances beyond the applicant's control, such as the length of the administrative procedures or the staffing and sickness levels of the competent authorities.[34]

The Court therefore concluded that, in order to ensure equal treatment and certainty for all unaccompanied minors, the date of the decision on the application for entry and residence for the purpose of family reunification submitted by the refugee's parents is not decisive for the assessment of their status as minors.[35] The relevant date for assessing the applicant's status as a child is the date of the application for international protection, with the result that the parents of a child who becomes an adult during the procedure continue to benefit from the family reunification right under FRD.[36] However, the application for family

[33] *Ivi*, para. 43.

[34] *Ivi*, para. 45.

[35] *Ivi*, para. 48: "In that regard, it should be pointed out that, as the Court has already held, the age of the applicant or, as the case may be, of the sponsor, cannot be regarded as a material condition for exercising the right to family reunification, within the meaning of recital 6 and Article 1 of Directive 2003/86, in the same way as those laid down in particular in Chapter IV of that directive, which are concerned by Article 16(1)(a) thereof. Unlike the latter provisions, the age requirement is a requirement in respect of the very eligibility of the application for family reunification, which is certainly and predictably going to change, and which can therefore be assessed only at the time of the submission of that application (see, by analogy, judgment of 16 July 2020, État belge (Family reunification – Minor child), C-133/19, C-136/19 and C-137/19, EU:C:2020:577, paragraph 46)".

[36] The same conclusion is warranted under the right to respect for family life enshrined in Art. 8 ECHR (see, for example, ECHR, judgment 14.6.2011, application no. 38058/09, *Osman v. Denmark* as well as ECHR, judgment 10.7.2014, application no. 2260/10, *Tanda-Muzinga v. France*, and ECHR, judgment 10.7.2014, application no. 52701/09 *Mugenzi v. France*), and international legal guidance (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 16 November 2017, *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on*

reunification must be submitted within a reasonable time, i.e., within three months of the date on which refugee status was granted to the reunified parent.

In its decision on the preliminary question at hand, the Court also added that where family reunification had been applied for by the parents of a minor refugee who in the meantime has reached the age of majority, they should be granted a residence permit valid for at least one year if their application is accepted. The fact that the child benefiting from refugee status has reached the age of majority cannot lead to a shortening of the duration of the residence permit.[37] Under EU law, the unaccompanied minor does not have to be unmarried for the parents to be eligible for family reunification. In addition, under the best interests procedure (BIP), unaccompanied minors are eligible for family reunification as long as they were minors at the time of their asylum application, regardless of whether they reached the age of maturity during the asylum procedure or after their status was recognized. They then retain their right to be reunited with their parents under EU law as long as the application is submitted within a reasonable time (in principle, three months after refugee status is granted).

The Court went further in its reasoning, dwelling on the assessment of a genuine family relationship and adding some important new elements. This is the most interesting part of the decision, as it paves the way for a broad extension of the right to family reunification. A pragmatic approach to family ties is required given that family separation, in the case of refugees, is not a deliberate choice, but rather the result of forced displacement due to persecution and war.[38]

Specifically, the CJEU held that mere first-degree ascendancy is insufficient to establish a genuine family relationship. It applied the traditional hermeneutic approach: the relevant provisions of Directive 2003/

the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, paras. 15 and 35).

[37] ECJ, *Bundesrepublik Deutschland v. SW and others*, cit., para. 51. It follows that Art. 16(1)(a) FRD precludes national legislation that, in the case of family reunification of parents with an unaccompanied minor refugee, requires that the refugee is still a minor on the date of the decision on the application for entry and residence for the purposes of family reunification submitted by the sponsor's parents.

[38] ECJ, judgment 12.12.2019, *TB*, case C-519/18, paras. 49-50.

86/EC and the Charter protecting and promoting the right to family life.[39] Conversely, it is left to the holders of this right to decide how they wish to conduct their family life. In particular, the law contains no requirements regarding the intensity of family relationships.[40] The Court recognized that these families were unable to lead a real family life during the period of separation due to the specific situation of their children as refugees, and that it cannot be assumed that any family relationship between a parent and children immediately ceases to exist once the minor reaches the age of majority. The existence of family life depends essentially on the actual existence of close personal ties. Using a "constructive" and flexible method of interpretation, the CJEU departed from formal considerations to conclude that it is not necessary for the child sponsor and the parent to live in the same household or support each other financially to qualify for family reunification. Occasional visits and regular contact of any kind may be sufficient to consider that they are re-establishing personal and emotional ties and the existence of a genuine family relationship.[41]

5. Concluding remarks

The Court's increased activity to improve the protection of UMMs reflects the growing phenomenon of child and adolescent migrants and exposes the limitations of the current legal framework.

Definitely, the extensive migratory flows of unaccompanied minors crossing international borders have become one of the most complex and challenging aspects of modern migration crisis. When dealing with migrant children travelling alone, deprived of the care and protection of family, the adult paradigm, as set by international refugee law, must be left aside and the acknowledgment of a child-centric approach on the protection of this specific group of migrants must be adopted.[42]

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[39] ECJ, judgment 4.3.2010, *Chakroun*, case C-578/08, para. 43 and ECJ, judgment 14.3.2019, *Y.Z. and others*, case C-557/17, para. 53.

[40] ECJ, *Bundesrepublik Deutschland v. SW and others*, cit., para. 62.

[41] ECJ, *Bundesrepublik Deutschland v. SW and others*, cit., para. 68. Similarly, under Art. 8 ECHR, the concept of 'family life' is rooted in genuine personal ties. See ECHR, judgment 17.1.2012, application no. 1598/06, *Kopf and Liberda v. Austria*.

[42] E. PAPOUTSI (2020), *The Protection of Unaccompanied Migrant Minors*

The case law analysed paints a reassuring picture of the protection of the right to family unity in contexts where migrant children are involved either as beneficiaries of international protection or as members of their families. In the above-mentioned cases the Court took a fundamental rights approach, underscoring the particular vulnerability of unaccompanied minors and stressed how the right to family reunification serves the crucial role of fostering a more coherent understanding of the principle of best interest of the child. Still, by putting the focus on the promotion of family reunification and not on the control of immigration towards Europe, the Court has taken a step closer to add broader assessment of the right of the most vulnerable migrants. While revealing the punitive and exclusionary approach of States towards irregular migration, case law has attempted to mitigate the effects of aseptic enforcement by hermeneutically attributing new rights to the most vulnerable migrants.

The Luxemburg Court's favourable interpretation of the relevant provisions of both the Family Reunification Directive and the Common European Asylum System Act (Dublin III Regulation) made it possible to interpret those provisions that could affect the effectiveness of the right to family reunification of minors in a way that takes into account, in addition to the objectives of these acts, above all the need to fully implement Arts. 7 and 24(2) CFR. [43]

The hope for the future is that the Court's judgments, based on an effective child's rights approach and a supportive interpretation of the concept of family unity, will promote more effective ways of fulfilling member States' responsibilities to manage and protect migrant minors. Indeed, the CJEU's method of interpretation could provide some input to the reform in order to consider a more constructive approach to protecting migrant children. [44] Widening the scope of inquiry, one might then wonder which is the legal value of the Court's statements and their

Under International Human Rights Law: Revisiting Old Concepts and Confronting New Challenges in Modern Migrant Flows, in *AUILR*, vol. 35, 2, 219 ff.

[43] C. FRATEA (2023), *La tutela del diritto all'unità familiare dei minori migranti*, cit.

[44] The report on migration and asylum for 2022 (COM/2022/740 final, 6.10.2022) while affirming the need for structural reforms of the European asylum system "in order to enable the Union to address both crisis situations and longer-term trends", refers to the advisability of envisaging measures specifically affecting the family sphere of migrant minors.

implications for the various proposals in the New Migration and Asylum Pact.

The Pact is an opportunity to improve asylum systems in Europe. Therefore, in the interest of good migration management, it would be advisable that the Court's rulings be reconsidered to ensure vulnerable migrants' effective protection.

However, there is a high risk that the final redrafting of the ongoing reform will not take into account the potential legal impact of the rulings, and that the legislation actually under negotiation, – which is the result of compromises among Member States political will –, may well erase or reframe the Court's ruling in the part that relates to child migrants. [45]

If the political strategies do not take these new elements into account, it will be the responsibility of domestic courts to keep a higher level of protection of migrants' minors by referring relevant cases to the CJEU. Its rulings will constitute a valuable contribution to the clarification of the applicable laws and at the same time will provide guidance for national judges as to the protective regime for refugees who are unaccompanied minors.

That is not the expected goal, but at least it is a concrete way to protect the youngest and most vulnerable victims of migration flows.

[45] This has already occurred, as the proposed Art. 15 of RDIV ignored the *M.A.* ruling (ECJ, judgment 6.6.2013, case C-648/11) and reversed the Court's decision.

Chapter 18

IMMIGRATION DETENTION: THE ASSESSMENT OF NON-EUROPEAN HUMAN RIGHTS CONTROL BODIES

Annachiara Rotondo

ABSTRACT: *Migrants are particularly exposed to the risk of being deprived of their personal liberty, and not only when national laws punish irregular migration by imprisonment. In fact, a great number of countries resort to administrative detention as an intermediate step before adopting other permanent measures, such as deportation or expulsion. However, this practice has always been strongly criticized not only because it is proven that strict immigration detention policies do not necessarily deter irregular migration, but also and especially due to its side-effects. Whatever its purpose, as well as being in some cases an excessive and unjustified restriction of the right of personal liberty, it is often accompanied by a series of unacceptable abuses and violations against detainees. Hence, States are exposed to the risk of incurring in international responsibility either directly, for the lack of compliance of the detention measure with international human rights law standard, or indirectly, for the detrimental behaviors carried out against migrants. This paper is therefore aimed at focusing on the immigration detention practice, in order to verify whether this measure, not illegal* ex se*, complies with the international human rights law. In particular, the analysis is conducted vis-à-vis the principle of the prohibition of arbitrary detention in the light of universal and non-European human rights control bodies assessment.*

1. Introduction

Because of their inherent condition migrants are particularly exposed to the risk of being deprived of their personal liberty, and not only when

national laws provide that irregular migration is to be sanctioned by imprisonment. In fact, a great number of countries resort to administrative detention as an intermediate step, in the meanwhile identifying migrants and determining their nationality, and before the implementation of other permanent measures, such as deportation or expulsion.[1] Furthermore, transit countries often resort to detention within the so-called 'pullback operations' in order to prevent migrants from leaving their territory, and notably when they are beneficiaries of funds for the containment of migration flows.[2]

Peculiarities connected to migrants' detention, and the wide range of possible grounds for confinement, led international organizations involved in human rights' protection to introduce the expression 'immigration detention' for identifying each kind of restriction on freedom of movement through confinement for migration-related reasons. This practice, albeit largely used by States for pursuing the legitimate aim of combating illegal immigration, has always been widely criticized. This is not only because it's proven that strict immigration detention policies do not necessarily deter irregular migration, but also and especially due to its side-effects. Whatever its purpose, as well as being in some cases an excessive and unjustified restriction of the right of personal liberty, most of the times immigration detention occurs in regrettable facilities where detainees suffer unacceptable abuses and violations. Furthermore, detention may endanger migrants' physical and mental health, aggravating existing conditions and causing new problems to arise, especially on the psychological level. In fact, it has been documented that anxiety, depression, exclusion, post-traumatic stress disorders, suicidal ideation are often caused by deten-

[1] IOM (2017), *Immigration Detention and Alternatives to Detention*, *Global Compact Thematic Paper*, 1, available online.

[2] Pullback operations "are designed to physically prevent migrants from leaving the territory of their State of origin or a transit State (retaining State), or to forcibly return them to that territory, before they can reach the jurisdiction of their destination State. 'Pullbacks' are carried out by retaining States or local armed groups, either in the interest of dictatorial regimes trying to prevent inhabitants from escaping (departure prevention), or at the instigation and on behalf of destination States desiring to prevent migrant arrivals without having to engage their own border authorities in unlawful 'pushback' operations (indirect arrival prevention)". Cf. HRC, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 26 February 2018, A/HRC/37/50, para. 56.

tion-related factors (as its excessive length, family disintegration or overcrowding).[3]

It thus seems clear how much States are therefore exposed to the risk of incurring in international responsibility either directly, for the possible lack of compliance of the detention measure with international human rights law standards, or indirectly, for all the detrimental behaviors carried out against detained migrants insofar they are however required to ensure the respect of human rights within their territory.

Hence, this paper is aimed at focusing on the immigration detention practice, in order to verify whether this measure, not illegal *ex se*,[4] complies with international human rights law. In particular, the analysis will be conducted *vis-à-vis* the fundamental principle of the prohibition of arbitrary detention ascribable, according to international human rights law, to the right to liberty of the person. More specifically, the study will linger over the universal and non-European human rights protection systems, with the aim of analyzing the assessments of human rights control bodies.

2. Describing and defining immigration detention

Immigration detention is a cross-cutting practice, implemented in both the East and the West, the North and the South. Notwithstanding governments have long seemed to agree on the need to pursue alternatives, it has been constantly increasing in conjunction with the growth of regular and irregular migration flows. In particular, it has been observed that while in the 1990s it was uncommon and conceived exclusively as a last resort, since 2015 it has become a widespread practice,[5] raising

[3] CMW, *General Comment No. 5 (2021) on Migrants' Rights to Liberty, Freedom from Arbitrary Detention and Their Connection with Other Human Rights*, 21 July 2022, CMW/C/GC/5, para. 6.

[4] Immigration detention is not contrary to international law *ex se* because it falls among measures States can resort to in the exercise of their sovereign powers of regulating human activities within their territorial sphere and fixing the legal regime applicable to individuals, whether having their nationality, under their sphere of sovereignty. States can, in fact, may freely decide not to admit certain aliens, or to admit them under certain conditions, and to impose their sovereignty and jurisdiction also with reference to measures regarding the management of migration flows.

[5] S-J. SILVERMAN, A. NETHERY (2015), *Understanding Immigration Deten-*

such an alarming rate that some scholars spoke about a "global prison network".[6]

Although immigration detention has been under the spotlight for a long time, no precise and unambiguous definition is found. Generally, it is considered a form of *administrative confinement of noncitizens for migration-related reasons and "for the purposes of realizing an immigration-related goal"*[7] (emphasis added). It basically opposes to criminal detention, which consists of deprivation of liberty on criminal charges or convictions,[8] even though it can also be imposed pursuant to criminal law when unauthorized entry in a State's territory is deemed as a criminal act. However, according to the prevailing opinion, this case is not to be ascribed to the category under consideration which, instead, commonly covers administrative measures. As such, immigration detention falls under the scope of administrative law and not under criminal law,[9] hence it does not formally amount to a punishment[10] serving, instead, the aim of avoiding the risk of the alien escaping or that the alien poses a danger to the community.[11]

Whilst detention as a criminal sanction always finds its legal basis in domestic criminal legislation,[12] most of the times administrative deten-

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tion and Its Human Impact, in A. NETHERY, S.J. SILVERMAN (eds.), *Immigration Detention. The Migration of a Policy and Its Human Impact*, London, 1 ff.

[6] L. FISKE (2016), *Human Rights, Refugee Protest and Immigration Detention*, London, 5.

[7] S-J. SILVERMAN, E. MASSA (2012), *Why Immigration Detention is Unique*, in *Population, Space and Place*, 18, 679.

[8] R. SAMPSON, G. MITCHELL (2013), *Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*, in *JMHS*, 99; L. FISKE, *Human Rights*, cit., 6.

[9] A. LEERKES, D. BROEDERS (2010), *A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention*, in *Brit. J. Criminol*, 50, 830.

[10] *Ibidem*. See also S.H. LEGOMSKY (1999), *The Detention of Aliens: Theories, Rules, and Discretion*, in *U. Miami Inter-Am. L. Rev.*, 30, 536.

[11] D. COLE (2002), *In Aid of Removal: Due Process Limits on Immigration Detention*, in *Emory L.J.*, 51, 1007.

[12] For instance, according to Niger's Law No. 40 on the Entry and Stay of Foreigners (*Ordonnance N°81-40 relative à l'entrée et au séjour des étrangers au Niger*, 1981) irregular stay without a residence permit (or failure to leave after an expulsion order) is criminalised and sanctioned with prison sentences for between two months and two years, and fines of up to 250,000 XOF

tion is not sufficiently regulated by national laws, with the result that migrants are usually left with very few – and sometimes without – safeguards or remedies. In fact, if on the one hand the administrative character of immigration detention suggests a less restrictive regime, on the other hand the lack of oversight, monitoring and protections proper of judicially ordered detention may lead migrants to a weakened protection:[13] "there are no readings of one's rights, no automatic rights to a lawyer or a phone call and […] no meetings to explain how to get out of detention […] no translators, no mandatory court reviews, no visitations, and no one to alert family and friends to the situation".[14] This clearly explains the reason why this practice has been labelled as an "extraordinary exercise of State power",[15] susceptible at leading towards abuses and discriminatory practices.[16]

However, in the perspective of international law immigration detention it's a practice that does not allow for any interpretive doubt: it's a form of deprivation of personal liberty "that begins with the arrest [of the migrant] and continues in time from apprehension until release".[17] In fact, according to the General Comment No. 35 on Art. 9 of the International Covenant on Civil and Political Rights (ICCPR) issued by the Human Rights Committee (CCPR) in 2014, deprivation of liberty

(382 EUR). Since besides detention undertaken pursuant to criminal law Nigerien migration law does not explicitly provide for administrative immigration detention, there are no provisions concerning guarantees for migrants detained on an administrative ground. (GLOBAL DETENTION PROJECT (2021), *Niger, Submission to the Universal Periodic Review 38th Session of the UPR Working Group, Issues Related to Immigration Detention*, April/May, paras. 2.1, 2.2).

[13] L. FISKE (2016), *Human Rights*, cit., 6. On the contrary an analysis of relevant US case law shows how immigration detention is to be considered a form of civil detention which must be subjected to the same due process rules that apply to civil detention elsewhere, D. COLE (2002), *In Aid of Removal: Due Process Limits on Immigration Detention*, cit., 1019.

[14] S-J. SILVERMAN, A. NETHERY (2015), *Understanding Immigration Detention and Its Human Impact*, cit., 2.

[15] *Ivi*, 10.

[16] J. KÖNÖNEN (2022), *Immigration Detention as a Routine Police Measure: Discretionary Powers in Preemptive Detention of Noncitizens in Finland*, in *Law Soc Rev.*, 56, 421.

[17] CCPR, *General Comment No. 35 Article 9 (Liberty and Security of Person)*, CCPR/C/GC/35, 16 December 2014, para. 13.

specifically includes administrative detention.[18] As a deprivation of liberty, it amounts to a more severe restriction of motion within a narrower space than a simple interference with the freedom of movement under Art. 12 ICCPR,[19] and occurs without the free consent of the detained person[20] who can be an alien, an asylum seeker, a stateless person or a migrant worker.[21] More specifically, as recently pointed out by the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), the expression under consideration "refers to any situation in which a person is deprived of liberty on grounds related to that person's migration status, regardless of the name or reason given for carrying out the deprivation of liberty, or the name of the facility or place where the person is being held while deprived of liberty. Accordingly, immigration detention includes the detention of migrants in prisons, police stations, immigration detention centres, closed reception facilities, health-care facilities and any other enclosed spaces, such as international or transit areas at air, land and maritime ports".[22]

3. Critical issues connected to immigration detention practice

The analysis of the countless reports from international organizations and NGOs involved in human rights protection reveals that immigration detention raises evident questions of legal concern which cannot be listed exhaustively given the wide range of criticalities posed by the measure as such and, more often, by the inhumane drift it takes, espe-

[18] *Ivi*, para. 5. It seems worth noting that, according to CCPR, the concept of deprivation of liberty is very broad including police custody, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported.

[19] *Ibidem*.

[20] *Ivi*, para. 6.

[21] *Ivi*, para. 3. Analogously: UN Working Group on Arbitrary Detention, *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, A/HRC/30/37, 6 July 2015, para. 9.

[22] CMW, *General Comment No. 5*, para. 14. For a further definition of 'deprivation of liberty' see also: HRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/37/50, 26 February 2018, para. 18.

cially in certain countries. Problems of compliance with international human rights law arise – *inter alia* – with reference to the prohibition of torture, cruel, inhuman, and degrading treatments or punishments and with the right of all persons deprived of their personal liberty to be treated with humanity and in respect of their dignity (respectively enshrined by Arts. 7 and 10 ICCPR). Affecting asylum seekers, children and people with disabilities indiscriminately, immigration detention may also be detrimental for the enjoyment of the rights that international human rights law specifically provides for these subjects. However, as a deprivation of liberty, immigration detention endangers *prima facie* the exercise of the right to liberty of the person, not infrequently violating the prohibition against arbitrary detention that stems from that right.

Broadly envisaged within UN treaties,[23] the right to liberty of the person is also largely enshrined at a regional level: in particular, alongside the European instruments,[24] by Art. 6 of the African Charter on Human and People's Rights (ACHPR) and Art. 7 of the American Convention on Human Rights (ACHR). Both the provisions approximately trace the formulation of Art. 9 ICCPR which recognizes and protects the right to liberty and security of persons prohibiting arbitrary arrests and detentions and any other deprivation of liberty, except when such deprivation is provided for by national laws (par. 1). According to the said Article, exceptions are allowed as long as they are based on the law and provide safeguards for persons who are legitimately deprived of their liberty. The latter include the right to be informed about the reasons for the arrest and the charges against the detained person; the right to be brought before a judge and to be entitled to trial within a reasonable time, or to release; the right to be entitled to take proceedings before a court which has to decide without delay on the lawfulness of the detention and eventually on the release; and finally the right to a compensation in case of unlawful arrest or detention (paras. 2-5).

It is almost clear that Art. 9 does not prohibit contracting Parties to

[23] Universal instruments which expressly recognize the right under consideration are: the 1948 Universal Declaration of Human Rights (Art. 3); the 1966 International Covenant on Civil and Political Rights (Art. 9); the 1989 Convention on the Right of the Child (Art. 37); and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Art. 16).

[24] The European Convention on Human Rights of 1950 (Art. 5) and the Charter of Fundamental Rights of the European Union of 2000 (Art.6).

resort to deprivation of liberty, rather prescribing clear limits on its lawfulness. States, are in fact bounded by a primary negative obligation to abstain of taking any measure which can consist of arbitrary or unlawful arrest or detention,[25] and by the corresponding positive obligation of protecting persons against arbitrary or unlawful arrest and detention by third parties which, because of their functions, are allowed to hold people in custody.[26] Additionally, when the measure is lawfully undertaken States are bounded by further obligations inherent to detainees' safeguards and, more broadly, by that of guaranteeing the exercise of detainees' human rights.

Consequently, Art. 9 determines both the questions of 'whether' personal liberty may be restricted and 'how' such restrictions may be carried out. Hence, as a deprivation of personal liberty, immigration detention should therefore respect the legal standards the said provision refers to both the aspects. However, this practice is often subjected to a mis-implementation which leads it towards arbitrariness, affecting both whether and how. Under the first, the main problems relate the lack of legal basis or the formal and substantive non-compliance of national laws, according to which the measure is undertaken, with the standards provided for by Art. 9. Under the second aspect, critical issues are wider, covering – *inter alia* – excessive length of confinement,[27] denial of access to judicial rights and communication with consular representatives,[28] regrettable conditions of detention facilities.[29]

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[25] In this context, the term 'arrest' refers to any apprehension of a person that commences a deprivation of liberty, and the term 'detention' refers to the deprivation of liberty that begins with the arrest and continues in time from apprehension until release (CCPR, *General Comment No. 35*, cit., para. 13).

[26] *Ivi*, para. 7.

[27] The length of confinement is frequently uncertain since national legislations not always specify a time limit beyond which detention should cease and, even if limits are established by law, the time limit is often exceeded. Migrants can remain in administrative detention for long periods awaiting deportation or expulsion and not rarely in facilities not equipped for long-term confinement.

[28] When arrested, they are usually prevented from communicating with their consular representatives and from exercising the right to judicial or administrative review of the lawfulness of detention, as well as the right to appeal against the decision or to apply for bail or other non-custodial measures.

[29] Detention's conditions are often regrettable: overcrowding, inadequate water, food, clothing and sanitation, lack of furniture (as beds, chairs, tables) and separate accommodations for men, women and children, understaffing are only

4. Immigration detention *vis-à-vis* the prohibition of arbitrary deprivation of liberty: UN Control Bodies Assessment

Arbitrary immigration detentions have been largely investigated in the practice of human rights control bodies which have argued extensively about the underlying causes. The UN Working Group on Arbitrary Detention identified five specific grounds leading detention towards arbitrariness: [30] when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty; when the deprivation of liberty results from the exercise of human rights and freedoms; when the violation of international norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty an arbitrary character; when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy; and finally when the deprivation of liberty consists in a violation of international law due to a discrimination. [31] However, according to CCPR this concept is to be interpreted in a broader sense to include elements of "inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality". [32]

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some of the elements that – not rarely – can make immigration detention worse than an incarceration (OHCHR Migration Unit (May 2021), *Unsafe and Undignified. The Forced Expulsion of Migrants from Libya*, 25; F. GONZÁLEZ MORALE, *Report of the Special Rapporteur on the Human Rights of Migrants, Ending Immigration Detention of Children and Providing Adequate Care and Reception for Them*, A/75/183, 20 July 2020, para. 27; F. CRÉPEAU (2012), *Report of the Special Rapporteur on the Human Rights of Migrants*, A/HRC/20/24, 2 April, para. 6; LAWYERS FOR HUMAN RIGHTS (2020), *Monitoring Policy, Litigous And Legislative Shifts in Immigration Detention in South Africa*, May, 49 ff., available online.

[30] The Working Group was established by the Commission on Human Rights in its Resolution 1991/42, it is entrusted with the task to investigate all cases involving 'deprivation of liberty' imposed arbitrarily according to the standards set forth in the Universal Declaration of Human Rights and the relevant international instruments accepted by the States concerned. The mandate of the Working Group was extended by the Commission in its resolution 1997/50 to cover the issue of administrative custody of asylum seekers and immigrants and recently was renewed for a three-year period by Human Rights Council Resolution A/HRC/RES/51/8, 6 October 2022.

[31] Detailed information on arbitrary detention according to UN Working Group on Arbitrary Detention are available online.

[32] CCPR, *General Comment No. 35*, cit., para. 12.

Notwithstanding arbitrariness may be in violation of national laws, the Committee specified that it does not necessarily mean "against the law" since also the detention undertaken pursuant to national legislations may lead toward arbitrariness.[33] In fact, as highlighted in the UNHCR Guidelines on Detention, the presence of "national legislation […] is 'not always the decisive element in assessing the justification of deprivation of liberty'".[34] because the legal basis must be however compliant with the principle of legal certainty which requires that national laws expressly identify the grounds for detention, and that their legal consequences are to be foreseeable and predictable. Arbitrariness and unlawfulness are thus two different grounds for noncompliance with the right to personal liberty: they can coexist and overlap, with the result that "detentions may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful" (immigration detention devoid of any legal basis is, for instance, both unlawful and arbitrary).[35]

With specific regard to administrative detention, CCPR pointed out that there is a high risk that it will result in arbitrariness because States do not impose it "in contemplation of prosecution on a criminal charge".[36] In particular, arbitrariness occurs when the recourse to administrative detention is not invoked on the basis of a present, direct and imperative threat posed by the individual who is to be detained. In this case, according to the Committee, the burden of proof the subject poses as a threat relies however always upon the State, which also has to prove that the threat cannot be addressed by alternative measures and guarantee that the detention does not last longer than necessary. Consequently, any custody that is unlimited or of unreasonable duration may deviate toward arbitrariness, even if the time stretches because the State is unable to expel the migrant due to his/her statelessness.[37]

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[33] See CCPR, Views: 23 July 1990, Communication no. 305/1988, *Van Alphen v. The Netherlands,* CCPR/C/39/D/305/1988, para. 5.8; 21 July 1994, Communication no. 458/1991, *Mukong v. Cameroon*, CCPR/C/51/D/458/1991, para. 9.8.

[34] UNHCR (2012), *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Guideline 3, para. 15.

[35] CCPR, *General Comment No. 35*, cit., para. 11.

[36] *Ivi*, para. 15.

[37] *Ivi*, para. 18.

Moreover, the prohibition of arbitrary detention requires that migrants have access to an independent legal advice or to a consular assistance, and the disclosure of, at least, the essence of the evidence upon which the decision ordering the detention is taken.[38] Also CMW agreed upon the assumption that immigration detention is arbitrary when "arrest warrants are […] insufficiently substantiated by evidence", further specifying that the same consequence arises if such detentions "are used as a means of stigmatizing certain groups".[39]

In addition, any decision of detaining migrants must consider relevant factors according to a case-by-case approach, and does not have to be undertaken on a mandatory rule for a broad category.[40] Hence, any compulsory, automatic, systematic or widespread detention of migrants is to be considered arbitrary.[41] In fact, immigration detention must be based on an assessment of the migrant's particular circumstance and, additionally, only for the achievement of a legitimate aim consisting in the protection of public order, health or security. In particular, CMW specified that the mere irregular entrance or stay in the State's territory is not enough to authorize the immigration detention of migrant workers and members of their families, since this exceeds the legitimate aim or interest of controlling and regulating migration.[42]

Moreover immigration detention must always be a measure of last resort, i.e. in respect of the principle of necessity according to which any decision must take into account alternative and less invasive means for achieving the same ends[43] since deprivation of liberty is always the most harmful measure for the person concerned.[44] Consequently when detention becomes a routine measure of law enforcement at the border it may be arbitrary *ex se*, since it's not based on an individualized and significant risk assessment.

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[38] *Ivi*, para. 15.

[39] CCPR, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, *Concluding Observations of the Human Rights Committee*, CCPR/C/COL/CO/6, 4 August 2010, para. 20.

[40] CCPR, Views, 26 July 2013, Communication no. 2094/2011, *F.K.A.G. v. Australia*, CCPR/C/108/D/2094/2011, para. 9.3.

[41] CMW, *General comment No. 5*, *cit*., para. 17.

[42] *Ivi*, para. 21.

[43] CCPR, Views, 9 August 2006, Communication no. 1050/2002, *D and E, and Their Two Children v. Australia*, CCPR/C/87/D/1050/2002, para. 7.2.

[44] CMW, *General Comment No. 5*, cit., para. 24.

Moreover, detention is to be considered as an exceptional measure of last resort especially when migrants are children.[45] In fact, the decision of detaining children must always be based on their best interests with regard to the length and conditions of detention, taking into account their extreme vulnerability and need for care.[46]

The prohibition of arbitrary detention also requires that the manner in which the detainees are treated must relate to the purpose for which they are ostensibly being detained.[47] In particular, under the "proportionality test" competent authorities must take into account the effects that detention may pose on migrants' physical and mental health,[48] and consequently have to provide for confinement in an appropriate, sanitary and non-punitive facilities.[49] This obligation is further strengthened by Art. 17 (para. 3) of the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families (CRMW) according to which migrant "workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial".

Given these premises, it seems particularly important highlighting that immigration detention in the course of proceedings related to the control of immigration is not considered arbitrary *ex se* (as long as, it is justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time).[50] Thus, also asylum seekers who unlawfully enter within a State's territory may be detained for the purpose of documenting their entry, recording their claims and determining their identity.[51] Nevertheless, immigration detention un-

[45] Convention on the Rights of the Child, 1989, Art. 37(b).

[46] On the detention of children see: UN Detention Guidelines, 2012, Guideline 9.2.

[47] CCPR, *General Comment No. 35*, cit., para. 14

[48] CMW, *General Comment No. 5*, cit., para. 25.

[49] CCPR, *General Comment No. 35*, cit., para. 18.

[50] CCPR, Views: 3 April 1997, Communication no. 560/1993, *A v. Australia*, CCPR/C/59/D/560/1993, para. 9.3; 26 March 2002, Communication no. 794/1998, *Mr. Samba Jalloh v. The Netherlands*, CCPR/C/74/D/794/1998, para. 8.2; 18 July 2011, Communication no. 1557/2007, *Nystrom v. Australia*, CCPR/C/102/D/1557/2007, paras. 7.2-7.3.

[51] CCPR, *General Comment No. 35*, cit., para. 18.

dertaken on this basis "should not continue beyond the period for which the State can provide appropriate justification" which can be, for instance, the need for investigations or the risk of absconding: "[w]ithout such factors detention may be considered arbitrary, even if entry was illegal". [52]

5. Arbitrary immigration detention in the practice of Inter-American Human Rights Control Bodies

Inter-American Human Rights Control Bodies boast a noteworthy practice on immigration detention because Latin-American States are affected by a massive migration pressure due to the widespread socio-economic instability, political turmoil, and humanitarian crisis of the region. As previously mentioned, the normative cornerstone is Art. 7 of the American Convention of 1969 which enshrines the right to personal liberty within a more comprehensive formulation than that of Art. 9 ICCPR. [53] Its normative content has been extensively interpreted by the Inter-American Commission on Human Rights (IACHR) and the Inter-

[52] CCPR, *A. v. Australia*, cit., paras. 9.3-9.4

[53] "1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment. 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial. 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies. 7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support", (American Convention on Human Rights, adopted in 1969 and entered into in 1978, Art. 7).

American Court of Human Rights (IACtHR), including the prohibition of arbitrary deprivation of liberty (although in Latin-America the use of arbitrary detention emerges primarily within the context of political repression against government's opponents).

Arbitrary deprivation of liberty was found by IACHR when an Ecuadorian citizen was arrested in Panama pursuant to a national Decree Law (No 16 of June 30 of 1960) without a trial or even a hearing.[54] After having taken charge of the case, IACtHR confirmed the Commission's assumptions, affirming that domestic rulings apt at impairing human rights, such as that of personal liberty, and which are not properly substantiated, are arbitrary.[55] In particular, the arrest warrant was considered arbitrary since it did not contain any grounds to justify or explain its purpose, according to the facts of the case and the particular circumstances of the applicant.[56] Moreover, the Court found that the legal basis according to which the measure was undertaken "did not pursue a legitimate purpose and was disproportionate, given that it established a punitive penalty for foreigners who evade previous orders for deportation" and therefore resulted arbitrary, leading to a violation of Art. 7.[57] In this context, the Court also specified that national migration policies based on the mandatory detention are to be deemed as arbitrary if they do not order "the competent authorities to verify, in each particular case and by means of an individualized evaluation, the possibility of using less restrictive measures to achieve the same ends".[58]

In another leading case (*Yvon Neptune v. Haiti*), beside reiterating the relation between arbitrariness and the lack of compliance of the legal basis to requirements provided for by Art. 7, the Court listed the main conditions the detention measures must respect for avoiding arbitrariness: the measure has to pursue a legitimate objective and is to be appropriate to the achievement of the intended objective; is to be strict-

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[54] IACHR, Petition 92-04, Admissibility, 23 October 2006, *Jesús Tranquilino Vélez Loor V. Panama*, Report no. 95/06, paras. 54-55.

[55] IACtHR, judgment of 23 June 2005, (Preliminary Objections, Merits, Reparations and Costs), *YATAMA v. Nicaragua*, para. 152; judgment of 6 July 2009, (Preliminary Objections, Merits, Reparations, and Costs), *Escher et al. v. Brazil*, para. 208; judgment of 27 January 2009, (Preliminary Objections, Merits, Reparations and Costs), *Tristán Donoso v. Panama*, para. 153.

[56] IACHR, *Jesús Tranquilino Vélez Loor V. Panama*, cit., para. 118.

[57] *Ivi*, para. 172.

[58] *Ivi*, para. 171.

ly necessary, which requires that no other less onerous measures can be undertaken to achieve the proposed objective; and has to be proportionate, "so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or disproportionate compared with the advantages obtained by the use of this restriction and the achievement of the intended objective". Consequently, any restriction of personal liberty that does not allow for an assessment of whether it is adapted to these conditions is to be deemed arbitrary. Moreover, detention is to be considered arbitrary if undertaken upon a decision stemming from an organ lacking the competence.[59]

In *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, the Court additionally specified that "it is not sufficient that any reason for the deprivation or restriction of the right to liberty is embodied in the law"[60] because Art. 7 prohibits detention that although law-abiding, actually turns out to be unreasonable, unpredictable and disproportionate.[61] In other words, the restriction of liberty, albeit legally based, that does not find justification in a concrete cause or reason may be arbitrary and, therefore, injurious to Art. 7.[62]

Grounds for arbitrariness found by the Court in the aforementioned cases seem to be fully aligned with the CCPR practice, however, it seems worth noting that some 'distance' can be observed with regard to the relationship between arbitrariness and unlawfulness. In fact, more than once, it is specified that "arbitrariness mentioned in Art. 7(3) of

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[59] IACtHR, judgment of 6 May 2008, (Merits, Reparations and Costs), *Yvon Neptune v. Haiti*, para. 100.

Analogously, IACtHR, judgment of 21 November 2007, (Preliminary Objections, Merits, Reparations, and Costs), *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 93.

[60] "No one may be subjected to arrest or imprisonment for reasons and using methods that – although classified as legal – can be considered incompatible with regard for the fundamental rights of the individual, because they are, among other matters, unreasonable, unpredictable, or disproportionate", (*ivi*, para. 90).

[61] IACtHR, judgment of 21 January 1994, (Merits, Reparations and Costs), *Gangaram Panday v. Surinam*, para. 47; judgment of 27 November 2013, (Preliminary objection, merits, reparations and costs), *J. v. Perù*, para. 127.

[62] E. FERRER MAC-GREGOR (2017), *Diritto alla libertà personale*, in L. CAPPUCCIO, P. TANZARELLA (eds.), *Commentario alla prima parte della Convenzione americana dei diritti dell'uomo*, Napoli, 239.

the Convention has its own legal content, which only needs to be analysed in the case of detentions that are *considered lawful*" (emphasis added).[63] On the contrary, as previously mentioned, CCPR did not exclude the possibility of ascertaining arbitrariness in case of unlawful detention, rather affirming that arbitrariness may affect also unlawful deprivation of liberty.

Outside individual petitions, IACHR dealt with the issue of immigration detention also, pursuant to Art. 41(b) of the American Convention on Human Rights, in two important resolutions, in which the intention of abolishing the practice is quite evident. The first is Res. n.1/08, providing Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, where the Commission stressed the need of resorting to the deprivation of liberty as an exception, in accordance with international human rights instruments, for the minimum necessary period and, in case of children, as a measure of last resort (Principle 2 para. 3).[64] The second is Res. 4/19 setting Inter-American Principles on The Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking, where the Commission identifies as a common objective for OAS member States to "take measures to eradicate the detention of migrants in law, public policy and practice" specifying that, until this goal will be achieved, they shall ensure that detention is not arbitrary, i.e. undertaken only in accordance with law when it's necessary, reasonable in all the circumstances, and proportionate to pursue legitimate purposes.[65]

6. Arbitrary immigration detention in the practice of African Human Rights Control Bodies

In the African continent, immigration detention is extremely widespread too, especially in transit countries where violations are paradoxically exacerbated by the circumstance that they receive large amounts of aids from third States to increase controls for the containment of migra-

[63] IACtHR, judgment of 30 October 2008, (Preliminary Objection, Merits, Reparations and Costs), *Bayarri V. Argentina*, para. 62.

[64] IACHR, Resolution 1/08, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, 2008, Principles 1-2.

[65] IACHR, Resolution 04/19, *Inter-American Principles on The Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking*, 7 December 2019, Principle 68.

tion flows.[66] The drift it takes is such an embedded problem that it's overcoming falls within the main objectives of the 2018 Migration Policy Framework for Africa and Plan of Action, adopted by the African Union Commission for realizing a better migration governance in order to facilitate safe, orderly and dignified migration.[67]

As with the Art. 9 ICCPR, Art. 6 of the African Charter on Human and People's Rights enshrines the right to personal liberty in a rather generic formulation.[68] However, according to the interpretation of African human rights control bodies, obligations stemming from Art. 6 do not substantively differ from those of other international and regional instruments. With specific regard to the prohibition of arbitrary detention, the African Commission (ACHPR) found that it is violated in any situation involving an indefinite detention of an individual,[69] specifying that the breach of Art. 6 occurs when the detainee does not know the extent of his punishment.

Arbitrariness was also ascertained when an individual was detained without having been charged with an offence[70] and when the detention

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[66] In Libya the situation has escalated to such an extent that since 2011 the Office of the Prosecutor of the International Criminal Court, on the basis of the UNSC Resolution concerning the situation in the Libyan Arab Jamahiriya, decided to include a specific investigative focus on crimes committed in detention centres. According to collected evidence about serious crimes allegedly perpetrated in official and unofficial detention facilities under the control of different militias (including unlawful detention, murder, torture, rape and other forms of sexual and gender-based crime) the Office affirmed that the said crimes "are of a potentially significant scale". For in depth information see: Twenty-Third Report of The Prosecutor of The International Criminal Court to The United Nations Security Council Pursuant to Resolution 1970 (2011) p. 6 and 7.

[67] African Union Commission, AU Department for Social Affairs, *Migration Policy Framework for Africa and Plan of Action*, Addis Ababa, 2018, 50, 72.

[68] Despite "[e]arlier drafts of the African Charter on Human and Peoples' Rights […] included more detail than is found in Article 6, including expressly that detainees be informed of the reasons for their detention and, promptly, the charges; that they be brought promptly before a judge; have trial within a reasonable time; and recourse to a competent court", (R. MURRAY (2019), *The African Charter on human and peoples' right. A Commentary*, Oxford, 184).

[69] ACHPR: Communications 25/89, 47/90, 56/91, 100/93, 1995, *Free Legal Assistance Group and Others v. Zaire*, para. 42.

[70] ACHPR, Communications 222/98, 229/99, 3 May 2003, *Law Office of Ghazi Suleiman v Sudan*, para. 50.

could not be questioned by domestic courts.[71] According to ACHPR detention leads to arbitrariness also when it is not open to a periodical review for the assessment of the grounds justifying the measure and if the body providing the review lacks independence and impartiality.[72]

Detention on the basis of ethnicity[73] or political belief[74] was deemed arbitrary too. In particular, the Commission found that the prohibition of arbitrary arrest was violated when detention and arrests are "based on grounds of ethnic origin alone".[75] Additionally, ACHPR found arbitrariness when detentions were undertaken upon indictments provided in violation of the African Charter.[76]

Outcomes of this practice partially flowed into the African Guiding Principles on the Human Rights of All Migrants, adopted by ACHPR during its 74th ordinary session in February 2023. The document, which is still a draft, is aimed at guiding States in the respect of their human rights obligations in the context of the movement of people across international borders. In particular, Principle 9, addressing liberty and security of person intended as a "vital right deserving protection", establishes that "States shall refrain from detention of migrants on the basis of their status as a migrant and shall seek non-custodial alternatives to detention in the treatment of migrants [and that detention] shall oc-

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[71] ACHPR, Communications 137/94, 139/94, 154/96, 161/97, 31 October 1998, *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interrights (on behalf of Ken Saro-Wiwa Jnr) v Nigeria*, para. 83.

[72] ACHPR, Communication no. 153/96, 15 November 1999, *Constitutional Rights Project v. Nigeria*, para. 16.

[73] ACHPR: Communications 27/89, 46/91, 49/91, 99/93, 31 October 1996, *Organisation Mondiale Contre la Torture, Association Internationale des Juristes Démocrates, Commission Internationale des Juristes, Union Interafricaine des Droits de l'Homme v. Rwanda*, para. 29; Communication no. 292/04, 28 May 2008, *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v. Angola*, para. 54.

[74] ACHPR: Communications 140/94, 141/94, 145/95, 5 November 1999, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria*, para. 51; Communication no. 250/02, 20 November 2003, *Liesbeth Zegveld and Mussie Ephrem v Eritrea*, para. 57.

[75] ACHPR, Communication no. 292/04, 22 May 2008, *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v. Angola*, para. 54.

[76] ACHPR, Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, 11 May 2000, *Malawi African Association and Others v. Mauritania*, para. 104.

cur only as a measure of last resort, pursuant to an individualized determination and shall last no longer than required by the circumstances". In the said Principle, particular emphasis is given to migrant children, who shall never be deprived of their personal liberty on account of their migrant status and, when strictly necessary, have to "be placed in alternative care, not detention". [77]

7. Conclusive remarks

The risk immigration detention leads toward an arbitrary deprivation of liberty is extremely high and, unfortunately, reasons behind this risk are numerous and often outside State's control. Among them, excessive migratory pressure and underdevelopment are certainly diriment. Nevertheless, these conditions may not usefully be invoked by States to avoid international responsibility. This circumstance implies that they are however required to carry out a balance between the need of protecting their borders and that of ensuring the respect of human rights in a context where a fair synthesis between two such opposing interests appears rather difficult. Unfortunately, not rarely, the first of the two prevails to the detriment of migrants who, besides suffering violations of their rights, are also – more often than not – unable to access international human rights protection mechanisms, which are structurally weak especially outside the European legal context.

This scenario seems however counterbalanced by an unusual multilevel joint response. On the one hand international organizations are pushing toward the ban of immigration detention [78] and, on the other, States seem to be moving in the same direction at intergovernmental

[77] ACHPR, Draft, *African Guiding Principles on the Human Rights of All Migrants*, proposed for consideration and adoption by the African Commission on Human Rights during its 74th ordinary session in [location], 14 February to 28 February 2023, available online.

[78] IOM (2017), *Immigration Detention And Alternatives To Detention*, Global Compact Thematic Paper, available online; UN, General Assembly, *New York Declaration for Refugees and Migrants*, A/RES/71/1, 3.10.2016, para. 33; UN, General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, A/RES/73/195, 11.01.2019; UN Working Group on Arbitrary Detention, Report to the Fifty-sixth session of the Commission on Human Rights, E/CN.4/2000/4, 28.12.1999, Annex II, Deliberation No. 5, available online.

level.[79] Additionally, important initiatives aimed at abolishing immigration detention practice have been undertaken also on behalf of the single State, leading in some cases towards the creation of valuable partnerships[80] and even to drastic legislative interventions.[81]

It is unquestionable that such a generalized response denotes a global abolitionist trend, which, in the perspective of international law, may also suggest the occurrence of a practice, albeit *in fieri*. However, although this cannot be excluded *a priori*, the massive growth of immigration detention in the last two decades may push toward a less optimistic assumption. In fact, the absence of a paradigm shift, notwithstanding this international excitement, might lead to the conclusion that States are rather working on a mere reputational strategy. In this perspective, the many actions undertaken at an international level, are nothing more than empty slogans and broken promises: nothing that can usefully contribute to a radical change in the *status quo*.

[79] For instance, in 2021 Canada launched the 'Declaration Against Arbitrary Detention in State-to-State Relations' to enhance international cooperation to end the practice of arbitrary arrest, detention or sentencing and to exercise leverage over foreign governments. The Declaration is available online.

[80] It seems worth mentioning the 2019-2023 Memorandum of Understanding among Rwanda, UNHCR and the African Union for the evacuation of refugees and asylum-seekers from Libya to Rwanda aimed at setting up an Emergency Transit Mechanism (ETM). According to the latter, the Government of Rwanda receives and protects refugees and asylum-seekers who are currently being held in detention centres in Libya providing access to adequate facilities where trained personnel carry out key activities as registration, documentation, community engagement, psychosocial support, legal assistance, or child protection case management. Once transferred on a voluntary base, they have access to adequate facilities where trained personnel carry out key activities as registration, documentation, community engagement, psychosocial support, legal assistance, or child protection case management.

[81] In the US, for instance, local communities across the country are proposing the adoption of legislations that would end immigration and customs enforcement facility contracts, gaining in some cases excellent results. For an update on national legislation banning immigration detention in United States, see: DETENTION WATCH NETWORK, *State Legislation Bans on Immigration Detention*, available online.

Part IV

RECENT MIGRATION FLOWS: EVOLVING LEGAL PERSPECTIVE AND PRACTICE

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Chapter 19

RETHINKING LEGAL CATEGORIES ON FORCED MIGRATION: LATIN AMERICAN SPECIFICITY AND POSSIBLE FERTILISATION OF THE EUROPEAN SYSTEM

Ida Caracciolo

ABSTRACT: *The Latin American region has always been subject to flows of migrants, often people forced to leave their country of origin or nationality due to civil wars, rebellions, guerrilla, and violence by organised crime. Faced with this situation, Latin American States, especially within the Organization of American States and under the control of the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights, have developed a typical, very progressive regional regime for asylum and for the international protection of forced migrants. This regime is mainly centred on a broad conception of asylum, the recognition of the existence of a right to asylum, and the integration of refugee law, human rights law and humanitarian law. It can offer interesting insights for the fertilisation of other international protection regimes despite the fact that, from a practical point of view, it is still confronted with many difficulties of implementation on the part of States, which have also become evident most recently with the large flow of Venezuelans who have fled their country, especially since 2019.*

1. Introduction

The International Organisation for Migration (IOM) defines forced migration as "a migratory movement which, although the drivers can be diverse, involves force, compulsion, or coercion".[1] The expression has

[1] MIGRATION DATA PORTAL. *Types of Migration*, available online.

not a legal meaning and its use is even criticised by some scholars. However, that expression well describes those situations in which an individual or groups of individuals are forced to leave their country of origin because their life, security or freedom are in danger, due to various forms of persecution based on race, religion, nationality, membership of a particular social group or political opinion, situations of armed conflict, generalised violence or human rights violations, or due to other circumstances altering public order or internal security. Climate migrants are often also included in the category of forced migrants.

Forced migrations have affected Latin America almost constantly. Such migrations have not usually been caused by a single factor, e.g. an armed conflict or an environmental catastrophe, but by a combination of factors including internal wars, widespread violence, rampant poverty and indifference on the part of the elite towards improving the social and economic conditions of the majority of the population, accompanied by corruption and bad governance. Finally, also many natural phenomena like floods, landslides and hurricanes have concurred to forced migration.

In the 1970s and 1980s, the establishment of the military government in Argentina and Pinochet's *coup d'état* in Chile generated large flows of asylum seekers and refugees; in the 1980s and 1990s, these flows came from Central America, due to the civil war in Nicaragua, while they were fuelled by Colombia, as a result of the conflict with the FARC, from the mid-1990s onwards. Lastly, since 2010 mixed migration came from Haiti because of dramatic natural events, widespread violence and political instability, and more recently migration flows have been produced by the political crises in Venezuela and Nicaragua.[2] Looking at figures and statistical data, Latin America is currently home to some 18.4 million refugees, asylum seekers and internally displaced persons. In summary, in Latin American region there is around 20% of the global total of forced migrants.[3]

In particular, recent political developments in Venezuela have resulted in a notably high number of forced migrants. Since 2014, an increasing number of Venezuelans have left their country. The United Nations High Commissioner for Refugees (UNHCR) calculated that the

[2] After the presidential elections in 2021, migration from Nicaragua has increased to include some 11,000 refugees and 164,000 asylum seekers.

[3] MIGRATION DATA PORTAL. *Migration Data in South America*, available online.

total number of Venezuelan migrants and refugees worldwide as of May 2019 was four million, and estimated that around 5,000 people per day were migrating to neighbouring countries. Since 2014, more than 414,000 Venezuelans have sought asylum and formal recognition as refugees in Peru and Colombia especially. Peru, by accepting almost one million Venezuelan refugees on its territory, has become the first destination country. Colombia, on the other hand, allowed practically unlimited immigration in recognition of the many Colombians who had been taken in by Venezuela during the internal armed conflict with the FARC.

The Latin American history of political instability, poverty and subsequent migratory movements has led to the development, since the early 20th century, of a regional Latin American regime of protection for those fleeing violence and persecution (but more generally concerning migrants), which has special features compared to the universal international regime centred on the 1951 Geneva Convention Relating to the Status of Refugees. It is, as will be seen below, a very advanced regime since it admits, *inter alia*, territorial or diplomatic asylum as well as extraterritorial asylum, conceived as a human right, and it contemplates a very broad definition of a refugee. The right to asylum has also been interpreted by the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACrtHR) in close correlation with many of the rights set forth in the 1969 American Convention on Human Rights and implemented through regional action plans adopted over the years. The regime is also specific in its sources: alongside multilateral and bilateral agreements, legal sources include also various non-binding acts and therefore domestic legislation plays the important role of transposing soft law and making it binding. In conclusion, it is a truly regional regime in its development, its sources and its content. A much more regional system than the European one, which has always remained within the framework of the 1951 Geneva Convention.

This regime, which seems *prima facie* capable of guaranteeing an adequate standard of protection for forced migrants, instead often shows clear limitations in its implementation. In the shift from the normative definition of the international protection to its actual implementation, the regime becomes deficient, underlining the need for further implementing efforts by the concerned States in order to achieve the conventional standards.

This paper dwells on the specificities of the Latin American legal system of refugee's international protection, highlighting its strengths, among which the assumptions, underpinning the entire international protec-

tion mechanism, that the right to asylum must be read and interpreted as a right that guarantees the enjoyment of other human rights which, if not enjoyed, would void the very concept of asylum. The analysis on the Latin American system on asylum and refugee's status could offer useful legal hints to possibly fertilise the European regional system.

2. The Latin American concepts of *asilo* and *refugio*

The first specificity of the Latin American system of international protection for forced migrants consists in the State's obligation to grant diplomatic asylum under certain circumstances. Diplomatic protection is offered at embassies and consulates to individuals wanted or persecuted for the commission of political crimes by the State in whose territory these diplomatic and consular representations are located. Despite the widespread conception that diplomatic asylum finds its legal basis in a regional custom peculiar to Latin America, in 2018 in Advisory Opinion OC-25,[4] the IACrtHR dismissed the existence of a constant and uniform practice of Latin American States necessary for the crystallisation of a particular custom in the field of diplomatic asylum. The normative source is therefore provided by domestic legislation and the 1954 Caracas Convention on Diplomatic Asylum which has, however, only been ratified by fifteen States.[5]

Some scholars retain that the Spanish term *asilo* be mainly used to define diplomatic or political asylum enshrined in the 1954 Caracas Convention on Diplomatic Asylum and other relevant Latin American agreements and be less frequently used with reference to refugee protection which is instead qualified as *refugio*.[6] The IACrtHR in the well-

[4] IACrtHR, Advisory Opinion OC-25/18, 30.5.2018, *The Institution of Asylum and Its Recognition as a Human Right in the Inter-American Protection System (Interpretation and Scope of Articles 5, 22(7) and 22(8), in relation to Article 1(1) of the American Convention on Human Rights*, available online.

[5] A. PASTORINO, M.R. IPPOLITI (2019), *A propósito del Asilo Diplomático*, in *Revista de la Facultad de Derecho*, 47, 1 ff.; E.A. FANGARY (2021), *A Peculiar Leap in the Protection of Asylum Seekers: The Inter-American Court of Human Rights' Jurisprudence on the Protection of Asylum Seekers*, in *AHRJ*, on line.

[6] L. FRANCO (coor.) (2004), *El asilo y la proteccioón internacional de los refugiados en América Latina: Análisis crítico del dualismo "asilo-refugio" a la luz del Derecho Internacional de los Derechos Humanos*, San José, 77.

known *Case of the Pacheco Tineo Family v. Bolivia*[7] concludes that the expression "solicitante de asylum" in the technical sense is equivalent in international law to that of "solicitante de reconocimiento de la condición de refugiado" and these expressions can therefore be used indiscriminately. This conclusion also seems to be confirmed by Advisory Opinion OC-25/18, in which the Court seems to relegate to the past (until 1954, the year of the adoption of the Caracas Convention) the distinction between the word *asilo* to refer exclusively to the specific mechanism of political or diplomatic asylum (in diplomatic missions abroad), and the expression "refugee status" referred to the protection granted in the territory of the foreign State.[8]

Beyond the Spanish terminology, the Latin American asylum system includes different legal mechanisms all of which nevertheless consist – as noted by the IACrtHR – of forms of protection in favor of individuals who suffer persecution. According to the Court "[…] each one operates under different circumstances and with different legal connotations in international and national law, making them not comparable situations […]". In this sense, "while [a]sylum and refuge are institutions that coincide in the essential purpose of protecting the human person when they are victims of persecution, under the conditions established by international law, this does not undermine the specificities of both regimes, in particular their special application procedures".[9]

In this regard, it is worth emphasising that the State is not obliged to grant diplomatic asylum or to give reasons why it considers granting or refusing it. Therefore, according to the Court "the diplomatic asylum cannot be conceived exclusively from its legal dimension; rather, it has other implications, since there is an interaction between the principle of State sovereignty, diplomatic and international relations, and the protection of human rights".[10]

The institution of diplomatic asylum under the 1954 Caracas Convention can still certainly be of some utility today with respect to forced migration, with reference to those fleeing authoritarian or quasi-authoritarian regimes of which they are opponents or deemed to be opponents. Thanks to the diplomatic asylum they are allowed to take ref-

[7] IACrtHR, judgement 25.11.2013, note 162.

[8] IACrtHR, Advisory Opinion OC-25/18, para. 88.

[9] *Ivi*, paras. 100-111.

[10] *Ivi*, paras. 108-109.

uge not only in diplomatic and consular missions (including the residence of the chiefs of mission and the premises provided by them for the dwelling places of asylees when the number of the latter exceeds the normal capacity of the buildings), but also on warships, military camps or aircraft (Art. I). However, it is a mechanism characterized by some substantial limitations; first of all, its scope concerns an altogether restricted group of forced migrants. It does not identify the political offences and the political reasons for granting asylum; so it is up to the State accepting the asylum request to assess the political nature of the concerned offence or motives for the persecution (Art. IV). The requested State therefore enjoys a certain discretion in assessing the status of the applicant, subject to the fact that it is unlawful to grant asylum to persons who are under indictment or on trial for common offenses or have been convicted by competent regular courts and have not served the respective sentence (nor to deserters from land, sea, and air forces) (Art. III).

That State discretion has been partially restricted by the jurisprudence of the IACrtHR which excludes that international protection can be granted by a State either directly or indirectly to those accused of serious crimes against human rights.[11] It is also worth adding that diplomatic asylum may only be granted in situations of urgency and for the period of time strictly necessary for the asylee to depart from the country with the guarantees granted by the Government of the territorial State, to the end that his/her life, liberty, or personal integrity may not be endangered, or that the asylee's safety is ensured in some other way (Art. V).

3. Asylum as a human right in the Latin American legal system

The second, but more important specificity in the Latin American system for the protection of forced migrants is the recognition of a right to asylum constructed along the lines of the 1948 Universal Declaration of Human Rights.

The 1948 American Declaration of the Rights and Duties of Man and the 1969 American Convention on Human Rights provide for the right to seek and obtain asylum once a person is in the country of ref-

[11] IACrtHR, judgment 22.9.2006, *Case of Goiburú et al. v. Paraguay*, *Merits, Reparations and Costs*, para. 232.

uge. The American Declaration recognises a wide right to asylum in Art. XXVII, which states 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". Conversely, the 1969 Convention, in Art. 22(7), dedicated to freedom of movement and residence, defines the right to asylum in slighty different terms than the American Declaration. In fact the right to seek and be granted asylum in a foreign territory can be exercised only by those who are persecuted "for political offenses or related common crimes" (para. 7), thus excluding a large category of people who leave their country because of other forms of persecution or situations of violence.

However, Art. 22(7) must be credited with admitting the human right to asylum that exists even before an individual enters the State of refuge. As the IACrtHR has observed "[…] the right to 'seek and receive asylum' in the context of the inter-American system is enshrined as an individual human right to seek and receive international protection on foreign territory, including with this expression refugee status in accordance with pertinent instruments of the United Nations or corresponding domestic legislation, as well as asylum in accordance with the different inter-American conventions on this matter". [12]

Asylum is thus no longer relegated to the sphere of State prerogatives, connected to the exercise of sovereignty. It remains yet unclear whether the right to asylum is a full and perfect subjective right – directly exercisable in the State of refuge which is respectively obliged to grant it once ascertained the existence of the required conditions – or a right not directly operative since its effectiveness stems from the international conventions and/or the domestic legislation defining the regime for the exercise of that right. On this point, doubts seem to have been dispelled by the IACrtHR in Advisory Opinion OC-25/18. The Court has reiterated that "[…] to the extent that article 22(7) refers to domestic legislation or international agreements to integrate its content more specifically, the right to seek and receive asylum is not an absolute right. However, in accordance with Article 29 of the American Conven-

[12] IACrtHR, Advisory Opinion OC-21/14, 19.8.2014, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, para. 73; Advisory Opinion OC-25/18, *The Institution of Asylum and Its Recognition as a Human Right in the Inter-American Protection System*, cit., para. 132 and *Case of the Pacheco Tineo Family v. Bolivia*, cit., para. 137.

tion, domestic legislation can broaden the scope of protection, but never restrict it beyond the minimum established by the American Convention and international law. Likewise, the reference to international agreements cannot be interpreted in the sense of limiting the right beyond what is established in the Convention itself. […] Similarly, the expression 'according to the legislation of each State' does not imply that States do not have an immediate obligation to respect and guarantee the right to asylum". [13]

On the meaning of the right to "seek and receive asylum" in Art. 22(7), the IACHR has clarified that the provision "contains two cumulative criteria that must be satisfied. The first criterion is that the right to seek and receive asylum on foreign territory must be in 'accordance with the laws of each country' (where asylum is sought). The second criterion is that the right to seek asylum in foreign territories must be in accordance with 'international agreements'". [14]

The IACrtHR has also articulately interpreted this expression in Advisory Opinion OC-25/18. In particular, the expression unfolds into an obligation for the receiving State "[…] to allow people to request asylum or recognition of refugee status, which is why such persons may not be rejected at the border or returned without an adequate and individualised analysis of their claims with due guarantees […]". [15] Vis-à-vis that obligation, asylum seekers enjoy the right "[…] to have a proper assessment by the national authorities of their applications and of the risk that they may face in the event of *refoulement*". [16] This results in a series of positive obligations on the part of the requested State, namely the obligations to "[…] allow entry into the territory and give access to the procedure for determining the status of asylum or refugee". Finally, the Court has deduced from Art. 22(7) the prohibition on third States to "[…] exercise actions whose objective is to prevent people in need of international protection from going to other territories in search of protection, or hide behind legal

[13] *Ivi*, paras. 140-141.

[14] IACHR, Report on Merits 51/96, Case 10.675, 13.3.1997, *Haitian Interdiction – Haitian Boat People* (United States), para. 153.

[15] IACrtHR, Advisory Opinion OC-25/18, *The Institution of Asylum and Its Recognition as a Human Right in the Inter-American Protection System,* cit., para. 122.

[16] *Ivi*, para. 132.

fictions to do so in order not to give access to the corresponding protection procedures […]". [17]

The Court has certainly made a particularly extensive and progressive interpretation of the right to asylum; such an interpretation is deemed to sustain the assumption that the Latin American asylum system is developing according to its own legal categories or profoundly revisiting universal legal categories.

The right to asylum provided by Art. 22(7) must also be read in conjunction with the subsequent paragraphs that enshrine at the inter-American level the principle of *non-refoulement* (para. 8) and the prohibition of collective expulsion of foreigners (para. 9). The prohibition of *refoulement* undoubtedly constitutes the main component of the right to asylum, as is also the case in the 1951 Geneva Convention.

The unequivocal qualification of the right to asylum as a human right and its inclusion in the decalogue of human rights by the 1969 American Convention means that the right to seek and receive asylum and the related obligations must be interpreted and applied in the light of the other rights and related obligations contained therein, such as, for example, the right to a fair trial and the "de amparo" remedy, the obligation of non-discrimination and the right to equal protection. Interpreting Art. 22(7) in conjunction with Arts. 8 and 25 of the 1969 American Convention, the IACrtHR in the *Case of the Pacheco Tineo Family v. Bolivia* went so far as to substantiate the right to seek and receive asylum: the applicant for refugee status must be given a fair hearing by the requested State with due guarantees through the respective procedure. [18]

Concerning the conditions to be met in order to be qualified as a refugee, the 1969 American Convention appears particularly cautious compared to the 1951 Geneva Convention. In fact, it conditions the right to seek asylum on the fact that the person is persecuted, not giving importance to the fear of possible future persecution. Not only must the persecution be political and not of any other nature, but it must be particularly serious political persecution so to amount to political or related offences. From this point of view, the extraterritorial asylum under the 1969 American Convention is absolutely in line with the concept, long standing in Latin America, of diplomatic asylum. These are two sides of the same coin.

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[17] *Ivi*, paras. 122 ff.

[18] IACrtHR, *Case of the Pacheco Tineo Family v. Bolivia*, cit., para. 154 ff.

The added value of Art. 22(7) thus lies in the explicit and clear qualification of asylum as a human right and not a prerogative of the State. It is noteworthy that the IACrtHR has broadened the scope of the right to asylum to include refugees in the sense of the 1951 Convention and then according to the definition contained in the 1984 Cartagena Declaration. [19]

4. The wide definition of a refugee developed by Latin American practice

With the Declaration of Cartagena, adopted in 1984 during the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held in Cartagena de Indias under the pressure of the great migratory flows affecting that area following the conflicts and guerrilla in El Salvador and Guatemala, another component is added to the Latin American system of international protection of forced migrants, namely a particularly wide definition of a refugee. According to the Cartagena Declaration (para. 3) "[…] the 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". [20]

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[19] IACrtHR: *Case of the Pacheco Tineo Family v. Bolivia*, cit., para. 139 and Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, cit., para. 79 according to which "[…] the Court considers that the 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".

[20] *Memoria del vigésimo aniversario de la Declaración de Cartagena sobre los Refugiados (1984-2004)*, (2021), San José, 111-112, available online and A.A. CANCADO TRINDADE (1994), *Aproximaciones y convergencias revisitadas: diez*

The recommendatory provision does not eliminate or replace the traditional definition of refugee under the 1951 Geneva Convention, but intends to supplement it in order to extend the international protection to those individuals affected by some objective situations occurring in their countries. The focus of the definition is therefore no longer on the serious political persecution suffered by a particular individual but on the situation in the country – either the country of origin or the country of nationality – from which the individual or rather many individuals have fled. It is no longer a question of analysing personal persecution on a case-by-case basis, but of assessing the conditions of widespread violence, generalised instability, war and massive violation of human rights characterizing the State of origin or nationality, in a geopolitical rather than individual perspective. [21]

The fact that the provision mentions generalised violence alongside external aggression and internal armed conflict seems to support the conclusion that "generalized violence" refers to riots, internal disturbances, uprisings, namely situations of serious violence but below the threshold of non-international armed conflict within the meaning of international humanitarian law. However, some scholars link the concept of generalised violence to the existence of armed conflicts. In case of armed conflicts, doctrine states that refugee status can only be granted to those who fall into the categories of civilians and civilian population under the terms of the Fourth 1949 Geneva Convention and the First 1977 Additional Protocol, i.e. those who do not participate in hostilities. [22] The question has also been raised as to whether draft evaders and

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años de interacción entre el derecho internacional de los derechos humanos, el derecho internacional de los refugiados, y el derecho internacional humanitario (De Cartagena/1984 a San José/1994 y México/2004), in *Memoria Coloquio Internacional: 10 Años de la Declaración de Cartagena sobre Refugiados*, San José, 79-168, at 147.

[21] L.L. JUBILUT, M.V. ESPINOZA, G. MEZZANOTTI (eds.) (2021), *Latin America and refugee protection: regimes, logics, and challenges*, New York, Oxford; V. TÜRK, A. EDWARDS, C. WOUTERS (eds.) (2017), *In flight from conflict and violence: UNHCR's consultations on refugee status and other forms of international protection*, Cambridge.

[22] N. CAICEDO CAMACHO, L. FELINE FREIER (eds.) (2022), *Voluntary and forced migration in Latin America: law and policy reforms*, Montreal, Kingston, London, Chicago; A. ABASS, F. IPPOLITO (eds.) (1994), *Regional approaches to the protection of asylum seekers: an international legal perspective*, London, 2016; H. GROS-ESPIELL (1994), *La Declaración de Cartagena como fuente del*

deserters can claim asylum. In principle, they do not fall into the refugee category unless they can prove that their engagement in military activities is contrary to their political, religious or moral convictions or that they were engaged in military activities condemned by the international community as unlawful since characterised by massive and generalised violations of human rights.[23]

Finally, a very innovative aspect of this provision consists in considering a situation of massive violation of human rights as justifying refugee status. On this issue, the International Conference on Central American Refugees (CIREFCA) notes that the denial of civil, political, economic, social and cultural rights in a serious and systematic manner constitutes a massive violation of human rights. Gross violations of human rights are those conducts that violate numerous non-derogable human rights or that violate the recognition of the legal personality of human beings (such as slavery, human trafficking) carried out on a large scale, affecting even large sections of the population if not the entire society of a specific country. This provision certainly covers the recent forced migrations from Venezuela after the political events that have occurred in that country since 2019.

The category of causes that may lead an individual to fleeing his/her country of origin or nationality and seeking asylum are defined in the Declaration in a rather broad terms given also the final general reference to "other circumstances which have seriously disturbed public order." Such an ample definition is deemed to embrace those fleeing violence and threats from criminal groups.[24] In the latter hypothesis, however, the ability of the State to guarantee effective protection from organised crime would have to be assessed.[25] In other words, protection

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Derecho Internacional de los Refugiados en América Latina, in *Memoria Coloquio Internacional: 10 Años de la Declaración de Cartagena sobre Refugiados*, cit., 253 ff.

[23] CIREFCA (1990), *Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America*, para. 36, available online.

[24] In this respect, the Cartagena Declaration is clearly inspired by the African Charter on Human Rights, which contains the same expression. M. REED-HURTADO (2013), *The Cartagena Declaration on Refugees and the protection of people fleeing armed conflict and other situations of violence in Latin America*, Geneva.

[25] UNHCR (2010), *Nota de orientación sobre las solicitudes de la condición de refugiado relacionadas con las víctimas de pandillas organizadas*, Geneva, para. 62.

offered within the State is considered a particularly good alternative to asylum abroad.

Under the category of circumstances which "have seriously disturbed public order", it seems plausible to also include events caused by climate change (hurricanes, floods, etc.) if they affect public order. Indeed, in the past the CIREFCA concluded that that category of circumstances includes only human-caused events, thus leaving out natural phenomena from the scope of the Cartagena Declaration. More recently, however, the United Nations High Commissioner for Refugees (UNHCR) has held that people displaced by the adverse effects of climate change and natural disasters can be refugees under the regional criteria for granting this status, thus allowing States to interpret climate change-related disasters as circumstances that "have seriously disturbed public order". [26]

In this regard, the UNHCR has held that it is irrelevant whether the disruption of public order stems from natural causes or whether it is a human-made event (actually, in such complex situations, it is difficult to attribute responsibility). The decisive point for deciding on eligibility for refugee status in connection of natural disaster seems to be whether the State's effectiveness, the rule of law and human dignity have been seriously affected. If there is an impact on the asylum seeker's place of habitual residence that forces him or her to leave this country, and if the concerned State and the international community are unwilling or unable to address that impact, then the displaced person may be eligible for refugee status as defined in the Cartagena Declaration. [27]

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[26] UNHCR, *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*, 1 October 2020, available online, paras. 13-16, where it is written that: "As such, climate change or a disaster must have an effect or impact on the person's place of habitual residence and compel or force the person to leave their country, i.e. it must have put the person at risk of serious harm. […] As such, while a disaster may by definition seriously disrupt public order, it will only warrant refugee status when the State, including with international assistance, is unable or unwilling to address its impacts on the State and its societal order and population. In this context, following a disaster, the State must be able to demonstrate its willingness to address the impact of the disaster and to mobilize aid and assistance to stabilize the situation as soon as possible". For comments see V. CANEPA, D. GUTIERREZ ESCOBEDO (2021), *Can regional refugee definitions help protect people displaced by climate change in Latin America?*, available online.

[27] UNHCR (2006), *The refugee situation in Latin America: protection and solutions based on the pragmatic approach of the Cartagena Declaration on Refu-*

On the other hand, it seems difficult to include within the circumstances having seriously disturbed public order major situations of an economic nature as these are unlikely to endanger the life, security and liberty of individuals. Nonetheless, economic measures could be grounds for the recognition of refugee status if they are so severe as to be persecutory towards a particular individual or group. [28]

All the situations above mentioned to be relevant for refugee status should have had a direct impact on the individual seeking refuge; they should have affected his or her life or liberty. A causal link between the situation of internal unrest (i.e. civil war, situation of generalised violence, external aggression, etc.) in the State of residence or nationality and the threat to the individual who has forcibly left that State is absolutely necessary. The absence of such a link because the situation is without impact on the individual asylum seeker, would not allow refugee status. The reference to threat in the Declaration seems to be interpreted in the sense of persecution. [29]

Most Latin American States have incorporated into their domestic legislation both the traditional definition of a refugee provided by the 1951 Geneva Convention and the broader definition of the Cartagena Declaration, in some cases fully in others with some modifications or additions. [30] This implies that the definition contained in the Declaration has become binding in these States. In these cases, a person is a refugee as soon as he/she meets the requirements set out in the defini-

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gees of 1984, Discussion Document UNHCR November 2004, in *Int. J. Refug. Law*, 1, 252-270.

[28] CIREFCA, *Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America*, cit., para. 37.

[29] S. CORCUERA-CABEZUT (2005), *Reflections on the application of the extended refugees definition of the Cartagena declaration in individual refugee status determination procedures*, in *Memoir of the Twentieth anniversary of the Cartagena Declaration of Refugees*, San José, 175.

[30] The States having not incorporated the definition given by the Cartagena Declaration into their legislation are: Cuba, Panama, Dominican Republic, Trinidad and Tobago and Venezuela. E.g. Brazil, Colombia, Paraguay and Peru have adopted a limited definition of refugee. The Brazilian legislation requires severe and generalized violations of human rights. Cf. M. REED-HURTADO, *The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America*, Geneva, 2013, 17, available online.

tion. Even if he/she has not been formally identified, he/she must be considered a refugee. The act of granting refugee status is therefore declaratory and not constitutive.[31] The principle of *non-refoulement* would be circumvented if only refugees already recognised by the requested State are allowed to enjoy protection against *refoulement*. If the recognition decision were considered constitutive, on the other hand, it would be easier for the requested State to ignore the principle by claiming that the asylum seekers were persons not protected (or not yet protected) by refugee status.

5. The obligations on States in connection with the right to asylum

The exercise of the right to asylum as crystallised in Latin American practice requires a series of obligations, both positive and negative, on the part of States.

Foremost among them, as previously mentioned, there is the prohibition of *refoulement* enshrined in Art. 22(8) of the 1969 American Convention, which provides that "[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".

The wording of the principle is not identical to that in Art. 33(1) of the 1951 Geneva Convention; the major difference lies in the fact that the prohibition of *refoulement* in the 1969 Convention applies to aliens, whereas that in the 1951 Geneva Convention only applies to refugees and, by interpretation, asylum seekers. The principle thus seems to take on a particularly broad subjective scope in the Latin American system, covering all foreigners. This means that it also operates with respect to a foreigner who has been refused refugee status. Moreover, the complementarity between international refugee law and international human rights law further consolidates the broad scope of the principle of *non-refoulement*. For example, the IACHR has held that the deportation of an

[31] E.g. Argentina Act No. 26.165 of 2006, Art. 2 "[…] conforme al carácter declarativo que tiene el reconocimiento de la condición de refugiado, tales principios se aplicarán tanto al refugiado reconocido como al solicitante de dicho reconocimiento" (*unofficial translation*: in accordance with the declaratory nature of the recognition of refugee status, these principles shall apply both to the recognised refugee and to the applicant for such recognition).

alien may result in the violation of other rights, such as the prohibition of being subjected to cruel, inhuman or degrading treatment, or the protection of family life.[32] The Commission has also retained that the prohibition of *refoulement* obliges a State both to prevent the removal of a refugee directly to a country of persecution, but also indirectly via a third country (so called "indirect refoulement" or "chain refoulement").[33]

Another difference is that Art. 22(8) also mentions the threat related to religious opinions on which Art. 33(1) is silent. Here, too, the scope of the regional rule is broader than that of the 1951 Geneva Convention. Finally, despite the fact that nothing is stated in the same provision about the extraterritorial scope of the prohibition of *refoulement*, it has been recognised by the IACHR.[34]

The principle of *non-refoulement*, since the Cartagena Declaration, has been intended as a cornerstone of refugee protection but above all as a peremptory norm of *jus cogens* (para. 5).[35] Consequently, it is characterised by its universal value, and its superior force vis-à-vis other international norms. On that issue, there is a clear jurisprudence of the IACrtHR supporting the *jus cogens* nature of the principle of *non-refoulement*. Such a nature is clearly recognised by the Court in its Advisory Opinion OC-25/18 on the basis of an *opinio juris* manifested by States.[36]

Other obligations on States in connection with the right to asylum, in light of domestic and regional States' practice and jurisprudence, are: the obligation to allow the asylum application and not to reject it at the

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[32] 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. 374, available online.

[33] IACHR, Report on Merits 78/11, Case 12.586, 21.7.2011, *John Doe et al.* (Canada), para. 103.

[34] IACHR, Report on Merits 51/96, Case 10.675, *Haitian Interdiction – Haitian Boat People*, cit. A definition combining the IACHR practice and the IACHR jurisprudence can be found in Principle 6 of the "Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking" adopted in 2019, available online.

[35] See Brazil Declaration "A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean", adopted on the 3 December 2014 in Brasilia, 2.

[36] IACrtHR, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, cit., paras. 98 and 181.

border; the obligation not to penalize or punish irregular entry or presence and not to arrest; the obligation to provide effective access to a fair and efficient procedure for determining refugee status; the obligation to ensure the minimum guarantees of due process in fair and efficient procedures to determine refugee status or condition; the obligation to adapt procedures to the specific needs of children and adolescents; the obligation to grant international protection if the refugee definition is met and ensure the maintenance and continuity of refugee status; the obligation to restrictively interpret exclusion clauses, and the obligation to provide access to rights with equal conditions under refugee status". [37] Case law tends to substantiate and detail these rights taking into account the indications coming from the United Nations system on international protection of asylum seekers and refugees, which thus provides a standard of reference. [38]

6. The complementarity between refugee law, international and regional human rights law and humanitarian law in the Cartagena process

The inclusion of asylum in the category of human rights has favoured complementarity between refugee law, human rights law and humanitarian law in the Latin American normative and judicial experience. Refugees are accorded a wide range of human rights enshrined in both international conventional instruments and domestic constitutions and legislations. No special regime of treatment is envisaged for asylum seekers and refugees since they mainly enjoy the international and regional regime operating for all individuals. [39] Regional regime, notably the 1969 Convention, which defines the category of non-derogable hu-

[37] *Ibidem*, para. 99.

[38] 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, paras. 340 ff. See J.C. MURILLO (2011), *El derecho de asilo y la protección de refugiados en el continente americano*, in UNHCR (ed.), *La Protección Internacional de Refugiados en las Américas*, Quito, 64.

[39] A. D'ALOTTO (2004), *El sistema interamericano de protección de los derechos humanos y su contribución a la protección de los refugiados en América Latina,* in L. FRANCO (ed.), *El asilo y la proteccioón internacional de los refugiados en América Latina*, cit., 161 ff.

man rights in broader terms than those of both the UN 1966 Covenant on Civil and Political Rights and the 1950 European Convention on Human Rights, since the 1969 Convention includes in the category the protection of the family, children's rights, the right to nationality, and political rights.

In such a context, the Cartagena Declaration appears to be a milestone despite its recommendatory nature. It requires States to develop a minimum standard of treatment for refugees based on the decalogue of human rights contained in the 1969 Convention (paras. 8 and 10). That minimum standard of treatment implies that States are required to recognise a number of fundamental rights for refugees that cannot be derogated from even in exceptional events, such as the prohibition on arbitrary deprivation of life, the prohibition of torture and inhuman and degrading treatment and punishment, the right not to be subjected to slavery or servitude, the right not to be subjected to retroactive punishment, the right to recognition as a person before the law, the right to freedom of thought, conscience and religion and the right to be protected against discrimination.

The complementarity between the human rights law and refugee law, since the Cartagena Declaration, has become a constant in the Latin American system as confirmed by the other declarations that have followed every ten years. First of all, the San José of Costa Rica Declaration on "Refugees and Displaced Persons" of 1994,[40] which (section II) stresses "the complementary nature and convergence between the system of protection to persons established in International Human Rights Law, International Humanitarian Law and International Refugee Law [...]". In this regard, it is worth noting that international humanitarian law is also called upon to contribute to the integrated system of refugee rights protection. Furthermore, the 1994 Declaration calls into play the human rights monitoring bodies operating at a regional level, specifically the IACHR (para. 15). And this too is a specificity with respect to the 1951 Geneva Convention, which does not involve any monitoring body in the development of refugee protection called upon to provide guarantees for the effective interpretation and application of the protection mechanism.

The concept of complementarity between these three branches of

[40] Adopted by the International Colloquium in Commemoration of the "Tenth Anniversary of the Cartagena Declaration on Refugees", San José, 5-7 December 1994, available online.

international law is reaffirmed by the Mexico Declaration and Plan of Action to "Strengthen the International Protection of Refugees in Latin America" adopted in 2004,[41] emphasising the importance of using the norms contained in international refugee law, international human rights law, and international humanitarian law "according to the principle of *pro homine*, [...] to strengthen the protection of refugees and other persons entitled to international protection [...]".

The reference to the principle of *pro homine* (or *pro persona*) – developed as a method of interpretation by the IACrtHR[42] – is noteworthy. It is a central hermeneutical criterion within the human rights legal system. According to it, human rights norms should be interpreted as broadly as possible when they establish rights for individuals and, conversely, as narrowly as possible when the norm imposes limits on the enjoyment of these rights. But this principle does not only have an interpretative function, it can also play the role of resolving conflicts between human rights norms, resulting in the prevalence of the norm (international or domestic as it may be) that best protects the rights of the individual.[43] In the perspective of refugee protection, the *pro persona*

[41] Available online.

[42] According to the IACrtHR, Advisory Opinion 25/18, cit., para. 136, "[…] no provision of the Convention shall be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party, or excluding or limiting the effects that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have". See principle 3 of the "Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking, cit., stating that "[w]here two or more provisions are applicable to a particular case or situation, States are obligated to use the most favorable provision to protect the rights of all migrants, regardless of their migration status. Likewise, where there are two or more interpretations of a provision, States are obligated to use the most favorable to the person, offering the broadest protection. In addition, States should apply the most favorable interpretation to guarantee human rights, and the most restrictive interpretation to impose limits to those rights".

[43] Y. NEGISHI (2017), *The* Pro Homine *Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control*, in *EJIL*, 2, 457 ff.; H. RODARTE BERBERA (2017), *The* pro personae *principle and its application by Mexican Courts*, in *HRLR*, 4, 1 ff.; M. PINTO (1997), *El principio* pro homine*: Criterios de hermenéutica y pautas para la regulación de los derechos humanos*, in M. ABREGÚ, C. COURTIS (eds.), *La*

principle seems to confirm the unity of refugee rights protection, in the integration, on the one hand, between refugee law, human rights law and humanitarian law and, on the other, between international and domestic provisions on refugee protection.

In the subsequent declaration adopted in Brasilia, the 2014 Brazil Declaration "A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean", the issue at stake is addressed again as it emphasizes that "[...] the convergence and complementarity of International Human Rights Law, International Refugee Law and International Humanitarian Law, to provide a common legal framework to strengthen the protection of refugees and other persons in need of it, on account of their vulnerable situation, in light of the *pro homine* principle". The concept of vulnerability is mentioned in this document probably following the jurisprudence of the IACrtHR, which is a further driving force behind the protection of human rights, including those of refugees.

The great effort to integrate refugee law and human rights law finds a final crystallisation in the "Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking" adopted by the IACHR in 2019. This document of no less than eighty articles, which is not binding, contains a comprehensive decalogue of human rights that should be guaranteed to migrants, asylum seekers, and refugees, ranging from fundamental rights, political, economic, social and cultural rights, to various forms of substantive and procedural, general and special, protection for individuals and groups. If a criticism must be addressed to that document, it certainly does not concern its comprehensiveness as much as its abundance and extensive articulation, which raises the doubt that so many intentions to protect may ever become effective.

The approach to the interpretation of the right to asylum and the rules on the protection of refugees through the prism of human rights characterizes also the jurisprudence of the IACrtHR, in particular that on States's obligation to prevent human rights violations. This obligation of conduct includes the adoption by the concerned State of all those appropriate measures of a legal, political, administrative and cultural nature that guarantee the protection of human rights of all persons

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aplicación de los tratados sobre derechos humanos por los tribunales locales, Buenos Aires, 163.

under its jurisdiction and that ensure that they do not have to leave the country as a result of any possible threat or persecution.[44] In other words, the State is the guarantor of the enjoyment of human rights and fails in this obligation if the violation of these rights becomes unavoidable and victims of human rights violations or their relatives need to flee their place of residence and seek protection in another State by exercising the right of asylum.[45] The unlawful conduct consists in forcing an individual to seek asylum abroad because of well-grounded fears that his/her life and personal safety are in jeopardy in the country of residence or nationality.[46] Therefore the condition of refugees abroad could substantiate the violation of human rights if the decision to forcibly migrate is adopted as a consequence of such violation. State is responsible if it has not prevented and suppressed persecution with the consequence that its nationals have become aliens in another State. The IACrtHR has also started to recognise the costs associated with forced migration as part of the compensation amount.[47]

Again in order to protect migrants, asylum seekers, refugees and others, the IACrtHR holds that the State also bears the obligation to conduct a serious, independent, impartial and effective investigation to shed light on the facts and punish any violation, even committed by private individuals, of the human rights of these categories of people.[48]

This complementarity between refugee law and human rights law leads to the application of the refugee protection to those who, without qualifying as refugees – not even according to the criteria of the Cartagena Declaration – are in need of international protection because if they were returned to their country of origin or residence or to a third country they would be victims of torture or other cruel, inhuman or degrading treatment or punishment. In this way, the so-called comple-

[44] IACrtHR, *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*, cit., para. 159.

[45] H.M. OLEA RODRÍGUEZ (2015), *Migración (en la jurisprudencia de la Corte Interamericana de Derechos Humanos)*, in *Eunomía*, 9, 249 ss.

[46] IACrtHR, judgment 23.11.2011*, Case of Lysias Fleury et al. v. Haiti, Merits and Reparations*, paras. 105 ff.

[47] IACrtHR, judgment 3.7.2004, *Case of Molina-Theissen v. Guatemala*, *Reparations and Costs*.

[48] IACrtHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, 2013, para. 390.

mentary protection is incorporated into the refugee protection system through the reference to international human rights law. [49]

The limitation of the complementary between refugee law and mainly human rights law lies in the poor implementation in State practice of many human rights with regard to refugees. Domestic legislations are often detailed and progressive on the refugees rights, recognizing them a wide range of social and economic rights. However, most of these domestic rules are barely implemented. Sometimes liberal legislation is passed but cannot be adequately enforced because of weak State capacity. In other cases, laws are passed without effectively considering how or whether they will be implemented. [50]

7. Conclusion

The progressive normative and jurisprudential vitality of the Latin American system of protection of forced migrants is undeniable. The system deemed to be open to "experimentation" for a better and more effective international protection mechanism for refugees and more generally for forced migrants. It is certainly a specific regional system that reflects the legal, as well as cultural, approach of Latin American States, but it can nonetheless play a fertilising role in relation to other regional systems, primarily the European one.

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[49] See the definition of international protection given by the afore mentioned "Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking", according to which "[t]he protection granted by a State or an international organization to a person because their human rights are threatened or violated in their country of nationality or habitual residence, and in which they could not obtain due protection because they are not accessible, available and/or effective. Such protection includes: (a) the protection received by asylum seekers and refugees based on international conventions or internal laws; (b) the protection received by asylum seekers and refugees based on the expanded definition of the Cartagena Declaration; (c) the protection received by any person of foreign nationality based on international human rights obligations and, in particular, the principle of *non-refoulement* and the so-called complementary protection or other forms of humanitarian protection, and (d) the protection received by stateless persons in accordance with international instruments on the subject".

[50] O.H. GALLEGO, L. FELINE FREIER (2022), *Symbolic refugee protection: why Latin America passed progressive refugee laws never meant to use*, available online.

At the same time, it is a system that still has several limitations regarding its implementation on which the concerned States should focus their efforts in compliance with the obligations in Arts. 1 and 2 of the 1969 American Convention, respectively to respect the rights contemplated therein and to adopt legislative and other measures at the domestic level. [51]

In fact, the standard of implementation by domestic laws of the rights enshrined in regional agreements, regional soft law, as interpreted by the jurisprudence of the IACrtHR, widely varies in terms of, *inter alia*, fair and efficient mechanisms in the refugee status determination procedure and respect for the right to *non-refoulement*. Not all countries in the region have procedures for refugee status determination, nor are their standards comparable. Critical points are the admissibility procedures, short deadlines for submitting asylum applications, lack of legal advice and representation, inadequate interviews, limited if not allowable possibility of appealing against decisions not to grant international protection, and long procedural delays in assessing applications. [52]

The recent migration of some six million Venezuelans who fled the authoritarian regime that governs that country has shown vividly the difficulties of putting the principles and rules on international protection into practice. Arguably, most Venezuelans would fall under the regional refugee definition of the Cartagena Declaration adopted in the legislation of most Latin American countries and should therefore be granted this status. Yet, few of these States have recognised Venezuelans as refugees, preferring instead to grant them *ad hoc* permits, leaving millions of people in an extremely vulnerable situation. [53]

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[51] E. FERRER, MAC-GREGOR, C.M. PELAYO MÖLLER (2017), *Art. 1 – Dovere di rispettare i diritti e Art. 2 – Effetti della Convenzione negli ordinamenti nazionali*, in L. CAPPUCCIO, P. TANZARELLA (eds.), *Commentario alla prima parte della Convenzione americana dei diritti dell'uomo*, Napoli, respectively 33 ff. and 71 ff.

[52] A.A. CANÇADO TRINDADE (2015/2016), *Una nueva década de consultas del Alto Comisionado de Naciones Unidas para los Refugiados en América Latina y el Caribe (de México/2004 a Brasilia/2014)*, in *Anuario hispano-luso-americano de derecho internacional*, 22, 175 ff.

[53] O.H. GALLEGO, L. FELINE FREIER, *Protección simbólica a los refugiados*, cit.

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Chapter 20

40 YEARS OF FORCED MIGRATIONS AND REFUGEES FLOWS IN SOUTH-EAST ASIA: A REGIONAL MODEL OR A LEGAL LIMBO?

Silvia Angioi

ABSTRACT: *In the last decades Southeast Asian countries have hosted significant numbers of refugees and forcibly displaced persons. The problem of refugee flows and forced migrations is continuing to occupy a prominent place in the political agenda of these countries and represents a difficult challenge to address. However, it has been mainly addressed through an emergency approach outside any regional mechanism that would serve to define a regional approach and coordinate the response of the various States of the region. Most of them have neither acceded to the 1951 UN Refugee Convention nor to the 1967 Protocol, and the initiatives taken at a regional level reflect their traditional attitude of not interfering in the internal affairs and their reluctance to conclude binding agreements. The aim of this chapter is firstly to describe the legal framework applicable to refugee flows and forced migrations in South-Est Asia; secondly, to highlight how the management of the refugees and forcibly displaced persons over the past forty years led, and is continuing to lead, to the violation of the non-refoulement principle, and the denial of the fundamental rights that are protected by international refugee and human rights treaties.*

1. Introduction

South-East Asia is a region that in the last decades has hosted and absorbed large-scale flows of refugees and forcibly displaced persons. In the late seventies and eighties, in the aftermath of the Vietnam war, some countries – especially Thailand, Malaysia, and Indonesia – were

faced with the problem of the "boat people", one of the largest mass exoduses in recent history. With the support of the United States and other Western countries, they adopted the Comprehensive Plan of Action (CPA), which is still considered one of the most remarkable examples of successful international cooperation in refugee matters. The CPA remains however, an isolated case, a parenthesis in the regional cooperation system. Since then, the problem of refugee flows and forcibly displaced persons has continued to represent a difficult challenge to face for the countries in the region. In fact, while occupying a prominent place on their political agenda, it has been tackled with an emergency approach and outside of any system that defines common policies and applicable rules at regional level. Despite the recent developments, including the participation in the Bali Process, the way the problem of forced migrations and refugees continues to be addressed reflects the perduring attachment of the South-East Asian states to the principle of non-interference and their reluctance to conclude binding agreements and undertake obligations in this field. Most of them have neither acceded to the 1951 UN Refugee Convention nor to the 1967 Protocol, and the initiatives taken at a regional level have resulted in the adoption of non-binding instruments, that mainly focus on security aspects of forced migrations and refugee flows.

This article firstly aims at analysing how the issue of forced migrations and refugees has been addressed by South-East Asian States and ASEAN, starting with the experience of CPA. The analysis will be focused on the legal framework applied by those States to regulate the refugee flows and forcibly displaced persons. I would like to specify that the term refugee is not limited to persons who have been granted the refugee status because they meet the refugee criteria according to the 1951 UN Refugee Convention, but also to persons who seek protection of another country from the threat of persecution on humanitarian and political grounds. As for the definition of forcibly displaced persons and forced migrations, the term is used according to the IOM definition of such concept.[1] Attention will be paid both to the legal systems of

[1] According to IOM, forced migration is "a migratory movement which, although the drivers can be diverse, involves force, compulsion or coercion". In fact, although the use of this term is debated as it is used to describe a dichotomy forced/voluntary that is more nuanced in practice than in theory, the element of coercion is of fundamental importance as it helps to distinguish irregular and undocumented migration and forced migration: it plays in fact a

those States – Thailand, Indonesia, and Malaysia – which are on the frontline as the main receiving countries, and to the various initiatives taken at a regional level by ASEAN. Secondly, this article aims at highlighting how the management of the refugees and forcibly displaced persons in South-East Asia over the past forty years led, and continues to lead, to the violation of the non-refoulement principle, and the denial of the fundamental rights that are protected by international refugee and human rights treaties.

2. The problem of the Indochinese "boat people" in the seventies and eighties: the search for a solution

The case of Vietnamese boat people who fled from South Vietnam after the collapse of the South Vietnamese government in 1975 is well-known, and a lot has been written about it. In the aftermath of the formation of the Socialist Republic of Vietnam (SRV) a mass exodus of people fleeing on boat from Vietnam and other communist countries of the region (Laos and later Cambodia) and seeking refuge in the South-eastern Asian States begun. Some of those States adopted a restrictive policy towards the asylum seekers and pushed them back, leading to a humanitarian crisis. A first attempt to address the problem was made in 1979 when the Vietnamese government and the UNHCR reached a Memorandum of Understanding: the aim was, on the one hand, to permit the orderly departure of family reunion cases, and the resettlement of the refugees in Western countries – basically the United States and France, but also Australia, UK and Canada – and, on the other hand to prevent illegal departures. A mechanism named Order of Departure (ODP) was set up, which consisted of the Vietnamese government and the host countries drawing up of lists of eligible persons: permit to leave was only granted to persons who appeared on both lists. The ODP however, did not have the intended outcome.[2] In the following decade

predominant role in forced migration while in other cases of economic – regular and irregular – the elements of coercion and choice can coexist. The concept of forced migration, therefore, refers to people who flee from armed and religious conflicts, persecution, and violence", IOM (2019), *Glossary on Migration*, Geneva, 77.

[2] One of the main problems was that the majority of people who left by boat were non entitled to access the ODP. Moreover, Vietnam blocked numerous demands from people wishing to reunite with their families and adopted a very

the number of boat people and of asylum seekers in various South-eastern Asian countries increased significantly: moreover the fact that the Vietnamese continued to flee from their country many years after the end of the war led western countries to think that most of them should be considered as economic migrants rather than refugees.[3] That was the reason why, in 1989, various countries of the region declared the failure of the ODP and put forward the idea of a new instrument to replace it. In that stage the ASEAN took the initiative of finalising a Comprehensive Plan of Action (CPA) that aimed at replacing the ODP and involving alongside the Asian countries (Malaysia, Indonesia, Philippines, Thailand, Singapore, but also China and Japan), various western countries, in particular the United States, France, Australia, Canada. The CPA, adopted in 1989 by the International Conference on Indo-Chinese refugees was based "on an explicit principle of responsibility-sharing in that the availability of first asylum in the region was made contingent on resettlement elsewhere".[4] Basically, the CPA provided for the countries in the area to receive and grant humanitarian aid for a transitional period with a view to relocating the migrants in various western countries, alongside Australia, Japan and China. For other migrants – those whose refugee status could not be certified – it was a matter of obtaining temporary shelter while waiting to be able to return to their countries of origin, once the necessary conditions had been re-established. The CPA provided a specific mechanism for screening asy-

restrictive policy towards those detained in the re-education camps. Although the ODP resulted in over 1 million of Indochinese temporarily placed in camps in South-East Asia and resettled in Western countries, the number of those fleeing Vietnam and departures by sea increased significantly and the that of countries willing to offer protection and asylum decreased. See A. SHURKE (1998), *Burden-Sharing During Refugee Emergencies: The Logic of Collective Versus National Action*, in *Jour. of Ref. Stud.*, 4, 405 ff.; S.E. DAVIS (2008), *Realistic yet humanitarian? The comprehensive plan of action and refugee policy in Southeast Asia*, in *Int. Rel. of the Asia-Pacific*, 8, 191 ff.; A. CASELLA (2016), *Managing the "Boat People" Crisis: The Comprehensive Plan of Action for Indochinese Refugees*, in *Desperate Migration Series*, No. 2.

[3] A. HELTON (1993), *Refugee Determinations under the Comprehensive Plan of Action: Overview and Assessment*, in *Int. Jour. of Ref. Law,* 4, 544 ff.; A. LAKSHMANA CHETTY (2001), *Resolution of the Problem of Boat People: The Case for a Global Initiative*, in *ISIL Yearb. Intern. Hum. Ref. Law*, 8; W.C. ROBINSON (2004), *The Comprehensive Plan of Action for Indochinese Refugees: Sharing the Burden and Passing the Buck*, in *Journ. of Ref. Stud.*, 3, 319 ff.

[4] A. SHURKE (1998), cit., 405.

lum seekers' demands: a specific role in assisting the country of first asylum was played by UNHCR which also assisted the country of return in negotiating the procedures for repatriation, so as to ensure conditions of safety and dignity for returnees, i.e., those who had not been granted the status of refugee. The status of asylum seeker was determined by national authorities, but according to the criteria provided by the 1951 UN refugee Convention and the 1967 Additional Protocol.[5]

The CPA was based on a principle of burden sharing between countries of origin, host countries and resettlement countries; it was also collaborative as it involved UN agencies and NGOs.[6] Over a period of seven years, the CPA put an end to the mass exodus of Vietnamese and Laotians, it expanded legal departures and mostly introduced procedures for determining refugee status. It facilitated the recognition and resettlement of a large number of Vietnamese and Laotian refugees and the reintegration of a comparable number of Vietnamese and Laotians who did not fulfil recognized refugee criteria. The CPA is therefore generally considered as an example of agreement that covered all possible solutions, from repatriation to resettlement to the local integration, as well as expanding migratory opportunities based on the changing circumstances. However, it is also agreed that the CPA would have never seen the light of the day, outside the specific political context in which it was conceived. In the aftermath of the Vietnam war, the regional security became a priority for the US and drove it to launch a phase of cooperation with ASEAN and to convince European States and Australia to collaborate in the search of a solution for the refugees. Therefore, the US played a fundamental role in fostering the international cooperation: the plight of boat people exodus and the humanitarian imperatives would hardly have been enough to sustain a program of such dimensions, without the US commitment to resettle an enormous number of refugees.[7] After the collapse of the Soviet Union, the loss of an important ally and the risk of a political isolation prompted Vietnam to seek an international rehabilitation and show the willingness to coop-

[5] As for the screening procedures adopted by various countries, see United States GAO, *Vietnamese Asylum Seekers. Refugee Screening Procedures Under the Comprehensive Plan of Action*, October 1996.

[6] G. LOESCHER, J. MILNER (2011), *Responding to protracted refugee situations Lessons from a decade of discussion*, Refugee Studies Centre, *Forced Migrations Policy Briefing*, 6, 8.

[7] A. SHURKE (1998), *op. cit.*, 406.

erate in the search for a solution of the problem of boat people.[8] A definitive solution to the problem was reached in 1996. Numerous criticisms of the CPA emerged which focused on the conditions of refugees' return to Vietnam, and the compliance with human rights standards; but despite the critical issues, there is a widespread feeling that it provides an example of successful international cooperation but also a possible model for finding viable solutions to emerging challenges.

3. Refugees and forcibly displaced persons in the South-East Asian receiving countries: the cases of Thailand, Malaysia, and Indonesia

Internal and international conflicts, political repression and violence against minorities have been at the root of the flows of refugees and forcibly displaced persons which cyclically have been affecting South-East Asia over the last decades.[9] Refugees and displaced persons follow different trajectories, sometimes by land and often by sea: it is therefore not surprising that also the problem of the boat people, far from being confined to the distant past, is being cyclically repeated, and the States in the area are called upon to manage repeated humanitarian crises (the case of the crises in the Andaman Sea in 2012 and 2015 is emblematic) as well as the landings and shipwrecks that occur almost daily.[10]

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[8] A. BETTS (2008), *International cooperation in the global refugee regime*, GEG Working Paper, no. 2008/44, 15 ff.

[9] UNHCR (2021), *Asia & the Pacific Regional Trends. Forced Displacements 2021*, available online.

[10] In 2012, UNHCR in a position paper denounced the gravity of the situation in Myanmar due to the internal conflict, and the brutal repression against the Muslim minority which had resulted in the population displacement – internal but also outside the country by boat – of tens of thousands (UNHCR, *UNHCR Response on Returns to Rakhine State, Myanmar*, 27 July 2012, available online). Between 2015 and 2016 UNHCR estimated that the number of arrivals in the Bengal Gulf and the Andaman Sea was around 95000 and the flow of Rohingya displaced persons and asylum seekers has grown exponentially from following the military assault against Rohingya villages in the Rakhine State in the late summer 2017. The flow of Rohingya refugees has not decreased considering that in 2022 3,545 attempted the journey across the Andaman Sea with a 360% increase from the number of individuals who attempted he journey in 2021. UNHCR (2023) *Protection at Sea in South-East Asia – 2022 in Review*, available online.

As mentioned above, most of South-East Asian countries with an ASEAN membership – the only exceptions are Cambodia, Philippines, and Timor Leste – are not part either of the 1951 UN Refugee Convention or the 1967 Protocol. The absence of a specific legal framework and of a system of binding provisions, on the one hand, has not prevented those countries from granting asylum, on the other hand, it has made it difficult to regulate the matter appropriately by guaranteeing displaced persons and refugees fundamental rights and protection in line with international standards. This is particularly evident in the case of those countries – firstly Malaysia, Thailand, and Indonesia – which have played a fundamental role as receiving countries. Over the years, they have hosted a significant number of refugees and forcibly displaced persons coming, in the case of Thailand, mostly from the neighbouring countries, and in the case of Malaysia and Indonesia from other South-East Asian countries but also from the Middle East and Afghanistan.

As for Thailand, between the mid-1970s and the late 1980s, it was on the frontline in hosting and managing nearly half a million Indochinese refugees from Cambodia, Vietnam, and Laos. But since the mid-1980s it has also started hosting large numbers of refugees in numerous camps set up along the Thai Myanmar border, mainly belonging to certain Myanmar minorities such as Karen, Kachin and Rohingya fleeing violence and conflict between the military regime and ethnic armed groups. Thailand is not part of the 1951 UN Refugee Convention and operates mainly under the 1979 Immigration Act as amended by several instruments adopted subsequently.[11] The domestic legislation considers forcibly displaced persons, refugees and asylum seekers as illegal immigrants who can be subject to detention and deportation, who are not permitted to access to health, education, national institutions, nor to move outside the camps.[12] As it was reported, refugees located in border camps as well as those residing in detention facilities because located in urban areas, are very often targeted with unlawful treatments,

[11] See *Immigration Act*, *B.E. 2522 (1979)*, available online; *Ministry of Interior Notification on Permission for Certain Categories of Aliens to Stay inside the Kingdom as a Special Case in Yala, Pattani, Narathiwat, Satun, and 4 Districts in Songkla i.e. Chana, Na Thawi, Thepa, Saba Yoi*, 22 March 2007, available online.

[12] The refugees detained in the camps rely on NGOs services for their basic needs and on UNHCR for protection and solutions. UNHCR (2022) *Factsheet Thailand*, available online.

random arrests and dire conditions while waiting for their resettlement. The registration of refugees has been led by the Royal Thai Government Provincial Admission Board (RTG-PAB), but this national screening mechanism has worked discontinuously, with closures and openings. This has created a legal vacuum and "a no-man's land of human and legal rights".[13] In a legislative and regulatory framework that was neither clear nor predictable, UNHCR, despite its work not being continuous and uninterrupted, has played a key role in finding solutions for people in need of protection. In fact, although UNHCR has been authorised to carry out refugee status procedures intermittently, depending on the decisions of the Thai government and the functioning of the national mechanism, it has nevertheless managed to provide protection and assistance to refugees awaiting resettlement in third countries or voluntary return to their country of origin.[14]

In 2013 the Thai government resumed the RTG-PAB, whose operation had ceased in 2005 and established the system of Fast Track Provincial Admission Boards (FTPAB) that served at least to consider refugee cases under family reunification criteria.[15] The most significant development occurred in 2019 with the adoption of the Regulation on the screening of aliens who are not able to return to the country of origin.[16] The Regulation focuses on asylum seekers and persons in need of international protection and aims at distinguishing these persons from economic migrants. It provides a framework to govern the situations of individuals who are unable to return to their country by firstly giving a definition of "protected persons".[17] These persons are entitled to tem-

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[13] JRS (2005), *Nowhere to Turn: A Report on Conditions of Burmese Asylum Seekers in Thailand and the Impacts of Refugee Status Determination Suspension and the Absence of Mechanisms to Screen Asylum Seekers*, available online; REFUGEES INTERNATIONAL (2005), *Thailand: Complications in the resettlements of Burmese refugees*, available online.

[14] UNHCR (2016), *Factsheet Thailand*, available online. Most of resettlement have taken place to the US; among other host countries are Australia, Canada, Finland, and Norway. See UNHCR (2017), *Resettlement of Myanmar Refugees from Temporary Shelters in Thailand* (2005-2017), available online.

[15] United States Department of State (2017), *2016 Country Reports on Human Rights Practices-Thailand*, available online.

[16] Regulation of the Office of the Prime Minister on the Screening of Aliens Who Enter into the Kingdom and are Unable to Return to the Country of Origin, B.E. 2562, available online.

[17] It defines "protected person" someone who enters or reside in Thailand

porarily stay in Thailand under special circumstances and in conformity with the Immigration Act. The Regulation, which entered into force in 2020, also provides for the establishment of the much-needed national screening mechanism. This mechanism, hinged on a screening Committee and a procedures Committee, has been recently implemented.[18] The adoption of the Regulation and the establishment of the related procedures are fundamental steps to align Thai legislation with the relating international standards and ensure the respect of the obligations of non-refoulement. Cases of refoulement of persons with a recognized status of refugees, or cases of deportation of persons who had documented violations of their human rights, persecution, and discrimination in their country of origin have in fact been numerous.[19] The operationalization of the national screening mechanism together with the improvement of the detention centres is a crucial phase, and it is not surprising therefore, that it is under the scrutiny of the UN human rights monitoring bodies and of NGOs.[20]

A similar approach to the issue of refugees and asylum seekers has been taken by Malaysia. The Immigration Act 1959/63, as amended in 2006, contains various provisions which can be used to detain and deport those who are classified as illegal immigrants.[21] Since the domestic legislation does not contain any specific provision on refugees and asy-

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and is unable or unwilling to return to the country of domicile due to a "reasonable cause that such person will suffer danger due to persecution".

[18] After the Regulation was adopted, the Screening Committee was established in 2020, the Criteria, Procedures and Conditions Committee in 2021, and the National Screening Mechanisms (NSM) Criteria were approved by the Thai Cabinet in October 2022.

[19] The Thai authorities have deported Chinese Uighurs, Cambodian and Vietnamese dissidents, numerous practitioners of the Falung Gong, Rohingya and Burmese nationals.; Amnesty International, Asia Pacific Refugees Rights Network *et. al.* (2017), *Joint Statement. Thailand: Implement Commitments to Protect Refugee Rights*, End Detention, forcible returns of refugees, available online.

[20] Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, A/HRC/49/17, 21 December 2021; Refugee Rights Network in Thailand, *Joint Submission Universal Periodic Review of Thailand*, Thailand Cycle 3, 39th Sessions, available online; AMNESTY INTERNATIONAL (2017), *Thailand: Amnesty International calls on Thailand to extend legal protections to refugees and asylum seekers in 2017*, available online.

[21] Immigration Act – Act 155, Incorporating all amendments up to 1 January 2006, sections 1-9, 15, 31-36, available online.

lum seekers and that Malaysia, like Thailand is not part of the 1951 UN Refugee Convention, these migrants fall within the provision of the Immigration Act and do not have the right to any form of special protection. No distinction, at least formally, is made between illegal migrants, refugees, and asylum seekers. Over the years, however, Malaysia has adopted an approach to the issue of forced migrations, and more specifically to the issue of refugee and asylum seekers that varies depending on the origin of refugees and the specific situation. Refugees coming from Muslim countries – Vietnamese Cham, Filipino Muslims from Mindanao, Bosnians from Bosnia-Herzegovina, and Indonesians from the Aceh province – have been granted residence permits, sometimes indefinitely. Conversely and despite the common Muslim worship, a different approach was taken for Rohingya refugees who since the early nineties, fleeing persecution and violence, have been seeking refuge in Malaysia: they are not granted with residence permits and considered and treated as illegal migrants.[22] As for the UNHCR's role, the relations between the Agency and the Malaysian government have been controversial. On the one hand, the Malay government has allowed UNHCR to operate in its territory and organize a system of assistance and registration of asylum seekers and persons "of concern" that would serve at least to prevent detention of asylum seekers and individuals registered by UNHCR as persons under the UNHCR protection.[23] On the other hand, it has repeatedly accused UNHCR of getting in the way of the work of agencies under the Ministry of Home Affairs,[24] and,

[22] K. MUNIR-ASEN (2018), *(Re)negotiationg refugee protection in Malaysia. Implications for future policy in refugee management*, Discussion Paper, No. 29/2018, Deutsches Institut für Entwicklungspolitik (DIE), Bonn, available online; R.A.A. KUSUMA PUTRI, D. GABIELLA (2022), *The Organisational Pattern of Rohingya Refugee Community in Malaysia: Structural Opportunities, Constraints, and Intra-Community Dynamics*, in *Refug. Surv. Q.*, 41, 673 ff.

[23] Through the UNHCR's processing, individuals who need protection are provided with a card or an identity documentation which attests that the bearer of the card is under the protection of UNHCR. These documents have no legal value in Malaysia and may simply reduce the risk of arrest. The Malay Home Minster has questioned the validity of this documents and has stated that any identification and residing document can be issued only by the Malayan authorities. See T.A. YUSOF (2021), *Govt, UNHCR to Discuss Overstaying Refugees, Asylum Seekers*, available online.

[24] IVY JOSIAH (2007), *Time for ministry, UNHCR to start dialogue*, in *Malaysiakini*, available online.

even recently, it has declared its intention to close the UNHCR offices in Malaysia and manage the country's refugees without UNHCR and without any foreign interference.[25] Since 2019 the Malay authorities have denied UNHCR the access to detention centres and due to the increasing inflow of Rohingya refugees from Myanmar it began to adopt strict measures, to conduct repeated raids, to detain and then deport hundreds of Myanmar nationals at risks of being arrested, tortured and killed after their return. UNHCR as well as UN human rights experts have repeatedly urged Malaysia to respect its international obligations and stop practices that are in violation of the non-refoulement principle.[26] The adoption by the Malay government of a refugee monitoring and tracking system (TRIS) in 2017 was not coordinated with the pre-existing system run by UNHCR and the Malay government; as a result, the validity of the documents issued by UNHCR may not be clear and it may not be clear whether the holders of these documents could access to TRIS and be registered under this procedure.[27]

The existing legal framework together with a political climate that continues to fluctuate have made possible the adoption of an ambiguous and punitive migration policy that has taken place outside a human and refugee rights legal framework. The Malay authorities on the one hand adopt a tighten policy and rigid immigration laws that expose refugees to the risk of arrets and deportation and, on the other hand, they tolerate the practice of irregular employment of refugees owing to the increasing demand of cheap labour in various sectors. This results not only in the increase of forms of exploitation but also in the flagrant violation of immigration laws and in the denial of fundamental human and labour rights.[28]

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[25] M. WALDEN (2022), *Refugees may become victims of Malaysia's electoral politics*, in *The interpreter*, available online; Z. PETER (2022), *Malaysia Mulls Closing UN Refugee Agency Office, Sparking Refoulement Fears*, in *Voa News*, available online.

[26] According to HRW, between April and October 2022 alone, Malaysian immigration authorities have returned over 2000 Myanmar nationals, including military defectors without assessing their asylum claims or other protection needs. UN Office of the High Commissioner on Human Rights (2021), *Malaysia: UN experts appalled by deportation of migrants to Myanmar despite court order*, available online.

[27] Asia Pacific Refugee Rights Network (2018), *Malaysia Universal Periodic Review 3rd Cycle. Submitted 29 March 2018*, available online.

[28] Human Rights Council. Working Group on the Universal Periodic Re-

Indonesia, for its part, shares with Malaysia and Thailand a long tradition of hosting refugees and people in need of international protection. It also represents an important transit point for numerous migrants and asylum seekers who have Australia as their final destination.[29] Indonesia shares with Malaysia and Thailand also the non-participation in the 1951 UN Refugee Convention and the 1967 Protocol and a domestic legal framework that deals with the problem of migration but does not provide asylum seekers and refugees with a special status.[30] In the case of Indonesia however, there is a Constitutional provision that recognises and guarantees the right to obtain asylum from another country.[31] Despite the existence of such provision, until 2016, when major changes were introduced with the adoption of a Presidential Regulation on refugee matters, the rules applicable to aliens regardless to their specific status were those contained in the 1992 Immigration Act, as amended by the Law 6 of 2011. The Immigration Act does not contain rules on refugees and provides for detention measures for foreign nationals who do not comply with the provisions concerning immigration.[32] It also provides for a different treatment for the victims of human trafficking and people smuggling: such treatment however, simply consists in the fact that migrants are not confined in prison together with ordinary prisoners but they are housed in special detention centres or other designated premises, while the decisions regarding

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view, *Summary of Stakeholders' submission on Malaysia*, 24 August 2018, A/HRC/WG.6/31/MYS/3; *Ibidem*, *Submission by Coalition Members of the Migration Working Group (MWG) for the 31st session in the 3rd cycle of the HRC's Universal Periodic Review*, available online.

[29] A significant numbers of asylum seekers and migrants who transited in Indonesia entered illegally. This transit is mainly fuelled by persons coming from various Middle eastern (Ira, Iraq, Syria) and Asian (Afghanistan, Bangladesh) countries and is facilitated by the fact that Malaysia offers visas upon arrival to persons who arrive from various Islamic countries. SEE G. HUGO, G. TAN, C.J. NAPITUPULU (2017), *Indonesia as a transit country in irregular migration to Australia*, in M. MCAULIFFE, K. KOSER (eds.), *A Long Way to go. Irregular Migrations Patterns, Processes, Drivers and Decision-making*, Acton Act, 167 ff.

[30] See the 1992 Immigration Act no. 9 and the Law no. 6 of 2011.

[31] Art. 28 (G),2: "Every person shall have the right to be free from torture or inhumane and degrading treatment and shall have the right to obtain political asylum from another country".

[32] *Ivi*, Arts. 81-85.

their repatriation are pending.[33] It must be pointed out that prior to 2016 the lack of a specific legislation on refugees and forcibly displaced persons, since the late seventies, had been somewhat compensated for by the adoption of a Memorandum of Understanding between the Indonesian government and the UNHCR. This Memorandum authorised UNHCR to process the refugee arrivals, and this system of co-operation was confirmed in 2002 when the Director general of Immigration issued a directive on procedures for aliens seeking asylum or refugee status. Interestingly, the directive provided that no measures should be taken that would include deportation to a country where the asylum seeker's life or freedom was threatened. The directive gave UNHCR the competence to determine the asylum or refugee status and issue the related documentation.[34] In subsequent years, further initiatives have been taken to assist the Indonesian government in developing mechanisms to address refugee protection pending the future Indonesia's accession to the 1951 Refugee Convention. But, as mentioned above, major changes have been introduced more recently, when in 2016 the Presidential Regulation 125 has been adopted to regulate issues relating to the status of refugees or asylum seekers.[35] The Regulation firstly outlines a definition of refugee which is consistent with the Refugee Convention; secondly, it contains some provisions on the search and rescue operations,[36] and other provisions on the transfer of refugees to the nearest port or shore and then to the nearest immigration detention centre for medical care and identification. Under the Regulation, UNHCR is entrusted with carrying out the procedures of identification of those who declare themselves as refugees and assessing whether those individuals meet the requirements for the recognition of refugee status. UNHCR is also entrusted with the assistance of refugees and their temporary pro-

[33] *Ivi*, Arts. 86-88.

[34] Directive from the Director General of Immigration no. F-IL.01.10-1297, 30 September 2002.

[35] Regulation of the President of the Republic of Indonesia Number 125, year 2016 concerning the handling of refugees, available online. The Regulation 125 implements Art. 27 of the Law 37/1999 on foreign relations that confers upon the President the competence to set out the policy concerning the issue of refugees, and to regulate the matter through a Presidential Decree.

[36] Art. 9 stipulates that refugees found in emergency must be immediately transferred to a rescue vessel, taken to the nearest port or shore if the lives of the refugees are in danger, and identified if in need of emergency or medical attention. Foreigners who are suspected of being refugees are handed.

tection until other solutions – firstly resettlement in third countries – are found.

The adoption of the Regulation 125 however, raised the question of compatibility between its provisions and those contained in the Immigration Act; consequently, the review procedure by the Parliament was initiated, and the possibility to amend the Regulation 125 is also being considered. In fact, despite the recent developments, Indonesia's non-adherence to the 1951 Refugee Convention results in the persistent absence of a comprehensive legal framework that grants legal status to refugees and protects their rights. Refugees and asylum seekers continue to be unable to work, have no access to any economic benefits, and suffer restrictions on their freedom of movement and association. As it was pointed out, the Indonesian constitution provides that the domestic legislation is conceived and interpreted in the light of the constitutional provisions and therefore of the right of asylum. Thus far however, the Indonesian government has adopted an approach that is the expression of an exercise of the state's discretion in granting or not granting international protection, with the result that the situation of refugees and asylum seekers continues to be inherently vulnerable.[37]

4. The regional framework and ASEAN's approach to refugees and forced migration

As mentioned above, when the problem of Vietnamese boat people forced the international community to find solutions, ASEAN, and its Member States,[38] together with UNHCR played a significant role in supporting the conclusion of the CPA that significantly contributed, despite its flaws, to end the Indochinese crisis. In recent years, the phenomenon of boat people and forced displacement has re-appeared. Although there are similarities between the past and the present, in general the circumstances, the political context, and the root causes of the refugees' movements have changed. As in the past, several ASEAN Member

[37] B. DEWANSYAH, R.D. NAFISAH (2021), *The Constitutional Right to Asylum and Humanitarianism in Indonesian Law: "Foreign Refugees" and PR 125/2016*, in *Asian Journ. of Law and Soc.*, 3, 537.

[38] When the CPA was adopted and implemented, the ASEAN Member States were the same ones that had been at the forefront of welcoming and accommodating the boat people, namely Indonesia, Malaysia, Thailand, Singapore, and the Philippines.

States – Thailand, Indonesia, and Malaysia – have continued to play a role in receiving forcibly displaced persons coming from various countries. ASEAN, however, has a different membership following the accession of other South-eastern Asian states like Vietnam, Laos, Cambodia, and Myanmar, which is currently one of the major source countries of forced migrants. There is no international conflict in the region and the flows of refugees and forcibly displaced persons are sometimes associated with conflicts in distant geographical areas (Syria, Afghanistan), or with internal conflicts or policies of discrimination and persecution against minorities (e.g. the Burmese Rohingyas and the Chinese Uighurs). Finally, unlike in the past, there is no direct involvement of a Western country in reaching and obtaining a solution to the problem.

Clearly, the numbers of the Vietnamese, Cambodian and Laotian exodus in the '70s and '80s cannot be compared to those of today's migrations flows;[39] however, the increase of migrant flows coming from Middle eastern countries – Syria, Iran, Afghanistan – together with the recurrent exodus, by land and by sea, of Rohingyas from Myanmar have made the problem of refugees and forcibly displaced persons of great relevance once again. What is important to note is that ASEAN has shown the tendency to consider and deal with this from the perspective of the fight against the human trafficking. Such tendency is reflected in the adoption by ASEAN of several instruments which are in line with those adopted by the United Nations to combat the transnational organized crime and trafficking in persons:[40] it is the case with the ASEAN Declaration on international crime (1997), and the ASEAN Declaration against trafficking in persons particularly women and children (2004), that was recently replaced by the homonymous Convention (2015). The focus on the security aspects of the migrations and refugee issue is also reflected in the so-called "Bali process", which involves all ASEAN

[39] More than 3 million people fled Vietnam, Cambodia, and Laos, and the number of resettlements is also remarkable: more than 1 million were resettled in the US, 260.000 in China, 200.000 in Canada, 185.000 in Australia; 130.000 in France. See C. ROBINSON (1998), *Terms of Refuge: The Indochinese Exodus and the International Response*, London, 2; S.A. BRONEE, (1993), *The history of the comprehensive plan of action',* in *International Journal of Refugee Law*, (5), 534 ff.; US Department of State (2004), *Refugee Admissions Program for East Asia*, available online.

[40] Reference is made to the UN Convention against Transnational Organized Crime (2000), as well as to the UN Palermo protocol (2003).

Member States,[41] and in some instruments adopted in that context such as the 2016 Bali Declaration on people smuggling, human trafficking, and related transnational crime. The Declaration, in fact, on the one hand emphasises the principle of non-refoulement and the importance "of a comprehensive approach to manage irregular migration, including victim-centred and protection-sensitive strategies, but on the other hand it reaffirms the sovereign rights and legitimate interest of states to safeguard their borders". The ASEAN's tendency to focus both on the safeguard of the principles of sovereignty and non-intervention and on the securitization of the refugee issue is also reflected in the official documents adopted by the Ministerial meetings that took place in the following years. Stress has systematically been placed on the fight against transnational crimes, particularly in the areas of human trafficking, and on the need to strengthen cooperation on border management. However, over and beyond the ASEAN's attitude toward the issue of refugee and forcibly displaced persons, the fundamental point is that ASEAN has refrained from adopting specific and binding instruments in this field and has not adopted a collective response to the challenge of forcibly displaced persons and refugees.

The absence of a primary role for ASEAN on the issue of refugees and forcibly displaced persons, coupled with the non-binding nature of the main initiatives launched within the organization has meant that the states have assumed the primary role of shaping migration and refugee policies. Unsurprisingly, attention to security aspects is at the core of the strategies and policies that also the ASEAN Member States have

[41] Launched in 2002 and participated in by over 50 countries of the Asia-Pacific region, the Bali process is an important international forum where various issues concerning the irregular migrations and trafficking of persons are debated: although it is not an ASEAN initiative, all ASEAN countries are part of it. The aim of the process is to coordinate the States' efforts in counteracting the traffic of illegal migrants, and to support States in adopting best practices in the field of asylum, in line with the provisions of the 1951 Refugee Convention. It has represented an important framework for the development of a series of initiatives aiming at strengthening cooperation on refugee protection and international migrations. Reference is made, particularly, to the Regional Support Office (RSO), established in 2012, that operates under the co-direction of Indonesia and Australia and in consultation with UNHCR and IOM, that acts as a focal point to facilitate information sharing, support capacity building and exchange of best practices and foster collaboration on practical activities.

adopted to address the recurring problem of flows of refugees, especially those by sea, that have affected them over the years.

In this respect, the way the Rohingya crisis has been addressed seems somehow paradigmatic. When in 2012 and 2015 thousands of Rohingya fled from Myanmar to other countries (Thailand, Malaysia, Indonesia), the ASEAN's role was irrelevant, and each State addressed the problem of refugees as it deemed appropriate. ASEAN refrained from adopting a clear position with regard to what was defined the "Andaman Sea crisis": it accepted the official stance of the Myanmar government, according to which Rohingya had to be classified as Bengali irregular migrants who voluntary migrate in search of economic opportunities.[42] Such position has been seen as yet more evidence of the structural ASEAN's adherence to the principles of sovereignty and non-interference: even in the face of gross human rights violations, it appeared to be insurmountable.[43] And in fact, ASEAN did not change course even in 2017, when the Myanmar's army deadly crackdown in late August resulted in the second largest refugee crisis since the boat people crisis in the seventies. In deference to the principle of non-interference and despite the consequences of what the UN High Commissioner of human rights defined as "a textbook example of ethnic cleansing".[44] there were no explicit statements from ASEAN condemning the government, nor has ASEAN

[42] In 2015 thousands of Rohingya migrants were targeted with pushback operations by Thailand, Indonesian and Malaysian authorities. The interception of boats by the Malaysian and Indonesian authorities led traffickers and smugglers to abandon boats on the sea, and more than 6,000 refugees were stranded without food and water. A mass grave containing remains of more than 30 bodies was discovered in Thailand a few hundred meters from the Malaysian border. See HUMAN RIGHTS WATCH (2015), *Southeast Asia: End Rohingya Boat Pushbacks*, available online; R. SPENCER (2015), *Thousands of Burmese migrants feared adrift at sea as south-east Asian governments refuse landing*, in *The Telegraph*, available online; S. TISDALL (2015) *South-east Asia faces its own migrant crisis at states play with "human ping-pong"*, in *The Guardian*, available online.

[43] I. JATI (2017), Comparative Study of the Roles of ASEAN and the Organization of Islamic Cooperation in Responding to the Rohingya Crisis, in *The Indon. Journ. of South. Asian Stud.*, 1, 17 ff.; I. JATI, E. SUNDERLAND (2017), *Playing with Words: The Securitization Construction of "Refugee" in Asean Politics*, in *Jurn. Hub. Intern.*, 6, 247 ff.; B.M. PALATINO (2015), *ASEAN's Response to Rohingya Crisis Falls Short Two recent meetings fail to address some crucial issues*, in *The Diplomat*, available online.

[44] The definition by the then High Commissioner for human rights, Prince Zeid Ra'ad Al Hussein has been mentioned very often in the years later.

taken any initiative to take joint action to address the crisis and the mass exodus of around one million Rohingya.

In fact, the mass exodus of Rohingya was not addressed as a crisis, but once again, as an internal problem. In subsequent years, when the Rohingya issue was mentioned in official ASEAN documents, it was done to confirm the ASEAN's support for the Myanmar government's efforts to ensure security for all communities in Rakhine State and facilitate the voluntary return of those who had fled.[45]

It is also significant that, within ASEAN, even states like Malaysia that since the very beginning had sharply criticized Myanmar and asked for a larger ASEAN's role in addressing the crisis,[46] progressively changed tone and policy: in recent years, Malaysia went from being a critical voice of violence and persecution against Rohingya to a country that frequently resorts to the refoulement of refugees and that increasingly perceives the presence of Rohingya as a social and security threat.[47]

5. Conclusions

Over the past forty years, ASEAN and its Member States have been systematically exposed to recurring flows of refugees and forcibly displaced persons, sometimes resulting in large-scale humanitarian crisis. However, thus far there does not seem to have been, either by ASEAN or its Member States, a change in the approach towards an issue that

[45] Mention is often made to the need to support the implementation of the Arrangement on return of displaced persons signed between Myanmar and Bangladesh in 2017. See Chairman's Statement of the 34th ASEAN Summit, 23 June 2019, available online. See also Chairman's Statement of the 35th ASEAN Summit, 3 November 2019, available online; Chairman's Statement of the 36th ASEAN Summit, 26 June 2020, available online. See also R. BARBER, S. TEITT, (2020) *ASEAN Summit: A chance to engage on Rohingya crisis*, in *The Interpreter*, available online; HRW, ASEAN (2019), *Don't Whitewash Atrocities Against Rohingya. Repatriation Report Ignores Dire Situation in Myanmar*, available online.

[46] *Mahathir slams Myanmar's Suu Ky for handling of Rohingya*, 13 November 2018, available online; *Help Myanmar deal with Rohingya refugee crisis, Muhyiddin urges Vietnam*, 23 June 2020, available online.

[47] N. KIPGEN, D. SHANDILYA (2020), *Malaysia's changing policy on Rohingya refugees*, in *The Bangkok Post*, available online; P. SUKHANI (2020), *The Shifting Politics of Rohingya Refugees in Malaysia*, in *The Diplomat*, available online.

continues to be perceived as a matter of security and of national interest. The absence of an ASEAN's role in the definition of a regional system that provides for a collective response to the refugee issues is coupled with the lack of participation of most of its Member States to the 1951 UN Refugee Convention and the 1967 Protocol. The result is that due to the lack of a regional system and a role for ASEAN, if not of leadership at least of coordination, its Member States continue to define their own policies on refugees and forcibly displaced persons and manage the problem according to their specific national interests. The result is also that the applicable legal framework remains weak and fragmented and its compliance with the principles that inspire global initiatives such as the UN Global Compact on Refugees (GCR) or with international human standards is questionable at best. Hints of a change can be glimpsed in the recent developments in the domestic legislation of Thailand and Indonesia; but what is still needed is the development, both at a national and regional level, of a comprehensive legal framework for the identification, protection and processing of refugees and asylum seekers. Although it is not a problem exclusive to those countries or to the South-East Asian region, the fact remains that, even in this context, the definition of a system of rules is necessary to provide these vulnerable groups with legal status and the recognition of their fundamental human rights in line with international standards. The enhancement of the refugee protection system requires firstly a change in the approach, which means a shift from the securitization and criminalization of migrations to a human rights-based approach. It also requires the adoption of strategies and policies based on the principles of cooperation and burden-sharing. In this respect, the experience of the CPA should be seen for what it is: an important legacy and a possible inspirational model for the definition of a regional system.

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Chapter 21

ECONOMIC AND CLIMATE MIGRATION IN GEORGIA

Andrea Borroni

ABSTRACT: *In the last decade, Georgia has consistently adopted liberal and favourable policies for economic migrants, a tendency that could face some changes due to the war events taking place beyond the Georgian borders.*

Even if this Country has historically played a main role in the migratory (and reception) phases, also due to its peculiar geographical position, Georgia has not yet adopted a definitive and comprehensive policy and/or legal framework concerning foreign immigrant workers, or an ad hoc *legislation dedicated to Georgian citizens employed abroad. Moreover, there are currently no specific rules regarding the guarantees and assistance offered to eco-migrants, or regarding their status, and the criteria for obtaining it.*

Therefore, this essay aims at investigating the primary motives behind the migratory phenomena that occur within the regions of the South Caucasus and, in particular, from Georgia. It also aims at highlighting the answers provided by the rulers on this domain of the law in order to propose an overview analysis from a de jure condendo *perspective.*

1. Introduction

After the fall of the Soviet Union, increasing unemployment and poverty have forced large numbers of people to seek job opportunities outside of their home countries. For most of them, neighbouring Countries become the main destination points. Although this trend has been slowing down, it has not reversed in recent years.

This is true also for the South Caucasian Countries.

Migration to and from the Caucasian Countries has varied in intensity since 1991, when independence from the USSR was declared. As a natural consequence, the States of the area gradually opened up to international

trade and integrated into the world economy, "but the collapse and instability of the economy during the 1990s led to large waves of emigration. While some of these flows were internal, particularly around the conflict regions of Abkhazia and South Ossetia, many were also international". [1]

In this perspective, in fact, over the past 25 years, major changes in population have shaped the approaches to migratory phenomena in the former URSS Countries of the Caucasian region.

Through the current migration strategy and the related action plan, the Governments have started to successfully institutionalize migration management.

In particular, the already implemented policies, and the one in progress as well, take into account not only "traditional" issues, such as, just to name a few, irregular migration or the possibilities to access employment, but also the rising challenges deriving from climate change and the consequent eco-migration.

Climate change, which was once only considered as an "environmental issue", now is an increasingly inherent element of national and international security agendas. It's a "threat multiplier", exacerbating existing risks to safety and increasing environmental stress, adding pressures that can push the governments' capacity of response to the limit.

Given these premises, the research aims at analysing the case of Georgia, as epitomic of the Caucasus region, while also providing a brief overview of the other South Caucasus Countries.

2. Georgian policies on migration

Emigration and immigration are a sum of complex and interconnected factors, often linked with economic, social, and political changes, as well as people's individual decisions.

In recent history, in Georgia, emigration was caused primarily by unstable geopolitical equilibrium, threats to life, and security-related issues (*e.g.* civil war, armed conflicts, etc.), even if, nowadays, the presence of emigrant networks abroad and the possibility of receiving a better education in developed Countries are playing an increasing role. [2]

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[1] OECD (2017), *Georgia's migration landscape*, in *Interrelations between Public Policies, Migration and Development in Georgia*, OECD Library, 50.

[2] See State Commission on Migration Issues (2020), *Migration Strategy of Georgia 2021-2030*, available online.

Notwithstanding the incidence of the phenomenon, migration policies in Georgia have only lately become a relevant subject of study and reform.

Indeed, paramount concrete steps towards the preparation of legislation were only taken on the month of October 2010 by means of Resolution 314 of the Government, establishing the State Commission on Migration Issues. Specifically, the Commission's main task was that of formulating proposals and recommendations aimed at defining the policy on internal and international migration and improving the management of the migratory State.

The activities of the Commission, subsequently, led to the adoption of the Georgian migration strategy by the Government in March 2013, through which the goals and principles of migration management in Georgia were identified and coordinated.

Thus, the development of a specific migration strategy has been pushed by the move of an accelerated process of Georgia's approximation with the European Union (EU). [3]

[3] State Commission on Migration Issues (2020), *op. cit*. In fact, during this period, migration strategy documents for 2013-2015 and 2016-2020 "were drafted to set up and improve the migration management system. Also, a corporate management body – the State Commission on Migration Issues (SCMI/Commission) was established (2010) which gathered all important actors operational in the field and devised action based on the whole-of-government approach". The Commission has become a common platform that made possible to unify "the interlinked basic thematic directions within the various sectoral agencies involved in migration management, and with that - on the one hand conditioned the thematic and structural expansion and development of these agencies, while on the other hand clustered them within the Commission, in accordance with linkages based on principles of shared responsibilities". State Commission on Migration Issues (2020), *op. cit*. In this regard, it is quite known that the majority of the Georgian people strongly support joining the EU and this sentiment is reflected in several key reforms that this Country has carried out and that are founded on EU values and standards. On this topic, see A. BORRONI (2022), *Introduction to the Commentary on Insurance Law: The Way of Georgia Towards the European Union*, in A. BORRONI (ed.), *Commentary on Georgian Insurance Law*, *vol. I Insurance* (Arts. 799-819), Tbilisi, XXIII-XXVIII. With specific reference to the migration sector, Georgia has been granted the status of observer country of the European Migration Network (EMN) in March 2021; this will of course "facilitate the institutional approximation with the EU (especially in the sphere of migration management). […] From the EU perspective, on the other hand, accepting Georgia as part of the EMN will enable the EU to share European good practices in managing

The legislation on migration adopted by the Georgian Government is the result of the adoption of international treaties and national legal acts and falls within the exclusive competence of higher State bodies of Georgia.[4] The *Migration Strategy* 2016-2020, receiving the results of the previously implemented Strategies,[5] was adjusted to the novelties introduced in 2015 by the Association Agreement (AA) and Visa-Liberalization Action Plan (VLAP).[6] It was "the first time since 1997 when a policy document on migration was adopted that was designed to improve migration management in the Country and implement Georgia's international obligations. The VLAP provides adoption of Strategy on Migration as a necessary pre- condition".[7]

Therefore, the 2016-2020 Strategy represented the first solid basis for trying to achieve a series of long-term planned objectives and formulating corresponding tasks, combining migration and development under the same umbrella.

The running 2021-2030 Strategy answers to the challenges of a post-pandemic, hyper-digitalized, and diversly globalized world.[8]

In short, the common objective of the Migration Strategies is still aimed at improving the management of migration processes. This aspect implies guaranteeing national security, combating irregular migration, and human being trafficking, guaranteeing the defence of migrants' rights and their social protection and channelling the potential benefits deriving from the migration fluxes.[9]

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migration while getting a better understanding of migration from the Caucasus perspective". State Commission on Migration Issues (2021), *Migration Profile of Georgia*, Tbilisi, 82, available online.

[4] As stated by Art. 7.1.a of the Constitution of Georgia, available online.

[5] In particular, the *Migration Strategy of Georgia 2013-2015*.

[6] See State Commission on Migration Issues (2020), *Migration Strategy of Georgia 2021-2030*, cit.

[7] R. TUSHURI (2013), *Georgia and Migration Legislation Analysis*, Tbilisi, 15.

[8] See State Commission on Migration Issues (2020), *Migration Strategy of Georgia 2021-2030*, cit., 29. With specific reference to the effects of the COVID-19 pandemic on the Republic of Georgia, see also: A. BORRONI, A. CENERELLI (2020), *COVID-19 and working mothers in Russia, the Caucasus and Central Asia*, available online; A. BORRONI (2020), *Il sistema georgiano e il Covid-19*, available online; A. BORRONI (2020), *The impact of new coronavirus (COVID-19) on domestic violence and violence against women: the case of the Republic of Georgia*, available online.

[9] R. TUSHURI (2013), *Georgia and Migration Legislation Analysis*, cit., 16.

In this perspective, the adoption of measures to prevent illegal migration flows represents an inescapable manoeuvre to improve licit migration shifts, besides being an embankment towards the well-known backlashes of illegal migration-related activities (and different forms of crime). [10]

With the aim of promoting greater cooperation with other states, Georgia sealed bilateral cooperation and information exchange agreements, international treaties, and memoranda of cooperation with more than 30 States. In addition, an operational and strategic cooperation agreement between EUROPOL and Georgia has been in force since 2017. As part of the agreement, the Government seconded a liaison officer to EUROPOL in 2018 and, since 2019, a communication channel has been in place for a fast and secure exchange of information with EUROPOL. Furthermore, starting from 2019, Georgia joined Europol's numerous analytical projects. Finally, a cooperation agreement between EUROJUST and Georgia was concluded in 2019 and the Government transferred its representative attorney to EUROJUST in 2020. [11]

3. Labor migration from and to Georgia

Over the past fifteen years, the migration policy that has targeted workers has been extremely liberal because of the specific economic attitude pursued by the Georgian Government. [12]

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[10] See State Commission on Migration Issues (2020), *Migration Strategy of Georgia 2021-2030*, cit.

[11] State Commission on Migration Issues (2020), *op. cit*. The cooperation formats with EUROPOL and EUROJUST will promote and enhance, in addition, the fight against serious crime related to illegal migration, especially transnational organized crime, including Trafficking in Human Beings (THB).

[12] State Commission on Migration Issues (2020), *op. cit*. It is important to stress that permanent or temporary emigration will not cause the termination of Georgian citizenship. On this point, in fact, Art. 5.6 of Georgia's Organic Law on Georgian Citizenship provides that "[a] Georgian citizen's residence outside Georgia shall not result in the change of Georgian citizenship". In particular, Art. 4 of the same law, provides that "1. Georgian citizens are equal before the law regardless of race, colour of skin, language, sex, religion, political or other opinions, national, ethnic and social affiliation, origin, property or social status, place of residence or any other characteristics. 2. Georgian citizens shall be guaranteed the rights and freedoms determined by the legislation of Georgia and recognised by international law. 3. Georgian citizens shall abide

In this sense, migration impacts on the labour market in various ways,[13] even if people also migrate for education and family reunification reasons.[14]

The globalized labour market grants the possibility to opt for both temporary and permanent migration. Georgia also did not stay out of this global process.[15]

The Law of Georgia on Labor Migration, which become effective in November 2015, largely regulates the norms of the labour emigration of Georgian citizens abroad, particularly emigration through intermediary agencies. The Law, also, foresees mechanisms for the protection of labour emigrants' rights. Later, Georgia's government has also approved a corresponding statute regulating labour immigration.[16]

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by the Constitution and other normative acts of Georgia, protect the country's territorial integrity and be committed to the interests of Georgia. 4. Georgia shall protect the rights, freedoms, and legitimate interests of Georgian citizens, both within and outside the territory of Georgia". Prior to the amendments to the text, Art. 32.b stated that a person loses Georgian citizenship if "he permanently resides in the territory of another State and has not been registered in a Georgian consulate for 2 years without any justification". In the 2022 version of the law, the conditions for the loss of Georgian citizenship are transposed in Art. 21, but this specific provision is no longer present.

[13] OECD (2017), *Georgia's migration landscape*, in *Interrelations between Public Policies, Migration and Development in Georgia*, 96.

[14] See, on this point, International Organization for Migration (IOM) (2019), *World Migration Report 2020*, Chapter 2 - *Migration and Migrants: A Global Overview*. The international treaties concerning labour migration binding for Georgia, in particular, are: (i) Convention concerning Discrimination in Respect of Employment and Occupation (binding for Georgia since 22 June 1997); (ii) Private Employment Agencies Convention, 1997 (binding for Georgia since 27 August 2002); (iii) European Social Charter (binding for Georgia since October 1, 2005); (iv) IMO Charter (binding for Georgia since 7 June 2001).

[15] State Commission on Migration Issues (2019), *2019 Migration Profile of Georgia*, Tbilisi.

[16] State Commission on Migration Issues (2019), *Ibidem*. See also ordinance No. 417 of the Government of Georgia, *On Approving the Rule on Employment by a Local Employer of a foreigner Holding no Georgian Permanent Residence Permit and Performance of Paid Labour Activities by such foreigners,* 07.08.2015, available online. Specifically, the national legal acts regulating labour migration are the (i) Labour Code and the (ii) Aliens' Law. On this point, with the purpose of ensuring the effective exercise of the right of migrant workers and their families to protection and assistance Georgia has an obliga-

The main purpose of this legislation is to protect the rights of migrant workers in line with international standards and, also, to prevent and reduce irregular migration, including human being trafficking.[17] Furthermore, the State strives to conclude agreements on circular migration.[18]

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tion to: (i) maintain or ensure that adequate and free services are maintained to assist such workers; (ii) take appropriate measures to facilitate the movement and reception of these workers and their families and provide adequate services for health, medical assistance and hygiene conditions during the journey; (iii) promote cooperation, where possible, between public and private social services in countries of emigration and immigration; (iv) ensure that such workers are treated no less favorable than that of their own citizens in a number of contexts (*e.g.* remuneration, accommodation, taxes, dues, contributions – just to name a few); (v) ensure that such workers are not deported unless they endanger national security or offend public interest or morals; (vi) allow, within the limits of the law, the transfer of those parts of the earnings and savings of the workers they desire; (vii) extend protection and assistance to migrant self-employed workers to the extent that such measures apply; (viii) promote and facilitate the teaching of the national language to migrant workers and their families; (ix) promote and facilitate, as far as possible, the teaching of the migrant worker's mother tongue to her children. R. TUSHURI (2013), *Georgia and Migration Legislation Analysis*, cit., 78-79.

[17] It is important to highlight, in this perspective, that both Constitution and international treatises recognize the right of immigrants. In fact, Art. 33 of the Constitution of Georgia states that "[c]itizens of other States and stateless persons living in Georgia shall have rights and obligations equal to those of citizens of Georgia except in cases provided for by the Constitution and law". On the same point, "paras 1-3 and Art. 19 of the European Social Charter bind a State to guarantee the rights of labour migrants on its territory and, entitles a State to require from other Member-States to guarantee the same rights on their territories to their citizens, provided labour migrants are staying legally therein". R. TUSHURI (2013), *Georgia and Migration Legislation Analysis*, cit., 76.

[18] R. TUSHURI (2013), *Georgia and Migration Legislation Analysis*, cit., 74-75. Furthermore, labour migration proved vulnerable ahead of the challenges imposed by COVID-19, which significantly impacted human mobility and, as a result, radically changed reality. Most employers have lost their income completely or their income has dropped dramatically, resulting in fewer jobs. However, it should be noted that the situation regarding migrant workers differs across States, economic sectors, and qualifications, as migrants, in general, occupy highly qualified and legal jobs in the most in-demand sectors of the labour market. Thus, a global demand for migrant workers has remained during the pandemic situation and will remain following it as well (for example in the agricultural and seasonal labour migration sectors, where there will always be a need for a certain workforce for a short period of time). Therefore, depending on the specific situation and related needs, the aim will be for temporary work

However, considering the lack of a complete migration registration system, statistical data on migrant workers from Georgia are incomplete (even if official reports point out the search for a better job as the prevailing factor). [19]

Until 2015, the Government had not yet adopted a specific legislation governing labour migration. And, even if Georgia's Labor Migration Act and several secondary legislative acts have formed a legal basis for regulating the sector, various issues still need an adequate and effective answer. [20]

An example of such challenges is the lack of effective regulation for the subjects offering intermediation services to job migrants; [21] as a result of this gap, there are a considerable number of individuals and companies that provide illegal intermediary services. [22]

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abroad, at the end of which migrants will have to return home and make the most of the experience and income gained abroad. This is only possible through the implementation of well-organized and safe temporary labour migration schemes, oriented towards return and development; and this is the rationale behind interstate cooperation in the field of temporary circular and seasonal labour migration. State Commission on Migration Issues (2020), *Migration Strategy of Georgia 2021-2030*, cit., 21. According to the *Enterprise Skills Survey of 2020* by the Ministry of Economics and Sustainable Development of Georgia, most labour immigrants employed in Georgia in that year worked in the transportation and warehousing sector (39%), in the processing industry (34%), in the construction sector (7%) and in hotels and restaurants (7%). Tourist and construction businesses were the most affected by the pandemic and 14% of all employed aliens in Georgia suffered the resulting consequences. International Organization for Migration (IOM) (2021), *Immigrant Integration Policy and Practice in Georgia – Achievements, Challenges and the Way Forward*, available online.

[19] See the UNFPA/RALPH HACKERT (2017), *Population Dynamics in Georgia – An Overview Based on the 2014 General Population Census Data*, available online. It is interesting to note that, according to the results of the 2014 census, the majority (55%) of emigrants of working age are women.

[20] State Commission on Migration Issues (2020), *Migration Strategy of Georgia 2021-2030*, cit., 21.

[21] State Commission on Migration Issues (2020), *op. cit*. In particular, in exchange for high enough pay, these individuals and companies provide poor-quality services to those wishing to get a job abroad, providing them with inaccurate information, entering into false agreements and promoting illegal work abroad – which ultimately, among other things, complicates the process of returning the migrant to the Country of origin.

[22] On this point, "aliens enjoy the same labor rights in Georgia as Georgian

However, although the economic situation in the Country is somewhat complex and the high unemployment is accompanied by a lack of well-paid jobs, Georgia still represents a State that attracts worker migrants. Specifically, the main Countries of origin of migrants that applied for a residence permit in Georgia between 2009 and 2013 have been the Russian Federation, China and Turkey,[23] a trend that was in place between 2016 and 2020.[24]

Immigrants from the Russian Federation and Ukraine, in most cases, apply for permanent residence permits based on whether they are for-

citizens except, if expressly stated differently by the Constitution or the law. Only Georgian citizens have the following rights: [b]e employed in public service; [b]ecome judge and prosecutor; [b]ecome notary". R. TUSHURI (2013), *Georgia and Migration Legislation Analysis*, cit., 80. Another challenge is posed by local employers who underestimate the Ministry for Internally Displaced Persons of Occupied Territories, Labor, Health and Social Affairs hiring foreign migrant workers to work in Georgia. Hence, the regularization of the registration of foreign employees, putting in place an effective monitoring system and the strengthening of the responsibility of local employers require the introduction and further refinement of adequate mechanisms for regulating immigration for work that are adapted to the needs and economy of the Country. State Commission on Migration Issues (2020), *Migration Strategy of Georgia 2021-2030*, cit., 21-22. Conceptually, internally displaced are persons or groups of persons who have "been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border". European Commission, *Internally displaced persons*, Migration and Home Affairs, available online. The large number of Internally Displaced Persons (IDPs) from Tskhinvali Region reside in Mtskheta-Mtianeti and Shida Karli, while IDPs from Abkhazia are primarily resettled in the Tbilisi and Samegrelo-Zemo Svaneti region. Most eco-migrants are registered in Adjara, Guria, Imereti and Samegrelo-Zemo Svaneti, and resettled in Adjara, Kvemo Kartli, Kakheti and Guria. Statistically, the population of rural settlements in Georgia is steadily declining every year, which has led to a transformation of the urban/rural structure.

[23] M. CHUMBURIDZE *et al.* (2015), *The State of Migration in Georgia. Report developed in the framework of the EU-funded Enhancing Georgia's Migration Management (ENIGMMA) project*, International Centre for Migration Policy Development (ICMPD), Vienna, 64.

[24] Specifically, it was estimated that in 2020 the great majority of work residence permits were issued to citizens of China (39%), Turkey (17%), Ukraine (6%), Russia (6%), and Iran (6%). State Commission on Migration Issues (2021), *Migration Profile of Georgia*, 36.

mer Georgian citizens, close relatives of Georgian citizens, or holders of a permanent residence permit. [25]

Moreover, in recent years, Georgia has also represented an important opportunity for foreign farmers involved in both small and large-scale agricultural development.

This, in particular, is facilitated by the forecast of the *Labour Code of Georgia* and the *Law on Entrepreneurs* that do not provide limits on employment, entrepreneur activities or the registration of legal persons by foreigners. [26]

In this sense, in fact, specialized consultancy organizations have been established both in Georgia and in the Countries of origin that have started to deliver tailor-made services to potential immigrants. [27]

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[25] State Commission on Migration Issues (2020), *Migration Strategy of Georgia 2021-2030*, cit., 22-23. From 2009 to 2013, a total of 8,525 permanent residence permits were issued in Georgia, with citizens of the Russian Federation, Armenia and Ukraine receiving just over 80% of all permanent residence permits issued.

[26] Art. 1 of the Code "defines the scope of application of the Code – to regulate labor and related relations on the territory of Georgia notwithstanding to the nationality of individuals engaged in those relations. It is clear that Labour Code is applied to aliens and Georgian citizens equally". R. TUSHURI (2013), *Georgia and Migration Legislation Analysis*, cit., 81, footnote 145. Labour relations, under Art. 2.1 of the Labour Code, "comprise the performance of work by an employee for an employer under organised labour conditions in exchange for remuneration". In addition, Art. 29 of Aliens' Law states "[l]abour activities of aliens shall be governed by the legislation of Georgia". Art. 28 of the same Law provides that "[a]liens in Georgia may carry out investment and business activity under the legislation of Georgia. In that case, they shall have the same rights and duties as the citizens of Georgia, unless otherwise provided for by the legislation of Georgia". National Legislation does not have "the rules established by the Georgian legislation" concerning employment or entrepreneur activities of aliens. R. TUSHURI (2013), *op. cit*. Considering as stated, migrant workers may legally stay in Georgia on the same basis as aliens. Art. 5.d. of Ordinance No. 520 on *Approval of the Procedures for Reviewing and Deciding the Granting of Georgian Residence Permits*, 01.09.2014, specifies that if a person wants to acquire a temporary residence permit based on labour activities or relations in Georgia, he/she has to submit "a document evidencing employment or business activity (labour contract or other employment document); if legal income of the alien is not confirmed with these documents, money in the alien's personal bank account may also be regarded as income; the amount of that money, taking into account the duration of the residence permit, shall not be less than double the amount of the minimum subsistence level for average consumers in Georgia".

[27] See, for example, Transparency International Georgia (2014), *Ban on land sales – stories from large foreign farmers*, available online.

However, the problems remain and not all the issues have been tackled. In this regard, "approval of the labour migration legislation alone will not change the situation, and significant capacity building of the involved institutions should take place".[28] The government, in fact, "can create a competitive environment, basic infrastructure, take care of education system, make business easier, establish reasonable taxes, and reduce interest rate on business loans".[29]

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[28] M. CHUMBURIDZE *et al.* (2015), *The State of Migration in Georgia*, cit., 51. It is interesting to notice that Iranian, Chinese and Turkish immigrants mostly apply for temporary residence permits on the basis of work. The same is true for about half of Indian temporary residence permit holders. M. CHUMBURIDZE *et al.* (2015), *Ibidem*. Although the data on which Georgian migration policies are based are not quite capable of capturing the true extent of all immigration flows, it is still noteworthy that immigration to Georgia is on the rise from countries such as India, China, and Egypt, which have no previous close historical and/or cultural ties with Georgia. This was also possible because "[o]ver the years, Georgia has had a relatively liberal visa regime, which enabled citizens of more than 100 countries to come, live, work and study in the country without the need to obtain a visa or residence permit". N. OTKHOZORIA, (2020), *Georgia as an Attractive Country for the Asian Immigrants (on the Example of Chinese Workers and Indian Students)*, in *USBED*, 2 (2), 45. However, on May 12, 2021, the latest amendments to the Law of Georgia on the Legal Status of Aliens and Stateless Persons entered into force: the requirements for issuing a residence permit have been restricted by the new regulations, which have also changed timeframes of those same permits. More specifically, it has been reported that "[i]n case of submitting the application for the first time for the residence permits for work, study and family reunification, as well as special residence permit for victims of trafficking, it will be granted for only 6 months or 1 year at the beginning. Up until now, no such special deadline was set for the first time issuance of these types of residence permits". See *New Changes in the Law of Georgia on the Legal Status of Aliens and Stateless Persons*, in *Tolerance and Diversity Institute*, 2021, available online.

[29] T. ZUBIASHVILI, S. VESHAPIDZE (2019), *Labor Emigration and Employment in Georgia*, in *Humanit. soc. sci. rev.*, 9, 133. Specifically, in today's turbulent and rapidly changing world characterized by digital revolution, Georgia has to face numerous challenges in terms of economic and social security. The priority to overcome them is to ensure the safety of education and science and it may be achieved with the relevant knowledge of the European standard. This is, in fact, the shortest way to overcome poverty. In relation to this, Georgia has started a large-scale reform of education. Indeed, it was stated that "[f]unding in the education sector by 2022 will reach 6% of GDP, or 25% of the country's budget. This will also encourage investments from the private sector. The share of education sector will be 10 to 11% in the economy. This important

4. Migration for climate change reasons

Human mobility induced by environmental conditions does not represent a completely new phenomenon. However, the potential migratory scale and vulnerability of affected populations have increased in recent decades due to climate change.

This is particularly relevant in vulnerable (often developing) Countries, where climate change impacts areas with fragile populations, limited adaptability, and limited access to resources.

In recent years, the number of studies and initiatives aimed at better understanding the complex link between human mobility and climatic events has increased. However, migration policies rarely integrate climate change or protection issues for displaced people in the context of climate change and, conversely, provide a real incentive for action.

Since the 1980s, natural disasters and environmental changes have

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national idea has challenges. The main thing is how the priorities will be sorted, whether they are oriented to results, what effectiveness will be. This can be achieved by motivating money spending". T. ZUBIASHVILI, S. VESHAPIDZE (2019), *op. cit*. The main priority is to give stimulus to private customer-oriented initiatives, establishing a free, competitive environment of education. However, as specified in *Georgia's National Statement of Commitment* published on the occasion of the *Transforming Education Summit*, 2022, several factors such as the COVID-19 pandemic, the impact of climate change and Russia's aggression in Ukraine require major efforts to be carried out in this direction; therefore, "Georgia committed itself to reimagine education policy framework and to invest more in Education and gradually increase the public funding of the sector, reaching up to 6% of GDP by 2030". Consequently, the Country has adopted the *National Strategy of Education and Science of Georgia for 2022-2030*, based on the three pillars of Quality, Equity and Good governance in Education, while the abovementioned commitment to increase public funding of education was also reaffirmed by Georgia's Prime Minister Irakli Garibashvili at the same Summit in his speech. He also stated that "[t]he Government of Georgia plans to redouble our efforts to improve curriculums, provide modern and diverse education resources, and invest in professional development for teachers and educators, who are the backbone of our efforts to equip the future generation with adequate skills and knowledge. […] By 2030, all Georgian schools will be fully modernized and aligned with internationally recognized standards. By 2030, all Georgian education institutions will undergo a new, multifaceted authorization process focused on ensuring effective education practices and the implementation of quality assurance mechanisms to promote accountability". On this topic, see United Nations, *The Unified National Strategy of Education and Science of Georgia for 2022-2030*, available online.

progressively forced the population of the Georgia highlands to move to more climate-friendly areas of the State. [30]

Focusing on the main resettlement waves observed over the past three decades in Georgia, they have occurred in 1987, from Svaneti to the Kvemo Kartli and Kakheti regions, and, in 1989, from the mountainous Adjara to Kvemo, the Shida Kartli, Kakheti and Javakheti. In particular, the populations of these regions suffered heavy winter snow which led to large-scale landslides. In these two cases alone, more than 10,000 families have been relocated. [31]

In the early years of Georgia's independence, eco-migrants were often moved to ethnic minority regions which at times led to alter the demographic balance on the ground. Given the absence of any kind of integration and adaptation program, these communities were predestined to social tensions and conflicts. [32]

In 2005, however, Georgia ratified the *Council of Europe Framework Convention for the Protection of National Minorities* which, *de facto*, prohibits the adoption of national policies and strategies aimed at changing the demographic picture in regions populated by ethnic minorities. [33]

The practice in question, therefore, stopped after Georgia ratified the Framework Convention, but, since then, no comprehensive policy has been developed to address the problem of ecomigrants either at a practical or legislative level. [34]

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[30] M. CHUMBURIDZE *et al.* (2015), *The State of Migration in Georgia*, cit., 58.

[31] *Ibidem*.

[32] J. LYLE (2012), *Resettlement of Ecological Migrants in Georgia: Recent Developments and Trends in Policy, Implementation, and Perceptions*, Working Paper No. 53, European Centre for Minority Issues.

[33] See the *Council of Europe Framework Convention for the Protection of National Minorities*, available online.

[34] Recently, numerous reports have been published on the issue of displaced people in Georgia due to ecological factors. One of the most recent reports was compiled by the Georgia Ombudsman's Office in 2013 – Human rights situation of people affected and displaced by natural disasters/ecomigrants in Georgia. The report extensively covers the legislative and social aspects of emigration to Georgia and concludes with specific recommendations for the MRA, the parliament and the Government of Georgia. The Caucasus Environmental NGO Network (CENN) also compiled a full report entitled *Ecomigration to Georgia. Background, Gaps, and Recommendations* in 2013, which analyses ecomigration in a global context. The report studies the conditions and drivers of emigration to Georgia from an environmental and socio-economic point of

From a regulatory point of view, the first concrete steps towards regulating the status of eco-migrants and towards an effective protection for ecological migrants were taken in 1998, when the presidential ordinance No. 67 on ecomigrants set up a special commission to monitor the process and trends in the sector. [35]

Other initiatives, on the other hand, date back to the late 1990s and early 2000s, without effectively contributing to the development of a better regulation in the field. [36]

Despite the scale of the problem, especially since 2014, from a terminological point of view, there is no clear definition of what an "eco-migrant" is meant to be, and no legal framework is clearly drafted to regulate their resettlement and assistance programs. However, it was agreed that the *Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia* (MRA) [37] is tasked with monitoring migration trends within Georgia and developing an effective management system; [38] also, in 2019, the *Agency of IDPs, Eco-Migrants and Livelihood* was established under the Ministry of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs with the purpose of implementing State policies in this sector and of promoting the improvement of the socio-economic conditions of this heterogeneous category. [39]

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view and compares the Georgian approach with international best practices and regulations. In the report, the CENN also provides specific recommendations on how the Georgian Government can and should address problem definition and victim assistance.

[35] M. CHUMBURIDZE *et al.* (2015), *The State of Migration in Georgia*, cit., 59.

[36] J. LYLE (2012), *Resettlement of Ecological Migrants in Georgia*, cit. Specifically, the new Government programs failed partly due to widespread corruption and weak institutional set-up at the time of implementation and partly because none of the initiatives or actions were sufficiently complete.

[37] Approved by the Resolution no. 34 of the Government of Georgia on *Approval of Regulations of MRA*, 2008.

[38] M. CHUMBURIDZE *et al.* (2015), *The State of Migration in Georgia*, cit., 59. MRA responsibilities also include predicting future natural disaster risks, resettling ecomigrants, building a database and developing adaptation and integration programs for displaced and host communities.

[39] The *Agency of IDPs, Eco-Migrants and Livelihood* includes the Integration-Reintegration Office, whose specific function is "to support the integration of persons who are legally residing in Georgia". The statute of the Agency was approved by Decree No. 01-109/ნ of the Minister of Internally Displaced

Despite this, in the Country, there are no specific rules regarding social guarantees and assistance for eco-migrants, their status, and the criteria for obtaining the same.[40] Moreover, State assistance and social guarantees are granted on a case-by-case basis to people who have suffered a natural disaster, even if the internally displaced persons mechanism could serve as a model for eco-migration since the latter is a form of movement of individuals or groups within the national borders.[41] The urgency of the case is due to the high number of eco-migrants, or people living/residing in regions concretely threatened by natural disasters.[42]

5. Brief analysis of the other South-Caucasian Countries

The migration data in the South Caucasus region, between 1988 and 2011, demonstrates how environmental and natural disasters have led to

Persons from the Occupied Territories, Labor, Health and Social Affairs, 31.10.2019, which while discussing "implementing integration programmes by the Agency, awarding grants and operating the Integration Center, it refers to only persons with international protection in Georgia, asylum seeker aliens and stateless persons with respective status as potential beneficiaries. Thus, other immigrants residing to Georgia receive less attention". International Organization for Migration (IOM) (2021), *Immigrant Integration Policy and Practice in Georgia*, cit., 41. The mentioned Decree no. 01-109/ნ is available online.

[40] R. TUSHURI (2013), *Georgia and Migration Legislation Analysis*, cit., 86. The Tax Code of Georgia, for example, exempts ecomigrants from profit tax for the profit out of receiving a new accommodation.

41 *Ibidem*. On this point, "[l]ocal authorities do have responsibility for ecomigrants. Art. 42.4.f of Organic Law of Georgia on Local Self-Government states that "Rcmunebuli" shall submit information to "Gamgebeli" (Mayor) concerning the number of resettled ecomigrants and IDPs and their conditions". R. TUSHURI (2013), *Georgia and Migration Legislation Analysis*, cit., 85.

[42] In 2010, the IOM provided a report in which it was stated the need to implement effective measures in the following ten areas: (i) establishing a better evidence base; (ii) disaster risk reduction; (iii) developing adaptation strategies; (iv) preparing evacuation plans; (v) filling gaps in the legal and normative framework; (vi) implementing national laws and policies on internal displacement and national immigration laws and policies; (vii) upgrade of national migration laws and policy; (viii) establishing proactive resettlement policies; (ix) providing humanitarian assistance; (x) planning for return and resettlement. IOM (2015), *World Migration Report 2010 – The Future of Migration: Building Capacities for Change*, available online.

large-scale exodus, with transfer involving primarily intra-region deployment. This trend is expected to increase again, and this is not a surprise. The awareness surrounding the case is evident and is manifested in all of the national consultations on the topic, where several references were made to migration due to environmental and natural disasters. In Azerbaijan, for example, migration was mentioned as a major concern related to climate change. [43]

The political turmoil of the 1990s and 2000s and the dissolution of the Soviet Union caused economic crisis, inter-ethnic hostility, and armed conflict which impacted on internal migration and migration to outside the borders. [44]

Moreover, in the past 20 years, the international community has slowly begun to recognize the broader links and implications of a changing climate on the environment and human mobility. Although relatively advanced in terms of developing legislative processes relating to internally displaced persons (IDPs), the Countries of the South Caucasus do not yet categorise the status of people and communities who relocate due to ecological ruin or calamities. [45]

In Armenia, for example, migration due to environmental and natural disasters is generally classified as socio-economic migration, although social and economic factors are often not the main factors. A diachronic survey addressed to determine the statistical incidence of the climate change on migration is quite a task, since the South Caucasus Countries have always been subject to natural adversities. [46]

Indeed, the economic and living impacts examined for Georgia are equally legitimate and valid in Armenia and Azerbaijan. In fact, such events have forced migration from particularly exposed areas of the region, including the Caspian Sea coast, and communities most vulnerable to climate shocks, such as farmers, to the main cities in the region and the rest of Europe. [47] A further key movement within is temporary

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[43] See, A. GABRIELYAN (2014), *National Climate Vulnerability Assessment – Armenia. A review from the Climate Forum East project*, Armenian Red Cross Society, available online.

[44] *Ibidem*.

[45] *Ibidem*.

[46] G. YEGPARIAN (2020), *Energy in Armenia*, in *Armenian Weekly*, available online.

[47] A. GABRIELYAN (2014), *National Climate Vulnerability Assessment – Armenia*, cit.

migration, predominantly with the purpose of mining in mountainous regions where the harsh climate and location make it difficult to promote and maintain permanent settlement. [48]

Both Armenia and Azerbaijan signed and ratified the 2015 Paris Agreement, respectively in 2016 and 2017. Under this, they have both submitted their first intended nationally determined contributions (INDC), which lay the groundwork for climate change mitigation and adaptation in the respective Countries.

For historical and geopolitical reasons, a major emphasis in the first migration policy frameworks for both Armenia and Azerbaijan focused on the refugee and Internal Displaced Persons issues pertaining to the Nagorno-Karabakh conflict. [49]

As for Armenia, the refugee crisis was accompanied by the economic blockade imposed by Azerbaijan and Turkey. In Azerbaijan, on the other hand, the internally displaced crisis has been exacerbated by the arrival of Turkish Meskhetians seeking refuge from Central Asia and Georgia. [50]

Thus, early political responses in Azerbaijan focused on material support (such as housing, work, education and health services), agendas on the integration of refugees and internally displaced persons into the labour market, as well as political measures to ease the resettlement or the return of internally displaced persons to their initial locations. [51]

In Armenia, in addition to support measures for refugees, the migration the policies issued in 2000 and 2004 highlighted the necessity to avoid impending massive, forced migrations of Armenians from other potential hotspot Countries by implementing dealings with those Countries and involving Armenian organizations overseas to aid preventing potential compulsory migration. [52]

With specific reference to labour migration, as already mentioned, it was after the fall of the URSS that post-Soviet Countries' citizens started to realize the work opportunities that lied ahead abroad; moreover, most of the restrictions regarding borders were now lifted, allowing for

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[48] G. YEGPARIAN (2020), *Energy in Armenia*, cit.

[49] S. MAKARYAN (2013), *Challenges in Migration Policy-Making in Armenia, Azerbaijan and Georgia*, in D. DAFFLON (ed.), *Caucasus Analytical Digest*, 57, 2-5.

[50] *Ibidem*.

[51] A. GABRIELYAN (2014), *National Climate Vulnerability Assessment – Armenia*, cit.

[52] S. MAKARYAN (2013), *Challenges in Migration Policy-Making in Armenia, Azerbaijan and Georgia*, cit., 3-4.

a greater degree of mobility: indeed, "[…] the Union's breakup transformed what had once been internal migration within one large State into cross-border migration, traversing internationally recognized borders".[53]

In the case of South Caucasian Countries, it has been noted that the chosen Country of destination varies according to the level of education of the migrants: so, low-skilled ones have mainly chosen Russia, both because of its proximity to their home country and because of "the presence of extensive social networks established there".[54] In fact, it was observed that more than 56% of emigrants from Armenia and more than 66.9% of emigrants from Azerbaijan reside in this State.[55]

Despite this, remittances transferred by these migrants to their home country – that mainly come from Russia,[56] were only a modest percentage in terms of share of GDP. For example, according to World Bank's World Development Indicators, these numbers have been declining for Armenia, going from 14.17% of GDP in 2015 to 11.23 in 2021 and have remained quite low for Azerbaijan, where they went from 2.39 in 2015 to 2.79 in 2021.[57]

The analysis of labour migration in Georgia, Armenia, and Azerbaijan "requires a spatial lens" since "[t]hese countries have relatively small populations and are located in a geographically difficult mountainous region distant from world markets. […] In Armenia and Georgia, the small populations are shrinking because of emigration. As more and more people outside the capital cities move, economic activity and population tend to become concentrated in the capitals".[58] This is the same for Azerbaijan where, despite the growth that has been experi-

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[53] CESD Research Group (2021), *Impacts of Labor Migration and Remittances in the South Caucasus and Central Asia: Trends and Challenges*, cit., available online.

[54] Mainly, this has been the case of workers employed in sectors such as construction, services and trade. *Ibidem*.

[55] *Ibidem*.

[56] World Bank Group (2022), *Remittances Brave Global Headwinds – Special Focus: Climate Migration*. Migration and Development Brief, no. 37, available online.

[57] See World Bank Group, *World Development Indicators*, available online.

[58] A. FUCHS TARLOVSKY *et al.* (2019), World Bank Group, *South Caucasus in Motion*, Washington D.C., available online.

enced by the Country thanks to oil production, many regions remain weak compared to the capital, Baku; moreover, "[t]hese spatial issues are exacerbated by the geopolitics of the region, which complicate co-operation within the region and with neighbouring countries". [59]

6. Conclusion

Georgia, in line with the liberal approach given by the government in the last decade and on the wave of continuous and stable economic growth, has adopted consistently liberal and favourable policies for economic migrants.

This tendency could face some changes following the latest tragic upheavals brought by the Ukrainian war. In fact, with reference to Russia, several waves of emigration followed its invasion of Ukraine and the imposition of sanctions. As reported by Georgia's Ministry of Economy on March 07, 2022, it was estimated that already 20.000-25.000 Russians had fled to Georgia since the start of the war a week prior. This situation has raised several concerns in Georgia's people, since it has been argued that Russia could use the presence of its citizens as a pretext to justify a military intervention; in this regard, several proposals regarding immigration restrictions for Russians were made.

On the other hand, as reported by CNBC, Georgia has seen its economy grow faster and its currency get stronger following these migration waves: in November of the same year, it was estimated that at least 112.000 Russians entered the Country; as a result, "Georgia has benefitted from a dramatic surge in capital inflows this year, primarily from Russia. Russia accounted for three-fifths (59.6%) of Georgia's foreign capital inflows in October alone – the total volumes of which rose 725% year-on-year"; however, this has also caused an increase in property prices (for example, in Tbilisi, they increased by 20% year-on-year in September 2022).

That being said, even if Georgia is geographically located on one of the routes of the old and new Silk Road and has historically played a pivotal role in the migratory and reception phases, this Country has not yet adopted a definitive and comprehensive political-legislative line for what concerns foreign immigrant workers, with the exception of the public sector where access to roles is clearly determined. Furthermore,

[59] *Ibidem*.

it is still lacking *ad hoc* legislation for Georgian citizens employed abroad.

On top of that, despite being part of the major international conventions since the end of the XX century, Georgia has not at present woven a network of bilateral agreements or even initiated negotiations with the other Countries to create the conditions for circular migration conventions,[60] which have been mentioned in the latest Strategies. On the other hand, measures on the recognition of educational and training qualifications obtained abroad were adopted.

Lastly, there are currently no specific rules regarding the guarantees and assistance due to eco-migrants, their status, and the criteria for obtaining it.[61] State assistance and social guarantees are still granted on a case-by-case basis to people who have suffered a natural disaster.

Based on Art. 33 of the Constitution, which gives foreign workers

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[60] In the past years, Georgia has implemented two main pilot Circular Migration Schemes (CMS) in cooperation, respectively, with Germany and Poland. The first project (2013-2016), funded by the EU and known as *Strengthening the development potential of the EU Mobility Partnership in Georgia through targeted circular migration ad diaspora mobilization*, involved 27 Georgian workers from the hospitality and healthcare sectors that were employed in Germany. Since the end of the project though, 5 hospitality professionals out of 14 remained in Germany and only one nurse out of 10 returned in Georgia. The second one, known as *Temporary Labour Migration of Georgian Workers to Poland and Estonia*, was implemented by the IOM (*International Organization for Migration*) in cooperation with the Ministry of Labour, Health, and Social Affairs (2015-2017) and involved some 30 workers, truck drivers and welders that were employed in Poland while, due to problematic negotiations with the Country, no worker was employed in Estonia. The main issues that the two projects faced were related to the fact that "[a]t the recruitment level it was difficult to meet employers' high expectations in terms of language proficiency and work experience. Thus, in the case of Germany, all migrants were full-time employed in Tbilisi before departure and had well-established positions. Ideally future CM projects should feature underemployed or less experienced workers with a special focus on rural areas of Georgia where unemployment and poverty is especially high"; moreover, achieving circularity was not always possible; most cases, in fact, "involved single departure and one-time return": in the case of Germany, workers decided to stay in the Country because salaries were higher there compared to Georgia; in the case of Poland, several workers have returned to Georgia after 6 months. N. MESTVIRISHVILI (2019), *Circular Migration Schemes in Georgia*, Policy Brief, Prague Process, available online.

[61] R. TUSHURI (2013), *Georgia and Migration Legislation Analysis*, cit., 86.

the same rights as Georgian citizens, discussions and reform projects are underway under ILO's leadership, to secure migrants equal trade union, social security, and the rights of economic initiative, in parallel with cultural, social, and humanitarian actions aimed at creating the basis for effective and operative integration (language courses, family reunification, introduction of a less liberal social State, preservation of an historical accepted religious freedom and spirit of hospitality, etc.). [62]

De jure condendo, the Government's attention should focus on the resettlement of the population from high-risk areas, taking into consideration the already available models, for instance the one for the management of internally displaced persons, since eco-migration can be considered in the same way and for some instances as one of the formulae of internal movement of individuals or groups. [63]

The need and hurry of the intervention is increasing given the high quota of potential eco-migrants, or, in any case, population vested in areas with a clear and concrete danger of natural calamities, whose frequency seems almost unstoppable if global actions will not be undertaken.

The same considerations are, taking into account the singularity of the case, extensible to the neighbour Countries of Armenia e Azerbaijan.

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[62] On the topic of migrants' cultural rights, see G.C. BRUNO, F.M. PALOMBINO, A. DI STEFANO, G.M. RUOTOLO (eds.) (2021), *Migration and Culture: Implementation of Cultural Rights of Migrants*, Roma.

[63] R. TUSHURI (2013), *Georgia and Migration Legislation Analysis*, cit., 86. However, in its 2023 World Development Report (*Migrants, Refugees, and Societies*), the World Bank Group has stated that "[p]rioritizing IDPs over other groups of citizens may not always be an effective way to frame policies or deliver aid, especially in resource-constrained environments. In some cases, other indicators of vulnerability, such as income or household composition or belonging to certain social groups, may be better proxies to focus the limited assistance on those who need it most. For example, in Georgia IDPs who live in the capital, Tbilisi, are less likely to be poor than non-IDPs in rural areas". Therefore, the World Bank Group has suggested a series of "key principles for intervention" which can be summarized in this way: (i) Government leaderships must base their policies on sustainable improvements; (ii) government and international responses must pay attention to political economy considerations; (iii) IDPs' economic and social inclusion must be promoted. The full Report is available online.

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Chapter 22

PLACING BARRIERS AGAINST THE DISEMBARKATION OF RESCUED MIGRANTS: BRIEF REMARKS ON RECENT ITALIAN PRACTICE FROM A HUMAN RIGHTS PERSPECTIVE

Antonio Marchesi

ABSTRACT: *In the summers of 2018 and 2019, in the context of an increasingly restrictive approach to migration, the Italian authorities delayed the indication of a place of safety (POS) to a number of vessels – including military, commercial and NGO vessels – which had rescued migrants in the central Mediterranean, forcing the rescued persons to remain on board, sometimes for a significant number of days. More recently, the new Italian Government taking office in October 2022, after adopting, and subsequently abandoning, what has been referred to as a "selective disembarkation" approach, inaugurated the practice of indicating to NGO vessels safe ports which are distant – sometimes several days of navigation away – from the area in which the rescue operation has taken place. This latter practice, in combination with new rules introduced by Decree-law no. 1 of 2023 to the effect of preventing multiple rescue operations, has resulted in keeping vessels away from rescue areas for many days, thus reducing the numbers of migrants brought to Italy by NGOs carrying out SAR activities. Concerns have been expressed over the impact of these practices on the internationally protected human rights of the rescued persons, including their rights to life, to personal liberty, not to be subjected to inhuman or degrading treatment and to seek asylum from persecution in other countries. This short essay addresses the creation of barriers against disembarkation of persons rescued by NGO vessels from a human rights perspective.*

and the right to seek asylum. – 5. Forcing migrants to remain on board the ship which has rescued them: is it an arbitrary deprivation of liberty? – 6. *Continued*: does it amount to inhuman or degrading treatment? – 7. Conclusion.

1. Preventing or slowing down disembarkation as part of an overall strategy aimed at reducing migrant arrivals

In recent years, with the aim of reducing migrant arrivals, Italian authorities have created obstacles to the disembarkation in Italian ports of persons rescued at sea. This approach reached its peak in the summers of 2018 and of 2019, when the practice of delaying the indication of a place of safety (POS) to vessels – including military, commercial and NGO vessels – with migrants on board was adopted, resulting in the forcible stay of the rescued persons on the ship, in some instances for a significant number of days. [1]

Delaying the indication of a POS and, more in general, making it difficult to disembark rescued migrants in Italy is part of a broader strategy developed by subsequent Italian Governments. This strategy embraces two main components. The first component consists in entrusting Libya with the role of keeping people away from Italian territory, thus replacing push-backs, including pushbacks from outside the territorial sea – which the European Court of Human Rights has found to be in violation of the European Convention [2] –, with pull-backs carried out by the Libyan coast-guard (LCG). In order to achieve this goal, Italy has, on the one hand, contributed to setting up a Libyan Search and Rescue (SAR) zone, which came officially into existence in June 2018; on the other hand, it has, in a variety of ways (including funding, technical assistance and training of personnel), supported Libya in carrying out the task of ensuring that persons rescued in the central Mediterranean do not reach Europe. [3]

[1] While Italian authorities now appear to be concentrating their efforts on countering SAR activities specifically carried out by "humanitarian ships", belonging to NGOs, in 2018 and 2019 the practice of delaying indication of a POS concerned different categories of vessels including NGO vessels such as *Sea Watch 3*, *Open Arms and Mare Jonio*, Italian Coast Guard ships such as *Diciotti* and *Gregoretti*, commercial ships such as *Alexander Maersk* and even a United States Navy ship, *Trenton*.

[2] See ECHR, Grand Chamber, judgment 23.2.2012, application no. 27765/09, *Hirsi Jamaa and others vs Italy*.

[3] On "externalisation" in the context of migration policies see V. MORENO-

The second element of the overall strategy aimed at restricting migration towards Italy consists in opposing SAR activities carried out by independent actors such as NGOs who, based on the premise that Libyan ports not to qualify as a POS, request authorization to disembark in Italy (or other southern European countries). Italy's hostile attitude *vis-à-vis* NGOs has led, in addition to the introduction of restrictive norms on disembarkation, to the initiation of criminal proceedings against crew members as well as to the seizure of vessels used to carry out SAR activities (with the effect of preventing them from resuming navigation).[4]

2. The "selective disembarkation" approach and the reactions thereto

Italy's restrictive approach to migration was never entirely abandoned in the years that followed, although changes in government did result in a lower anti-migration profile. It was however renewed and reinforced in late 2022, when a new coalition government with a strong agenda to limit migrant arrivals came into office. In an apparent attempt to replicate the so-called "porti chiusi" (closed ports) approach of 2018 and 2019, several NGOs vessels carrying out SAR operations were denied authorization to disembark in an Italian port.[5] They were eventually allowed to remain inside Italian territorial waters but only for the time strictly necessary for medical staff to verify the conditions of those on board, with a view to authorizing only vulnerable persons to disembark, before requesting the ships to leave. All other rescued migrants were to be encouraged, if they wished to make an application for asylum, to do

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LAX (ed.) (2017), *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law*, Oxford, and A. LIGUORI (ed.) (2019), *Migration Law and Externalisation of Border Controls*, New York. On the specific issue of Italian funding of and assistance to the Libyan Coast Guard, see A. MARCHESI (2020), *Finanziare i rimpatri forzati in Libia è legittimo? Sulla sentenza del Consiglio di Stato n.4569 del 15 luglio 2020*, in *Dir. um. e dir. internaz.*, 14, 796 ff.

[4] On the "criminalization of solidarity" see Transnational Institute (2018), *The Shrinking Space for Soldarity with Migrants and Refugees: How the Europe Union and Member States target and criminalize defenders of the rights of people on the move*, and Amnesty International (2020), *Punishing Compassion: Solidarity on Trial in Fortress Europe*, AI Index EUR 01/1828/2020.

[5] These vessels include *Ocean Viking* and *Geo Barents*, flying a Norwegian flag, and *Humanity 1* and *Rise Above*, flying a German flag.

so on board the ship, in the hands of the ship's captain. The authorities of the flag state would then, allegedly, be responsible for handling the applications. Only after this condition was met, would Italian authorities allow the applicants to disembark temporarily, with a view to eventually transferring them to the territory of the flag state.

The "selective disembarkation" approach was implemented, *inter alia*, in a decision issued on 4 November 2022 concerning NGO vessel *Humanity 1*.[6] The 35 migrants who were denied permission to leave that ship, however, addressed an urgent complaint under Art. 700 of the Code of Civil Procedure against the decision, claiming its unlawfulness, and their complaint was upheld by the Tribunal of Catania. The judge stated that Italian authorities are under an obligation to provide assistance to all rescued persons *without distinction*. Furthermore, a ship cannot be qualified as a POS proper, as permanence on board does not allow respect for the basic rights of the rescued persons, including their right to seek asylum. An asylum claim requires "the regularization, albeit temporary […] of the migrant's presence on the territory of the State".[7] Also, to force all those who do not fall within the category of vulnerable persons to leave Italian waters could, according to the Catania Tribunal, expose Italy to the risk of violating the principle of *non-refoulement* under Art. 3 of the European Convention on Human Rights (ECHR) as well as the prohibition of collective expulsion under Art. 2 of Protocol n. 2 additional to the European Convention.

The Governments of the flag states of the boats to which the "selective disembarkation" approach was applied, Germany and Norway, also expressed their disagreement with the Italian Government's claim to assign responsibility for handling asylum claims to them.[8] And when France allowed disembarkation on its territory of the migrants who had been rescued by Norwegian ship *Ocean Viking*, the Foreign Minister clarified that, according to the French government, France was under

[6] Decreto del Ministro dell'Interno, di concerto con il Ministro della Difesa e il Ministro delle Infrastrutture e dei trasporti, del 4 novembre 2022.

[7] Court of Catania (immigration section), ordinance of 6 February 2023, case no. 14232/2022. It should be noted that, following medical examination, all the migrants on board *Humanity 1* were eventually allowed to disembark. The Tribunal however decided not to discontinue the proceedings in order to address the outstanding question of expenses.

[8] A. ZINITI (2022), *Migranti, anche la Norvegia dice no all'Italia: "Non abbiamo alcuna responsabilità"*, in *La Repubblica*, 4 November 2022.

no obligation to do so, arguing that "the rule is that of the closest port, and the *Ocean Viking* was close to the Italian coast". [9] It was only due to "the stubborn refusal and the lack of humanity of Italy" – she added – that they had exceptionally accepted the ship. [10]

3. Decree-law no. 1/2023: a panoply of obstacles to effective SAR activities by NGO vessels

In December 2022, the Italian authorities, renouncing the "selective disembarkation" approach, began authorizing disembarkation of migrants rescued by NGO vessels. In doing so, however, they adopted the practice of indicating as a POS Italian ports which are distant, sometimes very distant, from the place in which the rescue operation has taken place. [11] This new approach was subsequently regulated in the context of a new Decree-law (no. 1/2023), issued on 2 January 2023, [12] which includes the following elements:

a) First, ships with rescued migrants on board are under an obligation to disembark in the POS indicated by the Ministry of Interior (wherever that be may be…NGO vessels, in early 2023, have been ordered to disembark in ports in Tuscany, Marche, even Liguria, while ports in southern regions of Italy, such as Sicily, Calabria and Puglia, have allegedly been reserved to Italian Coast Guard ships).
b) Second, ships who rescue migrants are under an obligation to request the indication of a POS immediately after a rescue operation has taken place. The implication is that multiple rescue operations and the transfer of rescued migrants from one boat to another are prohibited.

The impact of these rules is to limit the operational capacity of the

[9] La Repubblica (redazione politica), *Migranti, Italia con Malta, Cipro e Grecia alla Ue: "Ricollocamenti deludenti". La Spagna prende le distanze. Parigi: "Se Roma insiste, avrà conseguenze"*, 12 November 2022.

[10] *Ibidem*.

[11] *Humanity 1* was assigned the port di Bari, *Geo Barents* the port of Salerno, *Rise Above* the porto of Gioia Tauro and *Life Support* the port of Livorno, all at a considerable distance from the place of rescue.

[12] Decree-Law no. 1/2023, converted into Law no. 15 of 24 February 2023 ("Conversione in legge, con modificazioni, del decreto-legge 2 gennaio 2023, n. 1, recante disposizioni urgenti per la gestione dei flussi migratori").

NGO fleet, forcing the vessels, even if they have rescued a small number of persons, to travel a long way without deviating from their route in order to rescue other shipwrecked persons. It also involves greater costs and longer suspensions of SAR activity.

c) Third, any disregard of the new rules, for example by not providing full and speedy information about a rescue operation to the authorities or by attempting to enter territorial waters without authorization, leads to severe sanctions which are not only financial but may also consist in the seizure of the ship, thus preventing the continuance of all rescue activity for a period of time.
d) Finally, the captain of a ship which has carried out a rescue operation is under an obligation to inform the rescued persons that they can apply for asylum on board, the assumption being, as mentioned, that responsibility for handling any asylum applications submitted on board is assigned to the flag state.

4. The impact of restrictive and dilatory practices on internationally recognised human rights: the right to life and the right to seek asylum

Delaying indication of a POS, allowing selective disembarkation only, indicating a POS which is far away from the place of rescue, prohibiting multiple rescue operations and, more in general, hindering the efficient organisation of SAR activity by the NGO fleet in the Central Mediterranean, all these activities, individually and in combination, have rather obvious consequences on the enjoyment of human rights by the individuals affected. Concerns over these consequences have been voiced [13]

[13] See, for instance, the letter sent on 26 January 2023 by the Commissioner for Human Rights of the Council of Europe Dunja Mijatović to the Minister of Interior of Italy, available online. In her letter the Commissioner expresses concern that "the application of some of these rules [provided for in Decree n. 1 of 2023] could hinder the provision of life-saving assistance by NGOs in the Central Mediterranean and, therefore, may be at variance with Italy's obligations under human rights and international law". More specifically, noting that "the Decree provides that vessels having carried out a rescue should reach the port assigned for disembarkation without delay", she argues that "the provision prevents NGOs from carrying out multiple rescues at sea, forcing them to ignore other distress calls in the area if they already have rescued persons on board, even when they still have capacity to carry out another rescue". She also notes with concern "that, in practice, NGO vessels have been assigned distant

and complaints alleging violations of international obligations have been lodged with international courts.[14] The human rights that the above-mentioned practices are likely to curtail include the right to life, the right to seek asylum from persecution, the right to personal liberty and the right not to be subjected to inhuman or degrading treatment.

Our focus is on the rights of those whose lives have been saved and who are forced to remain on board a rescue ship. We will therefore not specifically address the right to life. We do wish, however, to point out that a policy aimed at limiting the rescue capacity of the NGO fleet, at a time in which its activity is badly needed, is against the object and purpose of international norms recognising the right to life. It should be noted, in this respect, that both Art. 2 of the ECHR and Art. 6 of the ICCPR do not impose a negative obligation not to arbitrarily deprive anyone of their life only. They also impose positive obligations to adopt adequate measures, both legislative and operational, aimed at protecting life from any reasonably foreseeable threat.

As for the right to seek asylum from persecution, the main concern revolves around the rule – which was included, as mentioned, in Decree law no. 1 of 2023 – according to which the captain of a rescue ship is under an obligation to promptly inform all migrants on board that they can apply for international protection on the ship. This rule, which reflects an attempt to hand over to the flag state of the ship all responsibility for handling the application, elicits a number of closely related questions: whether the coastal state is at liberty to impose on all those wishing to file an asylum claim an obligation to do so on board the ship, before being disembarked on land; whether it can force migrants who have filed an asylum claim on the ship to remain on board (or whether, once disembarked, it can send them against their will to the flag state of the rescue ship); whether the coastal state can consider inadmissible an asylum claim submitted on land on the grounds that it should have been filed on board the ship.

The basic premise is that "the 'place of safety' concept should be in-

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places of safety, such as ports in Central and Northern Italy. This prolongs the suffering of people saved at sea and unduly delays the provision of adequate assistance to meet their basic needs".

[14] See, for instance, the three separate complaints to the European Court of Human Rights concerning the delayed authorization to disembark migrants rescued by *Sea Watch 3* (*Y.A. and Others v. Italy*, complaint no. 5504/19; *B.G. and Others v. Italy*, complaint no. 5604/19; *M.S. and J.M. v. Italy*, complaint no. 20561/19).

terpreted in light of international law, so that when migrants and refugees are rescued at sea, international human rights and refugee law and transnational criminal law norms are to be taken into account in identifying and deciding where they may be disembarked".[15] In other words, States exercising effective control over a vessel with rescued migrants on board must respect the principle of *non-refoulement*, refraining from all conduct which may put the persons on board at risk of persecution or of torture.

Resting on this assumption, it is reasonable to believe that bringing people to safety, unless very special circumstances justify a different sequence of events, should precede, and not follow the reception and assessment of possible asylum claims. According to the United Nations High Commissioner on Refugees (UNHCR), "Claims to international protection by rescued persons are best assessed in fair and efficient procedures on dry land, *once disembarkation in a safe place has been secured* and the immediate needs of rescued people […] have been addressed […]. This typically means that the State allowing post-rescue disembarkation on its territory will be responsible in the first instance for providing access to international protection" (emphasis added).[16]

This proposition is consistent with the idea that "Shipmasters are not generally competent to assess claims for international protection",[17] all the more so when they are the shipmasters of private vessels, who do not directly engage the international responsibility of flag States. The responsibility of the latter States is, in any case, "to coordinate and cooperate to secure timely and safe disembarkation and to take appropriate measures to protect against human rights violations, including refoulement"; not to assume responsibility "for receiving rescued persons, admitting them to an asylum procedure on their territory, and affording international protection".[18]

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[15] *The concept of* place of safety *under international law and the respect of the rights of migrants and refugees rescued at sea by all States,* Joint statement by UNHCR, IOM, Office of the High Commissioner for Human Rights, UN Office on Drugs and Crime, UNICEF, UN Special Rapporteur on the Rights of Migrants, May 2022.

[16] UNHCR (2022), *Legal considerations on the roles and responsibilities of States in relation to rescue at sea, non-refoulement, and access to asylum*, 1 December.

[17] *Ibidem*.

[18] *Ibidem*.

Thus, while it goes without saying that for different States to share responsibility in handling migration flows is desirable, the absence or inadequacy of a burden sharing mechanism does not justify the denial of the right to seek asylum (i.e. to have access to a fair asylum procedure) by a coastal state in which rescued migrants are disembarked. Should the rule providing for "on board" asylum claims in Decree no. 1 of 2023 be understood as implying such a denial, it would be at odds with international human rights and international refugee law.

5. Forcing migrants to remain on board the ship which has rescued them: is it an arbitrary deprivation of liberty?

Let us now consider the rights which are specifically relevant to the condition of those who, having been rescued, are forced to remain on board. Deprivation of liberty is prohibited by Art. 5 of the European Convention on Human Rights (ECHR) and Art. 9 of the International Covenant on Civil and Political Rights (ICCPR) unless certain conditions are met. The first point requiring clarification, before addressing those conditions, is therefore whether the practice of forcing rescued migrants to remain on board a ship may indeed amount to a deprivation of liberty or whether, instead, it should be qualified as a restriction to freedom of movement under Art. 2 of Protocol no. 2 additional to the ECHR and Art. 12 of the ICCPR.

The difference between the two situations, according to the European Court of Human Rights, is one of degree or intensity, not one of nature or substance. In order to determine whether a person has been deprived of liberty, one must look at his or her concrete situation and take into account a variety of criteria including the type, the duration, the effects and the manner of implementation of the measure in question. The Human Rights Committee's understanding of deprivation of liberty, according to which it "involves a more severe restriction of motion within a narrower space than mere interference with liberty of movement", is similar.[19]

In the light of this clarification, it is reasonable to believe, in our view, that when disembarkation is the only possible way of leaving a ship which, due to the presence on board of persons in numbers be-

[19] HRC, General Comment no. 35, 16 December 2014, *Article 9 (Liberty and security of person)*, para. 5.

yond its normal capacity, is not in a position to resume navigation in conditions of safety, to force – either by act or by omission [20] – persons to remain on board for a significant number of days is to be qualified as a deprivation of liberty.

The next question is whether deprivation of liberty in these particular circumstances is in conformity with the conditions which render it lawful under international human rights conventions. Art. 5 of the ECHR and Art. 9 of the ICCPR are similar in prohibiting deprivation of liberty when it is not "in accordance with a procedure prescribed by law". The two provisions, instead, differ when it comes to indicating specific cases in which deprivation of liberty is exceptionally permitted: Art. 5 provides a list, Art. 9 does not; rather, it includes an overall prohibition of arrest or detention which is "arbitrary". [21]

Deprivation of liberty allowed by Art. 5(1)(f) of the ECHR includes "the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition". However, "the detention of an asylum-seeker or other immigrant prior to the State's grant of authorization to enter […] must be compatible with the overall purpose of Art. 5, which is to safeguard the right to liberty and ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion". [22] It is not enough, in other words, for deprivation of liberty to be aimed at one of the permissible purposes. It can still be arbitrary. Furthermore, the notion of 'arbitrariness' "extends beyond lack of conformity with national law". [23] "To avoid being considered arbitrary, detention under Art. 5(1)(f) must be carried out in good faith: it must be closely connected to the detention ground identified and relied on by the government; the place and conditions of detention should be

[20] Whether the coastal State's conduct is qualified as an omission (for refraining to issue an authorization to disembark) or as an action (in the case of a specific refusal of entry order), denial or significant postponement in indicating of a POS can be attributed to it under general international law according to which an internationally wrongful act may consist in either (see Art. 2 of the International Law Commission's Articles on the International Responsibility of States).

[21] The expression "arrest or detention" is to be understood, according to the HRC, as covering any form of deprivation of liberty.

[22] ECHR, Grand Chamber, judgement 29.1.2008, application no. 13229/03, *Saadi v. the United Kingdom*, para. 66.

[23] *Ivi*, para. 67.

appropriate; and the length of the detention should not exceed a duration that is reasonably required for the purpose pursued".[24]

As for the ICCPR, while, as mentioned, "[t]he Covenant does not provide an enumeration of the permissible reasons for depriving a person of liberty, […] regimes involving deprivation of liberty must […] be established by law and must be accompanied by procedures that prevent arbitrary detention".[25] In other words, "Article 9 […] requires compliance with domestic rules that define when authorization to continue detention must be obtained from a judge or other officer, where individuals may be detained, when the detained person must be brought to court and legal limits on the duration of detention".[26] As for the notion of 'arbitrariness', as in the ECHR, it "is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality".[27]

The questions that need answering, in light of the above, are: does a law prescribing a procedure for the deprivation of liberty, covering deprivation of liberty aboard a rescue ship, exist within the Italian legal order? If the answer is yes, are the practices described above in compliance with that law? Last but not least, do those practices satisfy all other conditions required in order for them not to be qualified as arbitrary?

The answer to the first question is: yes, in the Italian legal system rules on deprivation of liberty, applicable to all forms of deprivation of liberty, including rules on timing, physical spaces and judicial supervision, are in place. According to Art. 13 of the Constitution, "No one may be detained, inspected, or searched, or otherwise subjected to any restriction of personal liberty, except by a reasoned order of a judicial authority and only in such cases and in such manner as provided by law. In exceptional circumstances and under such conditions of necessity and urgency as shall be precisely defined by law, the police may take provisional measures that shall be referred within 48 hours to a judicial authority and which, if not validated by the latter in

[24] ECHR, judgement 20.12.2011, application no. 10486/10, *Yoh-Ekale Mwanje v. Belgium*, paras. 117-119.

[25] HRC, General Comment no. 35, 16 December 2014, *Article 9 (Liberty and security of person)*, para. 14.

[26] *Ivi*, para. 23.

[27] *Ivi*, para. 12.

the following 48 hours, shall be deemed withdrawn and ineffective".[28]

Is deprivation of liberty resulting from the practices described above – i.e. delaying the authorization to disembark all or some of the rescued migrants and/or authorizing disembarkation only in a port which is several days of navigation away from the place of rescue – implemented according to the current legal framework? The evidence suggests that, in the context of efforts to curb migration, existing norms governing deprivation of liberty have been more or less set aside. The requirement that deprivation of liberty be decided by an administrative authority and confirmed within specific time limits by a judge has not been respected, leading to a *de facto* rather than to a *de jure* deprivation of liberty which is, as such, not in accordance with a procedure prescribed by law.

As for the other requisites of a non-arbitrary deprivation of liberty, forcing persons to remain on board a rescue vessel does not, in our view, comply with the required appropriateness of the place and conditions of deprivation of liberty and may, if it is prolonged, "exceed a duration that is reasonably required for the purpose pursued".[29] More in general, it is hard to believe that significantly delaying authorization to disembark or compelling an NGO vessel to disembark rescued migrants in a port which is several days of navigation away is in conformity with the requisites of "reasonableness, necessity and proportionality" of deprivation of liberty under human rights law. Finally, one of the reasons given for the latter practice – i.e. the need to reserve closer ports to Italian Coastguard and other public vessels with rescued migrants on board – raises questions with regard to the principle of non-discrimination between persons who are all equally in need of assistance. In conclusion, there is little doubt, in our view, that the practices described above amount to an *arbitrary* deprivation of liberty.[30]

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[28] This rule is reaffirmed with specific reference to the administrative detention of irregular migrants in Art. 14 of Decree law no. 286 of 25 July 1998, according to which all measures depriving an irregular migrant of his or her personal liberty must be notified within 48 hours to the judicial authority, which must eventually confirm the measure within additional 48 hours, bringing the maximum number of hours in which deprivation of liberty without judicial confirmation is allowed under national law to 96. Furthermore, deprivation of liberty must take place within specifically designated spaces, indicated in Decree-law no. 286 itself as well as in other norms, which must comply with adequate standards.

[29] See fn. 24.

[30] It should be noted that the absence of a firm legal basis for deprivation of

6. *Continued*: does it amount to inhuman or degrading treatment?

The conditions under which migrants are forced to live on board a rescue vessel during the time in which they are not allowed to disembark also raises the question as to whether they may be subjected to inhuman or degrading treatment, within the meaning of Art. 3 of the ECHR and of Art. 7 of the ICCPR.

According to the European Court of Human Rights, in order to fall within the scope of Art. 3, "ill-treatment must attain a minimum level of severity which depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.". [31] More specifically, inhuman treatment does not require intention or a specific purpose as torture does and thus may consist in the mere infliction of physical or mental pain or suffering on condition that it is sufficiently severe. Treatment is considered degrading "when it is such as to arouse in its victims' feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance or when it was such as to drive the victim to act against his will or conscience". [32] As for Art. 7 of the ICCPR, the Human Rights Committee has not "consider[ed] it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment". [33] It has, however, clarified that "the distinc-

liberty, leading to a violation of the prohibition of arbitrary deprivation of liberty under Arts. 5, 1 of the ECHR and 9, 1 of the ICCPR, also implies a violation of the rights to be informed promtply of the reasons of an arrest and to have the lawfulness of detention speedily decided on by a court (respectively under Arts. 5,2 of the ECHR and 9,2 of the ICCPR and 5,4 of the ECHR and 9,4 of the ICCPR). As the European Court of Human Rights has recently reaffirmed, it is hard to see, in the presence of a "lack of a clear and accessible legal basis for detention, […] how the authorities could have informed the applicants of the legal reasons for their deprivation of liberty or have provided them with sufficient information or enabled them to challenge the grounds for their *de facto* detention before a court" (ECHR, judgement 30.3.2023, application no. 21329/18, *JA and others vs Italy*, para. 98).

[31] ECHR, judgement 18.1.1978, application no. 5310/71, *Ireland vs United Kingdom*, para. 162.

[32] ECHR, Grand Chamber, judgement 11.7.2006, application no. 54810/00, *Jalloh vs Germany*, para. 68.

[33] HRC, General Comment no. 20, para. 4.

tions depend on the nature, purpose and severity of the treatment applied".[34]

Creating barriers to disembarkation of rescued migrants has resulted in men, women and children being forced to live, for a variable period of time, in overcrowded spaces, with seriously inadequate sanitary facilities, frequently outdoors, often with low temperatures and bad weather conditions. The nature and equipment of the NGO ships carrying out rescue operations, on which migrants have been forced to live, does not allow them to host such numbers of persons for a protracted period of time without the situation degenerating.

Also, it should be noted that the existence of inhuman or degrading treatment is not based solely on the objective conditions in which the victims find themselves. It also depends on the subjective condition of each individual: the fact that a rescued migrant may suffer, as is frequently the case, from physical and/or mental health problems, or may have undergone traumas, and that these issues should be aggravated by uncertainty about his or her future, should also be taken into account. As for minors, whether accompanied or unaccompanied, they belong to a vulnerable category of individuals deserving special attention, who are more likely to be the victims of inhuman or degrading treatment in the abovementioned situation.

In view of all this, while each case requires a specific assessment of the living conditions to which the alleged victim is subjected to in order to establish whether the minimum threshold for a violation to take place has occurred, to force individuals who have faced considerable hardship to live for a significant number of days on the ship that has rescued them at sea, in conditions of overcrowding, with little or no shelter and seriously inadequate facilities, is indeed likely to amount to inhuman or degrading treatment.

7. Conclusion

In conclusion, limiting the right to seek asylum after disembarkation on the grounds that a claim should have been made on board a rescue ship, as well as preventing disembarkation of those who have filed an asylum claim on board, amounts to a breach of international refugee law.

Conduct by the authorities of a coastal State resulting in the forcible

[34] *Ibidem*.

stay of migrants aboard a rescue ship which cannot resume navigation in conditions of safety is likely to qualify as a deprivation of liberty. It is to be qualified as arbitrary, thus amounting to a violation of international human rights law, when it is not according to a procedure established by law and/or the place and conditions of deprivation of liberty are not appropriate and/or it exceeds the duration that is reasonably required or is otherwise unreasonable, unnecessary, or disproportionate. Placing barriers to disembarkation in the ways and with the results that we have briefly described amounts, in our view, to a deprivation of liberty which is arbitrary.

Finally, to force people to remain on a rescue ship for a significant period of time, in small spaces, with inadequate facilities and in bad weather – all the more so if those on board suffer from health problems and/or have undergone traumas – is likely to amount to inhuman or degrading treatment.

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Chapter 23

MIGRATIONS AND LEGAL REFORMS IN TUNISIA AMONG PHYSICAL AND DIGITAL CIRCULARITY

Anna Marotta

ABSTRACT: *The phenomenon of return migrations adds further elements of complexity to the relationship between migration and law. The legal impact of cultural encounters is not limited to the demands for protection of cultural identity by migrants in the host countries, but it also extends to the return of migrants to their countries of origin, affecting several law fields.*

Population movements between European countries and Maghreb countries, which result in the encounter between Western Legal Tradition and Islamic Legal Tradition, are likely to give rise to calls for legal reforms by migrants who return to their countries of origin, after experiencing contact with the Western legal culture. This might be the case in Tunisia, whose 2011 Revolution made this country a clear representation of the will for a legal change in the MENA region.

Although the mediation between post-revolution political actors led to a new constitution (2014), which included rights and freedoms that gave unprecedented protections to core civil and political rights, and paved the way for a democratic transition, the popular uprising has not quite achieved its goals in terms of human rights and internal democracy.

Such a legal framework seems to have been aggravated by the recent political transition. Tunisia is going to enter a new phase, where the influences of Western legal values and principles conveyed by return migrations and the use of social network sites may find an obstacle in the dreaded return to autocracy, that could compromise the protection of human rights and fundamental freedoms.

This contribution aims at shedding light on those areas of the private law in which the physical and digital circulation of legal rules that occurs through a circular movement may contribute to make room for Western legal concepts and rules within the Tunisian legal systems. Accordingly, the comparative law analysis ends up showing whether and to what extent human rights and freedoms connected to Western principles and values are hampered by the new legal order.

SUMMARY: 1. Introduction. Tunisian law and Western law: a faded Jasmine? – 2. Not only emigration: Tunisia as a country of return. – 2.1. Leaving and returning. – 2.2. Return migration dynamics. – 3. Human rights in the return country: from legal developments to the new tools of empowerment. – 3.1. Family law through circular migration waves between progress and conservatism. – 3.2. From the circularity of migrations to digital circularity: social networks as a boost to legal changes in Tunisia? – 4. Multi-faceted circularity: final remarks on the circular movements of people and contents.

1. Introduction. Tunisian law and Western law: a faded Jasmine?

After the Jasmine Revolution, Tunisia was internationally praised as the first example of post-Arab Spring democracy. Domestic legal reforms introduced to widen the room for individual rights and freedoms gained it support and subsidies by the European Union.

Shortly after the 2011 uprisings, however, a large number of young Tunisians irregularly left the country to reach Europe. As a result of a generational crisis that has progressively intensified, the 2011 migration peak was followed by a new upsurge in 2017. Low socio-economic conditions and deterioration of living conditions resulted in poorly prepared and risky journeys, which were perceived as the only chance to have a better future.

The lack of regular travel channels, for its part, complicated migrants' adaptation at the destination. In fact, they generally stayed in Europe for a short amount of time, facing many challenges.

The two large outflows were accompanied by significant return migrations, which were characterised by scarce information about the return modalities and conditions, affecting returnees' opportunities to successfully reintegrate back home.

Meanwhile, political and economic instability and social discontent have continued to grow in Tunisia, with terroristic attacks and the COVID-pandemic contributing to exacerbate the state of general crisis. Consequently, returnees were confronted with debates about civil, social and political rights along religious/secular and conservative/modernist lines powered by populist narratives.

In July 2021, political and social tensions were further fuelled by the (current) President Kaïs Saïed's unilateral decision to suspend the Parliament (within which Ennahda, an Islamist moderate movement, was the largest party) and dismiss the Prime Minister, together with other high-level officials, granting himself the right to rule by decree and the mandate to change the Constitution.

The subsequent implementation of a new Constitution in July 2022, which replaced the 2014 Constitution adopted in the aftermath of the Revolution, raised several questions regarding the future of human rights protection, at both a national and international level. Institutions such as the International Monetary Fund (IMF) and the World Bank have made it clear that they do not agree with the Tunisian President's policies. [1]

Saïed's recent statements against anti-subsaharan migrants have further put the Tunisian President in a bad light. [2] Last March, Saïed claimed that subsaharan migrants are part of a wider criminal campaign to change the demographic composition of the country and make it 'purely African', without any affiliation to the Arab and Islamic nations. He also emphasised that some individuals receive large sums of money to give residence to this kind of migrants. He, therefore, called for urgent action to halt the flow of subsaharan migration into the country.

Several Tunisian human rights organisations have denounced the arrest of hundreds of migrants in a single week. Additionally, racist speeches and hate speeches have gained ground ever since.

Negotiations to save Tunisia are proceeding slowly. On the one hand, faced with the lack of guarantees from Saïed, the IMF has blocked the US$ 1.9 billion loan to Tunisia in order to support the home-grown program to restore macroeconomic stability, to strengthen social safety nets and tax equity and to step up reforms that support an enabling environment for inclusive growth and sustainable job creation. [3] On the other hand, the World Bank has temporarily suspended some of its programs in Tunisia. [4]

It's very likely that the state of uncertainty linked to the economic crisis and to the apparent restoration of authoritarianism will encourage further migratory outflows, which will be accompanied by return migrations due to forced or voluntary returns, that, in turn, can be temporary or permanent.

Return migrations may not represent the end of the migration cycle.

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[1] L. MARTINELLI (2023), *Tunisia, la Banca mondiale sospende i negoziati dopo le dichiarazioni di Saied contro i migranti*, in *La Repubblica*, available online.

[2] L. BLAISE (2023), *Tunisia's President Saied claims sub-Saharan migrants threaten country's identity*, in *Le Monde*, available online.

[3] F. BECHIS, V. ERRANTE (2023), *Migranti, piano italiano per la Tunisia: fondi americani per bloccare gli sbarchi*, in *Il Messaggero*, available online.

[4] *Ibidem*.

The question, therefore, is: can Western values that migrants experience in European countries find room in the new Tunisian legal framework so as to intervene on migratory dynamics? What instruments do Tunisians use for this purpose?

The statement that Tunisia is part of the Islamic nation, and the State alone must work to achieve "the goals of pure Islam in preserving life, honour, goods, religion and freedom" (Art. 5) seems to affect the responses, being destined to have a great impact on all the areas of Tunisian law. This is especially true for those law fields such as family law. In fact, the implementation of principles that migrants bring with them from European countries, first of all gender equality, would produce effects that go beyond the family sphere, (re)defining the traditional role of men (as guardians of women) and women (as wives and mothers responsible for household activities) in society and the rights they are entitled to.

Tunisia's 1956 Code of Personal Status (CPS), adopted after its independence from France, is considered historic in how it advanced women's rights compared to the other countries across the MENA region. However, despite developments in the field of personal status, gender-based discriminatory provisions are still in force in the country, as in the case of inheritance law.

Tunisian women continue to claim their rights in the various areas of law, as a part of a larger human rights movement that brings several social and political groups together in Tunisia. Demands for rights are expressed through instruments ranging from street protests to the use of social network sites. The latter, more simply known as social networks, ensure the circulation of the most varied contents: opinions, ideas, initiatives, principles and underlying values. All this flows mainly through the role of social media influencers, who persuade people on a daily basis, directing their decisions and their actions and making social networks new power centres in the development of current societies.

The very governments, in their capacity as traditional holders of power, increasingly use social networks to interact with citizens and try to involve them – at least apparently – in decision-making processes.

Currently, social networks are something more than platforms connecting people with each other or people with institutions. They are a place where emerging social needs easily find a voice, a new expression.

The circulation of legal values, principles and rules, which may occur in a circular form, with the possibility to inspire legal reforms or even

give rise to hybrid forms of law, is no longer exclusively linked to people's movements from a country or a continent to another. It also follows new routes linked to digital instruments. Digital circularity takes its place along with physical circularity, accordingly.

In the Tunisian case, apparently social networks have been an instrument in the struggle for democracy since the Revolution. The growing role of these platforms in the last few years raised the question of their ability to prevent the 'Jasmine' from fading, faced with the recent weakening of the classic instruments of democracy.

Currently, there are no public data linked to social media analytics in Tunisia with reference to legal aspects and expectations, also due the existing restrictions. In this contribution, therefore, the study of digital circularity relies on the analysis of social media and academic publications about the use of social networks sites in Tunisia from multiple disciplinary perspectives.

Likewise, considering that theoretical and empirical studies/reports on return migrations to Tunisia in the period immediately before and after the COVID-pandemic are practically non-existent, the analysis of physical circularity is mainly based on a 2011-2018 report led by humanitarian actors and on scholarly works which address the different aspects involved in the return process.

2. Not only emigration: Tunisia as a country of return

A study on 2011-2018 Tunisian migratory dynamics led by the humanitarian organisations REACH and Mercy Corps reported that, in the aftermath of the 2011 revolution, "Tunisia has seen a large share of its young population leaving irregularly for Europe, part of which returned forcibly or on their own initiative over the years".[5]

More specifically, the report registered two major peaks: an upsurge after the 2011 revolution, when more than 20, 000 Tunisians left the country in order to irregularly reach Europe,[6] and a new increase in the second half of 2017, when protesters returned to the streets of Tunisia again asking for more dignified living standards.

[5] REACH, MERCY CORPS (2018), *Tunisia, country of emigration and return: migration dynamics since 2011*, December, 8, available online.

[6] H. BOUBAKRI (2013), *Les migrations en Tunisie après la révolution*, in *Confluences Méditerranée*, 87, 31 ff.

This made Tunisians the largest group of migrants arriving in Italy – main landing country – in December 2018.[7]

Things didn't change in the last five years. In late 2022, Tunisians made up the second nationality of sea arrivals, becoming the sixth nationality in March 2023.[8]

According to the abovementioned study, migration outflows – the majority of which were composed of males, single and aged between 18-24 years old – were closely linked to the transformations that the country had been going through since the Jasmine revolution. Much was expected by the 2011 popular uprising. However, Tunisia's initial dynamism aimed at replacing policies inherited from the regime of Ben Ali came to a halt in a short time.

Hopes for a process of democratisation of political institutions, law and society have progressively given way to disenchantment among Tunisians, who have found themselves facing an economy that had failed to take off and a political class that remained detached from society.

Tunisia stayed divided between the centre and periphery and Tunisians continued to experience inequalities linked to the persisting distinction between privileged and unprivileged people, witnessing the emergence of populisms which presented themselves as the solution to the country's problems.

2.1. Leaving and returning

For those who left Tunisia between 2011 and 2016, the revolution represented a turning point to start considering emigration. At that time, departures were facilitated by weak border controls linked to political situation.[9]

By contrast, one third of the study participants who left in 2017-2018 – who had a higher level of educational attainment compared to

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[7] REACH, MERCY CORPS (2018), *Tunisia, country of emigration and return*, cit., 8.

[8] UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), *Operational Data Portal: Refugee Situations – Italy: Most common nationalities of sea arrivals*, available online.

[9] M. HERBERT (2016), *At the edge: Trends and routes of North African clandestine migrants*, in *The Global Initiative Against Transnational Organized Crime and the Institute for Security Studies*, ISS paper 298.

those who had left in 2011-2016 – decided to migrate because the lack of economic resources prevented them from building a family. [10]

Overall, final (and autonomous) decisions to leave for Europe, [11] by embarking on an irregular, costly and risky boat journey through Mediterranean with family members, friends or colleagues, can be explained in the light of a combination of factors: Tunisia's poor socio-economic performance, persisting unemployment, political instability, social inequalities, poor household, feelings of frustration (especially among the youth) [12] and the presence of extended social relationships in Europe. [13]

Decisions about irregularly migrating to Europe were also influenced by the perception of a wealth and good life in Europe. "The latter was defined by most respondents as living in a country where full respect of human rights, freedom and peace are guaranteed". [14]

Migrants spent a short time in Europe before returning to Tunisia, with negative consequences in terms of securing economic resources to improve their pre-departure conditions. [15] Only in a few cases, they had (partially) achieved their goals at destination.

Sometimes, challenges for Tunisian migrants in Europe started with the very journey, which ended up impacting on their ability to

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[10] REACH, MERCY CORPS (2018) *Tunisia, country of emigration and return*, cit., 22.

[11] It should be said that almost one fifth of respondents migrated internally before crossing into Europe. See REACH, MERCY CORPS, *Tunisia, country of emigration and return*, cit., 28.

[12] I. SCHAFER (ed.) (2015), *Youth, Revolt, Recognition The Young Generation during and after the "Arab Spring"*, Berlin, Mediterranean Institute Berlin (MIB)/HU Berlin.

[13] It must be emphasised that some respondents reported that they had tried to apply for regular pathways to reach Europe. Around one fifth of respondents had applied for a visa and had decided to leave irregularly after their application had been rejected. Others were dissuaded by the expensive application fees and the low chance of being granted a visa. A sense of frustration and injustice emerged from the fact that the few legal avenues available to reach Europe were reserved to economically and socially well-endowed people. See REACH, MERCY CORPS, *Tunisia, country of emigration and return*, cit., 26-27.

[14] REACH, MERCY CORPS (2018), *Tunisia, country of emigration and return*, cit., 24. Very often, migrants reported knowing Tunisians living in Europe and occasionally returning home with money and fancy cars.

[15] *Ivi*, 33 ff.

face the difficulties in the host country.[16] While some migrants relied on the support of their families or their friends at destination, others struggled to meet their primary needs. Only a few managed to find an employment. Many migrants experienced housing problems, seeking refuge in abandoned houses. Some were brought to centres for migrants where they had no freedom of movement. And others were involved in petty crime due to the difficulty of accessing to any kind of licit activities.

While abroad, migrants had to also face other types of problems: complex interaction with the host society because of language barriers, discrimination, integration, racism, difficult access to formal labour market, low salaries, health problems. These difficulties sometimes affected the decision to return to the country of origin.[17]

The 2018 study reports that "overall, large outflows have been accompanied by proportionally comparable figures in terms of forced returns".[18] However, "despite the emphasis on forced returns and assisted voluntary returns on the agenda of the European Union (EU) and its Member States, and Tunisia's cooperation in this field, information about this phenomenon remains scarce. No comprehensive figures on Tunisians returning on their own initiative are publicly available. Furthermore, the panoply of organisations and schemes providing assisted voluntary return and reintegration (AVR-R) to Tunisians abroad makes it difficult to retrieve reliable data on this modality of return".[19]

Return policies have been increasingly gaining ground on European political agendas.[20] A number of countries have repeatedly concluded readmission agreements. Tunisia has been the first North African country which concluded a readmission agreement with a European country, intensifying its cooperation over time by concluding a variety of bilateral and multilateral, standard and non-standard agreements.[21]

According to Eurostat figures, efforts to forcibly repatriate Tunisian

[16] *Ibidem*.

[17] *Ibidem*.

[18] *Ivi*, 8.

[19] *Ibidem*.

[20] D. De Bono (2017), *The EU's emphasis on migrant returns has some serious human rights problems*, in *The Conversation*, available online.

[21] J.P. Cassarino (2012), *Hiérarchie de priorités et système de réadmission dans les relations bilatérales de la Tunisie avec les États membres de l'Union européenne*, in *Maghreb et Sciences Sociales*, 4, 245 ff.

nationals have increased in both 2011 and 2017.[22] Taking into account whether return is chosen or not is a fundamental step for the identification of all the factors characterising pre and post-return conditions.[23] There are different types of return, indeed: 1) forced return, also called 'removal' or 'expulsion', which consists in the involuntary return of a migrant following the issuance of a removal order;[24] 2) Assisted Voluntary Return (AVR), which provides those migrants, who are no longer willing, or no longer able, to stay in the host country with the possibility of returning to their country of origin and of being supported in the reintegration path;[25] 3) individual return, which includes both those who regularly return and those who go to the police or to the Tunisian consulate on their own initiative in order to return to their own country.[26]

"Return is not a phenomenon, but rather a process that requires time".[27] The linkage between return and individual development varies according to the returnees' level of preparedness and capacity to mobilise and gather the resources necessary for their reintegration at home. Not least, return seems to necessarily require a legal framework that discourages future intensions to re-emigrate, by creating the conditions for personal and collective development.

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[22] REACH, MERCY CORPS (2018), *Tunisia, country of emigration and return*, cit., 37.

[23] J.P. CASSARINO (ed.) (2008), *Return Migrants to the Maghreb Countries: Reintegration and Development Challenges*, European University Institute, Florence Robert Shuman Centre for Advanced Studies, MIREM, Collective Action to Support the Reintegration of Return Migrants in their Country of Origin, Global Report, Badia Fiesolana, San Domenico di Fiesole (FI).

[24] J.P. CASSARINO (2012), *Hiérarchie de priorités*, cit., 245 ff.

[25] INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM) (2004), *Return migration: Policies and practices in Europe*, United Nations Publications available online.

[26] This is different from the EU notion of 'voluntary return', which refers to the compliance with the obligation to return within the time-limit fixed for that purpose in the return decision. See Directive 2008/115/EC, *on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16, 12. 2008, OJEU, L 348/98, 24.12.2008, 1 ff.

[27] REACH, MERCY CORPS (2018), *Tunisia, country of emigration and return*, cit., 27.

2.2. Return migration dynamics

According to the REACH-Mercy Cops study, the majority of returns to Tunisia, between 2011 and 2017, were forced returns.[28] Those who were compelled to return were notified about their repatriation while they were in migrant centres or in jail. By contrast, most of those who were enjoying freedom of movement were stopped in the street as a part of routine immigration checks, whilst fewer migrants were stopped while committing illicit activities or fighting with strangers in the streets.

Migrants generally were denied the opportunity of making alternative plans. Those who forcibly returned had a very limited time to prepare to their return allegedly in order to reduce flight risk or prevent resistance.[29] Only very few study participants learned about their expulsion some time before their return.

Decisions about assisted voluntary return (AVR) were reportedly taken after having learnt about AVR programmes or because of specific circumstances, which tend to coincide with those triggering individual returns.[30]

Upon return, which generally occurred by plane and only secondarily by ship, some migrants spent a few days in custody, others paid a fine and others were interrogated by the police, receiving a bad treatment from police officers, mostly verbal aggression.[31]

Almost all migrants being interviewed returned to the governorates where they were living before departure, which, in most cases, corresponded to the place where the family was located.[32]

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[28] *Ivi*, 35 ff.

[29] *Ibidem*.

[30] *Ivi*, 36 ff. Circumstances include lack of employment opportunities, worsening living conditions in Europe, family pressure, illness, hopelessness, witnessing a crime, losing access to accommodation, coming across Tunisians in vulnerable conditions, having found employment in Tunisia, personal events such as a divorce or the death or illness of a close relative in Tunisia, rumors that economic conditions in Tunisia have improved, restored family relations in Tunisia, missing family, the fact that the costs of staying in Europe would outweigh the benefits of returning.

[31] *Ibidem*, 40 ff.

[32] They include: Greater Tunis, the governorates of Sfax, Mahdia and Medenine, but also the coastal governorates of Bizerte and Gabes, as well as the inland governorates of El Kef, Beja, Siliana, Sidi Bou Zid and Tozeur, which are among Tunisia's main regions of emigration.

Once back in Tunisia, returnees faced challenges connected with their socio-economic situation in their country of origin.[33] Finding employment or working in unstable forms of employment figured among study participants' most reported challenges. Some were employed in low/middle skilled occupations or self-employed, while others heavily relied on their families' direct or in-kind economic support.

Not only return affected migrants' relationship with their own families in Tunisia or in Europe. A few respondents reported having faced legal constrains upon their return, referring to their inability to obtain a future public employment and to legally reach Europe again.

Mental health is also affected by the entire migration process, depending on the type of travel, length of stay and return experience.[34] Returnees' feelings about return, whether forced or voluntary, were marked by the association with feelings of failure. A sense of discomfort, sadness and even depression emerged, especially among the youth, sometimes resulting in a rejection of the host community.

Young people who dangerously cross the Mediterranean send a strong signal about the state of despair in which they live. They try to build a future for themselves and for their families. Return confronts them with a reality where unemployment continues to rise, the social context is tense, adequate public policies are non-existent and legal developments proceed slowly.

The intention to re-emigrate in the future is widespread, accordingly.[35] The data show a stronger intention to re-emigrate among migrants who were compelled to return compared to those who returned otherwise. Return, therefore, appears not to be "the ending phase of a migrant's experience, but the phase of a cycle that is likely to repeat itself, especially – but not only – if the circumstances that encouraged the first attempt to migrate persist".[36]

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[33] REACH, MERCY CORPS (2018), *Tunisia, country of emigration and return*, cit., 42 ff.

[34] A.A. DAVIES, R.M. BORLAND, C. BLAKE, H.E. WEST (2011), *The dynamics of health and return migration*, in *PLoS Medicine*, 8, available online.

[35] REACH, MERCY CORPS (2018), *Tunisia, country of emigration and return*, cit., 44 ff.

[36] *Ivi*, 47.

3. Human rights in the return country: from legal developments to the new tools of empowerment

Tunisian returnees had to face many problems as citizens of a country where a multidimensional crisis results in an arduous process of legal adjustment to the needs emerging from the society, especially in some law fields.

Those were years when populist actors started making their voice heard. An example is the 2019 elections, which saw an ascent of populist narratives that "fell on opposite ends of the Islamist-secularist polarisation spectrum that had influenced Tunisia's politics to varying degrees since the revolution".[37] This led to further alienation across the political spectrum and promoted an intensification of exclusionary rhetoric normalising contention as a political mode.

The Islamist movement, for its part, was no longer the same as before. It had undergone a hybrid transformation since 2011, with Islamic associations embarking on trajectories – professional empowerment, party complementarity and political challenge – that have challenged binary interpretations of transformation that reflect the dichotomy radicalisation/moderation or teleological narratives predicting the end of political Islam in Tunisia.[38]

In this complex context, family law continued to be one of those areas of law where tension between tradition and modernity was better reflected. Since the impact of family law norms inevitably goes beyond the family sphere insofar as they define the social role of people who make up a family under the law, it was mainly the role of women in the various areas of life that was affected by these dynamics.

Tunisian family law rules are collected in the 1956 Code of Personal Status (CPS) and are based on Islamic law of Maliki school. The recognition of women's rights, therefore, moves between compliance with Islamic law and implementation of Western values and principles.

Returns following the 2017-2018 peak in irregular emigration confronted migrants with the growth of the debate over gender equality.

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[37] H.L. MURPHEY (2023), *The intensifying effects of polarised populisms: opposed Islamist and Bourguibist discourses in post-revolutionary Tunisia*, in *J. North Afr. Stud.*, 28, 1104-1123.

[38] E. SIGILLÓ (2023), *Understanding the transformation of Political Islam beyond party politics: the case of Tunisia*, in *TWQ*, 44, 152 ff.

More specifically, 2017 can be considered a milestone on gender-related issues.

On the 13th of August 2017, on the occasion of Tunisia's National Women's Day and on the anniversary of the establishment of the CPS, the late President Beji Caid Essebsi proposed to reform inheritance law, which was based on Islamic prescriptions.[39] Islamic Law States that a woman inherits half as much as a man would in a similar kinship relation to the deceased.[40]

The president set up an Individual Freedoms and Equality Committee (COLIBE) made up of human rights advocates, legislators and academics with the general task of harmonizing the existing laws with the 2014 Constitution, which enshrined the principle of equality of all citizens, male and female, before the law (Art. 21).

The report addressed multiple problems and issued recommendations, but the main focus was on the inheritance law. Despite the protests, the late president declared that he would submit a bill to the Parliament in order to set gender equality in inheritance.

The proposed changes mobilised both secular and religious elements of the society, causing demonstrations and a media storm.[41] In November 2018, after tensions between supporters and opponents of the reform, the Tunisian cabinet approved the draft law, which would amend the CPS.

The bill was supposed to head to the Assembly of the Representatives of the People so that it could be debated in plenary session. However, many Islamists objected to the cabinet's decision. Furthermore, Essebsi passed away in July 2019, with the result that inheritance law reform lost its presidential support.

The current President Saïed has expressed opposition to the reform of inheritance laws, since "The Koranic text is clear and allows for no interpretation"[42] and "the principle of inheritance in Islam is not based on formal equality but rather on justice and equity".[43]

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[39] J. KEBSI (2022), *When will Tunisian women be granted equal inheritance human rights?*, in *Arena Online*, available online. See also Human Rights Watch (2018), *Tunisia: Parliament Should Back Gender Equality in Inheritance, Government-Approved Draft Law Sent to Chamber*, available online.

[40] F. CASTRO (2007), *Il modello islamico*, G.M. PICCINELLI (ed.), Turin, 60 ff.

[41] J. KEBSI (2022), *When will Tunisian women be granted equal inheritance human rights?*, cit.

[42] I. ZAYAT (2020), *Tunisian president rejects gender equality in inheritance*, in *The Arab Weekly*, available online.

[43] *Ibidem*.

2017 was also the year of the new electoral law in Tunisia, which granted women the right to equal participation in elections, even for positions at the top of the lists.[44]

The revolution had triggered an interest in politics. For many women, however, this interest was accompanied by demotivation, which was exacerbated by factors such as low educational attainment, unemployment, underemployment, or engagement in the informal economy.[45] Additionally, the dynamics connected with the first elections held after the Jasmine Revolution, the municipal elections of the 6th of May 2018, confirmed persistent gender inequality in political participation.[46] Women's decisions to participate in politics are reported to be affected by relationships of trust and personal dependence, which are often influenced by patriarchal initiators. The role of opinion leaders appears crucial in shaping women's political opinions and decisions. Furthermore, novice women candidates face discrimination regarding the right to speak and are often victims of the subjective presupposition of competence.

Discriminatory practices are displaced into the daily subtext of interactions and internal relations of small groups.[47] These practices have as alibi 'discursive incompetence' and violations of institutional grammar of meetings, making it hard for women to participate in politics. Finally, age and gender intersect in power relations, which means that discrimination is cumulative for young people and women.

A link between marital status and political experiences has also been identified.[48] For some women, divorce or the fact of remaining single seems to contribute to their empowerment and determination of a lifelong plan.

Gender discriminatory practices may be carried out through a certain reading of constitutional provisions. Although Art. 23 of the 2022 Tunisian Constitution states that male and female citizens are equal before the law, the provisions according to which Tunisia is part of the Is-

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[44] Statute no. 2017-7 amending and supplementing Statute no. 2014-16 of 26 May 2014.

[45] A. SOUMAYA (2023), *Women's Political Citizenship in Tunisia: The May 2018 Municipal Elections and the Gender Gap*, in *Social Sciences*, 12, 150.

[46] *Ibidem*.

[47] *Ibidem*.

[48] *Ibidem*.

lamic nation (Art. 5) and family is the basic unit of society (Art. 12), entrusting the task of both realizing the purposes of authentic Islam (Art. 5) and protecting family to the State, could be used to preserve discriminatory dynamics, justifying curbs on rights.

Not surprisingly, the experts of the Committee on the Elimination of Discrimination Against Women (CEDAW), who have recently concluded their consideration of the seventh periodic report of Tunisia, have asked questions about domestic violence and women's participation in politics, despite considerable legislative and institutional progress made by the country in matters of gender equality. [49]

The Law 58 of 2017 on the Elimination of Violence Against Women, which aims at eradicating all forms of gender-based violence, has not yet achieved the desired results, especially with regard to domestic violence. The report entitled "So What If He Hit You? Addressing Domestic Violence in Tunisia" found that the poor allocation of financial resources for the implementation of the law along with problematic attitudes among the police and judiciary have led to inconsistencies and failures in the State's responses to domestic violence. [50]

Apparently, family law seems to be the law field to start if Tunisia wants to reach gender equality in all areas of life.

Tunisia has a set of family law rules that have been operating since 1956 through various phases of reform. Tunisian family law is generally represented as the vanguard of gender-friendly legislation in the Arab world. However, the new political phase raises further doubts about Tunisia's ability to strongly break with the past and act as a bearer of human rights in the MENA region.

[49] UNITED NATIONS (2023), *Experts of the Committee on the Elimination of Discrimination against Women Commend Tunisia on Achieving Gender Parity, Ask About Domestic Violence and Women's Political Participation*, available online.

[50] HUMAN RIGHTS WATCH (2022), *So What If He Hit You? Addressing Domestic Violence in Tunisia*, available online.

3.1. Family law through circular migration waves between progress and conservatism

Traditionally, Tunisian family was socially central.[51] The society was articulated in lineages.[52] The State was nothing but one of these lineages, and the group was generally organised like a family.

Over time, MENA region countries have adopted family codes in order to overcome the patriarchal model of family and social relationships. These codes make protection of women's rights a primary objective.

The will to protect women's rights seems to date back to a period prior to the codification of family law. In fact, it dates back to the early 19th century and is linked to the role of intellectuals and social reformists, such as Mohamed Abduh, Abdel Aziz Thaalbi, Jamal al-Din Al Afghani, Ibn Abi Al Diaf, Khayr Al Din Bacha and Rifaa Al Tahtawi, who partly attributed the cause of the socio-economic deficit in most Muslim States to the inferior position of women.[53]

These reformists intended to raise the status of women within the Islamic context, modernising the Arab world without westernising the Tunisian State, its people and culture.[54] Most of them defended Islam and its role in protecting women's rights and cautiously advocated for the reform (technically a new *ijtihad*) of Islamic structures, using *sharia* as a departure point to interpret and improve certain laws and principles and referring to the primary sources of Islamic law, namely the Quran and the *sunna*.

In Tunisia, the first commission for the codification of Islamic family law was established under the French protectorate in 1947.[55] Tunisian family law was mainly based on the Maliki legal school, according to

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[51] A. BOOLEY (2019), *Progressive Realisation of Muslim Family Law: The Case of Tunisia*, in *PER / PELJ* (22), 1 ff.

[52] V.M. MOGHADAM (2004), *Patriarchy in Transition: Women and the Changing Family in the Middle East*, in *J. Comp. Fam. Stud.*, 35, 137 ff.

[53] R. KHEDER (2017), *Tracing the Development of the Tunisian 1956 Code of Personal Status*, in *J. Int. Women's Stud.*, 18(4), 30 ff.

[54] A.N. AMIR, A.O. SHURIYE, A.F. ISMAIL (2012), *Muhammad Abduh's Contribution to Modernity*, in *AJMSE*, 1, 63 ff.

[55] On the modernisation process of family law in Muslim countries see R. ALUFFI BECK-PECCOZ (1990), *La modernizzazione del diritto di famiglia nei paesi arabi*, Milan.

which family is a divine institution and marriage is the only form of legitimate union between the sexes.[56]

Marriage is a consensual contract which can be polygamous: a man can have up to four wives – who can be Muslim, Christian or Jewish –, whilst a woman is only allowed to have one Muslim husband.

Marriage subjects are the future spouses (who must be sound of mind, have attained puberty and be able to consummate marriage) and the marriage guardian (known as *wali al-nikah*).

The *wali* is usually the father. He must satisfy the same criteria required to act under Islam: he must be a free Muslim sound of mind who has attained puberty and complies with ethical-religious principles of Islam. He integrates the bride's will and, therefore, allows to conclude the contract.

For the marriage to be valid, the genuine will of the parties is required. No official forms are needed for the expression of the consent, however. The contracting parties must be present and consent cannot be subject to deadline or condition.

The object of the marriage contract is twofold. The man has to pay the *mahr* as a nuptial gift for the woman and to comply with a set of obligations arising from marriage, in return for his authority over the woman and the physical pleasure that the woman is required to perform.

The *mahr* is to be paid to the woman, who may use it as she wishes. Part of the *mahr* is usually paid at the time of the conclusion of the marriage contract, while the other part is paid at a later moment, such as the husband's death or in case of repudiation.

When it comes to the form, Islamic marriage requires the presence of two Muslim free male witnesses who are sound of mind, have attained puberty and are able to bear witness.

The lack of the abovementioned elements (that is to say, subjects, consent, object, form) nullifies the marriage contract.

Islamic law identifies a set of impediments to marriage: blood kinship, breast-feeding, affinity (relationship due to marriage, in-law relationship), the existence of a previous marriage, a triple repudiation, difference in social condition and difference in faith. In this last respect, it should be added that a Muslim woman cannot marry a non-Muslim man, while a Muslim man is allowed to marry a non-Muslim woman as

[56] On Maliki Muslim law, including family law rules, plese see D. SANTILLANA (2017), *Istituzioni di Diritto Musulmano Malichita con riguardo anche al sistema sciafiita*, Rome, 198 ff.

long as she is either Christian or Jewish, who are called "The people of the Book".

Personal relations between wife and husband are marked by the principle of natural superiority of the man over the woman, which means that the wife is to obey her husband, who is to provide for her maintenance in return. Property is ruled by the principle of separation of assets.

Rules concerning the dissolution of marriage encompass remedies that deal with defects and imperfections of marriage contract (such as the lack of the *wali al-nikah*, the existence of redhibitory defects, breach of contract), and tools that help to obtain the dissolution of a valid marriage.

Voluntary causes producing the dissolution of a valid marriage are to be distinguished between repudiation (*talaq*), which is the husband's right to unilaterally put an end to marriage (it can have different forms), and *khul'*, under which the wife is allowed to provide compensation to her husband in return for the dissolution of marriage. Judicial dissolution of marriage is also provided in the cases strictly indicated by Islamic law.

Family law remained the domain of Muslim judges (*qadi*), who adjudicated disputes within religious courts or tribunals.[57]

During the French Protectorate, the French colonial officials used not to interfere with the Islamic family law because this could lead to social disorders, while laws pertaining to contracts and property were amended for economic and political reasons.

On the eve of independence, a conflict arose between two major nationalist factions: those supporting modernization, led by Habib Bourguiba (this faction also included partisans of the New Constitutional Liberal Party, referred to as Neo Destour), on the one hand; and a group led by Ben Yousef, who held on to the traditional practices, on the other hand.[58] These factions had opposing views about the role of Islamic establishment and kin-based groupings.

Tunisia gained independence on March 20, 1956, under the presidency of Bourguiba. The Code of Personal Status was enacted six

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[57] M. ZEGHAL (2013), *The Implicit Sharia: Established Religion and Varieties of Secularism in Tunisia*, in W. FALLERS SULLIVAN, L.G BEARMAN (eds.), *Varieties of Religious Establishment*, London, 107 ff.

[58] J.N.D. ANDERSON (1958), *The Tunisian Law of Personal Status*, in *ICLQ*, 7, 262 ff.

months after the independence and was introduced as a law on January 1, 1957.[59]The CPS has no explicit reference to Islamic law.[60] It did not abolish the *sharia*, however, nor did it replicate the European model, as in the case of Turkey under the leadership of Ataturk.[61] Its reforming spirit was intended to find a comprise between tradition and modernity.

The CPS applies to all Tunisians, without distinction of religion, and is based on the Maliki legal school. It complemented a wider State-building programme aimed at the construction of a modern centralised State, and targeted towards efforts to diffuse tribalism, classism and kin-based communities in the rural and urban areas.[62]

The promulgation of the CPS made marriage a voluntary and consensual union between parties of a certain age (for males the prescribed age was 18 years old and for females 15 years old), in front of two worthy witnesses. The dower (*mahr*) must be specified and paid to the future wife. Polygamy was prohibited, and divorce procedures could be undertaken by both spouses only before the court, which was called upon to determine the financial indemnity to which the wife may be entitled because of damages. The court was also empowered to take all the measures for the accommodation of the spouses, their maintenance and the upbringing of children, whose well-being became a paramount principle.

The CPS has been revised several times since 1956.[63] Currently, marriage is a contract between a man and a woman who have reached the age of 18 and are not in one of the cases of impediment provided by law.[64] A prenuptial medical certificate must be provided by both parties for the establishment of marriage.

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[59] A. BOOLEY (2019), *Progressive Realisation of Muslim Family Law*, cit., 11 ff.

[60] A. CHERIF AMMARI (2007), *La condition juridique des femmes dans le code de la famille en Tunisie*, in *Après-Demain*, 1, 24-32.

[61] J. WEIDEMAN (2016), *Tahar Haddad after Bourguiba and Bin Ali: A Reformist between Secularists and Islamists*, in *Int. J. Middle East Stud.*, 48, 47 ff.

[62] M.M. CHARRAD (2007), *Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation*, in *Wash. & Lee L. Rev.*, 64, 1513 ff.

[63] A. BOOLEY (2019), *Progressive Realisation of Muslim Family Law*, cit., 14 ff; A. CHERIF AMMARI (2007), *La condition juridique des femmes dans le code de la famille en Tunisie*, cit., 24-32.

[64] Art. 5 of the CPS, which had been amended by Law no. 1 of 21 April 1964 (according to which the prescribed age for marriage was 17 years old for

Marriage is concluded by clear and mutual consent of the future spouses in the presence of two honourable witnesses. A man and a woman can conclude their marriage in person or through a special legal representative appointed by a notarial deed for the clear purpose of marriage.

Marriage must be celebrated either in the presence of two notaries or before the State registrar. Marriage concluded by a mean other than either two notaries or State registrar is considered null. The marriage officer transcribes the marriage certificate in the civil registry and hands over it to the spouses.

In the case of marriage of a minor, consent of both parents is required. If the consent by both is refused, and the minor persists, the judge must decide. He can grant an age exemption on behalf of parties in case of grave necessity.

The marriage contract requires the determination of the dowry. It must indicate whether the payment of the dowry is immediate or subsequent. If the dowry has yet to be paid, the husband cannot compel the woman to consummate the marriage. After the consummation, she can claim payment. Failure to pay by the husband does not entitle the wife to file for divorce. The wife is entitled to half of the dowry in case of divorce before marriage consummation.

Clauses concerning people and goods can be also incorporated in the marriage contract.

There are permanent and provisional impediments to marriage. An example of permanent impediments is the existence of blood relationship, while provisional impediments include the existence of an ongoing marriage. Polygamy continues to be expressly prohibited.

The wife's duty of obedience to her husband has been abolished. Both spouses have rights and obligations: to treat each other kindly, avoid causing each other harm and to stay faithful; to fulfil their marital duties according to customs and practices; to cooperate in the conduct of family affairs, the good upbringing of their children and the management of children's affairs. [65]

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females and 20 years for males), was further amended by Law no. 32 of 14 May 2007.

[65] It may be worth adding that, according to Mayer, the language of the CPS closely resembles the modern *French Civil Code*, which stipulates that the spouses together are to ensure the moral and material direction of the family, provide for both the education of the children and their preparation for the future. See E. MAYER (1995), *Reform of Personal Status in North Africa: A Problem of Islamic or Mediterranean Laws?*, in *Middle East J.*, 49, 432 ff.

The husband is still considered as head of the family and must support the family members. Nevertheless, he has no power of administration over his wife's property. The wife must contribute to the expenses of the family if she has the means.

Marriage can be dissolved by nullity or divorce. A marriage contract containing a clause which is contrary to the essence of marriage or is entered into in contravention of the provisions contained in the CPS concerning the consent of the spouses, impediments to marriage and polygamy, is void.

The void marriage is dissolved without undertaking divorce procedures. However, a consumed void marriage gives the wife the right to claim the dowry contained in the marriage contract or determined by the judge. Other consequences are, for instance, the establishment of filiation and the obligation for the woman to observe the *'idda*, namely the legal withdrawal that runs after the separation.

Divorce can only take place in court. The CPS stipulates that there are three possibilities for divorce to be declared: 1) in case of mutual consent of both parties 2) upon the request of the spouse who suffers prejudice at the hands of the other spouse 3) upon the request of the husband or wife.

In case of monetary damage, the woman can demand a monthly allowance which is paid at the end of the *'idda* period and depends on the standard of living to which she was accustomed during the marriage. [66]

Another step in the realisation of women-friendly family legislation was the 2017 legislative intervention that enabled Tunisian Muslim women to marry non-Muslim men, by putting an end to a ban introduced by a 1973 circular. [67] Although the CPS does not include impediments to this kind of marriages, the difficult relationship between written law and the day-to-day operation of law is demonstrated by civil servants and judges pronouncing inter-faith marriages as null and void. [68] This state of things causes Tunisian women to emigrate in order to get married, adding a further element in the migration circle.

In the light of the above, it seems evident that, although Tunisia is

[66] H. CHEKIR (1996), *Women, the Law, and the Family in Tunisia*, in *Gender and Development*, 4, 43 ff.

[67] A. BOOLEY (2019), *Progressive Realisation of Muslim Family Law*, cit., 18 ff.

[68] M. VOORHOEVE (2012), *Judicial Discretion in Tunisian Personal Status Law*, in M. VOORHOEVE (ed.), *Family Law in Islam: Divorce, Marriage and Women in the Muslim World*, London, 1 ff.

widely represented as a pioneer of gender/human rights-friendly laws in the Arab world, the democratic path inaugurated by the early reformists and fuelled by the 2011 Revolution, finds an obstacle in the reluctance of Tunisian institutions to effectively meet social needs.

An ally in the struggle for human rights could be identified in the social networking sites, better known as social networks, as a (new) potential instrument of impulse to democratic development, the use of which dates back to the days of the Revolution.

At present, Tunisian women, as well as other social and political movements in Tunisia – as elsewhere – claim their rights through a variety of instruments that include social networks, where the type of communication guarantees that their demands as well as the values behind them circulate quickly, reaching large numbers of people around the world.

Social networks witness the convergence of emerging needs from various social groups, who increasingly voice and share their demands on these platforms. Consequently, the circulation of legal rules and underlying systems/models, which is generally linked to people's movements from place to place and sometimes occurs in a circular form, also follows routes connected to digital instruments.

Both physical circularity, understood as a circularity of migrations, namely of people who migrate through circular movements of comings and goings bringing with them a set of values, principles and rules, and digital circularity, understood as a circularity of contents spread through social networks, may contribute to stimulate legal debate in a country, resulting in legal developments.

In Tunisia, the fight for democracy and the recognition of human rights takes place both on social platforms and in the classic *fora* since the Revolution. A harsh response from the State does not prevent people from continuing to resort to authorities or protesting in the streets to promote change, showing a country moving between an old and new world.

3.2. From the circularity of migrations to digital circularity: social networks as a boost to legal changes in Tunisia?

The role of social networks in the changes connected with the Tunisian Revolution has been questioned over time. According to a current of thought, social platforms such as Facebook played a significant role in

sparking and feeding the protests, since it provided Tunisians with a forum that built shared awareness, "creating a common cause and understanding that kept mobilizing Tunisian 'netizens' to reclaim their rights as citizens, and, in the end to oust Ben Ali's regime'". [69] Communication was direct, transparent and faster, since messages travelled in an instantaneous manner.

Women, for their part, have been described as big users of social media during the Revolution, resulting in a sense of personal empowerment and collective potentiality that was fundamentally linked to the communicative platform. [70]

In contrast, some scholars argue that social networks only partly contributed to the uprisings, since economic, political and historical factors were much more important, even suggesting that social media companies tried to undermine the protests. [71]

Yet there is something more than the ability to quickly connect people when it comes to this type of social *medium*. Social networks convey a way of seeing, understanding and living the world. They contribute to spread a certain picture of things, places and people. This is also true for the general representation of Europe and the Western world, which motivates people to migrate and accompanies them even when they forcibly or voluntarily get back to their home country.

Twelve years after the Revolution, we should ask ourselves whether and to what extent social networks, through the promotion of a lifestyle which wants to establish itself as an expression of a more advanced Western thought, may exert some influence on domestic legal claims and related developments.

The first thing to say is that "in Tunisia, until January 2021 the number of social media users has increased to 8.20 million, which represents 69 percent of the total population, while 97%, are accessed via mobile phones. According to the ALEXA report, Google.com, Facebook are

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[69] M.G. MULLER, C. HUBNER (2014), *How Facebook facilitated the Jasmine Revolution. Conceptualizing the functions of online social network communication*, in *J. Soc. Media Stud.*, 1, 28.

[70] C.C. RADASCH, S. KHAMIS (2013), *In their own voice: Technologically mediated empowerment and transformation among young Arab women*, in *Fem. Media Stud.*, 13, 887.

[71] A. SMIDI, S. SHAHIN (2017), *Social Media and Social Mobilisation in the Middle East: A Survey of Research on the Arab Spring*, in *India Q.*, 73, 199 ff.

the most used networks by Tunisian people. Most importantly, 18,5% of Facebook users are under 13 years old".[72]

The use of social networks involves both those who govern and the governed ones. E-government has been significantly impacted by the Information and Communication technologies (ICTs), in particular by social networks, which are increasingly used by governments as an e-participation instrument for a better involvement of citizens in decision-making process.[73]

Tunisian government institutions are strongly present on social networks, first among all Facebook, to reinforce their communication strategy with citizens.[74] However, their use is limited to giving information and posting news, without using the virtual space for leading discussions or animating debates that can actually result in a better citizen participation.

On the front of the governed ones, the growing role played by social networks around the world has led many people to make them their profession. The so-called 'influencers' use social networks to direct users' opinions on a variety of topics, products and places. In 2017, influencer marketing was the most widespread and trendiest communication strategy used by the companies.[75] Many marketing experts consider influencers as opinion leaders because of their role in persuading and influencing their followers.

Young people and teenagers are the most sensitive to social networks, which affect their ideas, decisions and actions.[76] This does not

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[72] K. LAJNEF (2023), *The effect of social media influencers' on teenagers Behavior: an empirical study using cognitive map technique*, in *Current Psychology*, available online.

[73] C. CHAIEB, H. ACHOUR, A. FERCHICHI (2018), *E-Government and Social Media in Tunisia: An Empirical Analysis*, in M.A.B. TOBJI, R.J.Y. KOUBAA, A. NIJHOLT (eds.), *Digital Economy: Emerging Technologies and Business Innovation*, Third International Conference, ICDEc 2018 Brest, France, May 3-5, 2018, Proceedings, 173 ff.

[74] C. CHAIEB, H. ACHOUR, A. FERCHICHI (2018), *E-Government and Social Media in Tunisia*, cit., 173 ff.

[75] M. DE VEIRMAN, V. CAUBERGHE, L. HUDDERS (2017), *Marketing through Instagram influencers: The impact of number of followers and product divergence on brand attitude*, in *International Journal of Advertising*, 36, 798 ff.

[76] Consequences include mental health problems. According to the 2020 MICS6 Survey, 18.7% of children aged 15-17 years suffer from anxiety, while 5.2% are depressed. The incidence of suicide among children (0-19 years old)

always occur in a positive manner. An example of the kind of distortion connected with the influence of social network among the youth is the documented landing of Tunisian influencers in Lampedusa between November and December 2021.[77] In a photo posted in November, the 18-year-old Sabee al Saidi shared a video of herself crossing the Mediterranean on a boat with other irregular migrants, while she smiled and gestured to a popular rap song. A month later, Chaima Ben Mahmoude, filmed and shared the dangerous sea crossing with her fiancé in a boat crowded with migrants. Once landed in Lampedusa, the two women travelled across Europe sharing pictures of themselves in luxury cars and boutiques.

The controversy surrounding these posts was linked to the fact that the two Tunisian social media influencers glamourised a journey that causes thousands of deaths every year, with the risk of inspiring people to make the dangerous crossing. According to the Missing Migrants Project, 2,048 people went missing in the Mediterranean in 2021.[78]

From a certain perspective, social networks have become the glossy window on the West, which is generally perceived as a legal space that offers rights (and subsequent opportunities) that are denied in some parts of the world, including Tunisia.

Undeniably, although the events of the Arab Spring have led to the destruction, or at least to the weakening, of a multi-level oppressive regime in the country, the road to democratisation and the introduction of significant legal safeguards seem to be still far away. Tunisia's legal advancements have not resulted in the construction of a State modelled on the values, principles and rules of Western modern democracies. When it comes to gender equality, for instance, there is still a big gap between men and women in the labour market.[79] Nonetheless, it should

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was 2.07 cases per 100,000 in 2016, against 1.4 per 100,000 in 2015. Most child suicides concerned 15-19-year-olds. Although they were in part connected to the intensive use of online games, some scholars emphasise that scientific studies rarely test the link between social media use and psychological disorders for young people in the Tunisian context. See K. LAJNEF (2023), *The effect of social media infuencers' on teenagers Behavior*, cit.

[77] THE INDEPENDENT (2022), *Tunisian women's posts glamorize risky migrant crossings*, available online.

[78] *Ibidem*.

[79] Z.X. SIPOS (2022), *Women's Role in the Tunisian Process of Democratisation*, in *AARMS*, 21, 75.

also be pointed out that women are not alone in suffering the consequences of the Tunisian labour market. Tunisia has a labour market which is mainly based on informal employment. Workers, both male or female, are not granted rights, are subject to harsh working conditions, low incomes and unpaid vacations, and are denied work safety and health assistance. [80]

Gender discrimination also affects the access to social networks for political purposes in Tunisia. The use of Facebook by political candidates during the 2019 Tunisian parliamentary election campaign showed a gender bias: men were more likely to have a Facebook public figure page because party decision-makers had prioritised to put men as top candidates. [81] Party resources are scarcer in the Tunisian context, so that very few candidates per party have a chance to be elected to Parliament, and the large majority are men. As a result, in the elections of 2019, women candidates were less likely to have access to resources to run a public profile, and/or party gatekeepers did not perceive it as useful to the campaign in social media due to their small chances of being elected. [82]

The current political, legal and social situation in Tunisia means that the demands of the population did not change since the Jasmine Revolution: work, democracy and human rights. Following 2022 internal and international political events and the worsening of the economic crisis, 2023 opened with social unrest. Against a background of unemployment levels and food inflation of over 15% and significant public debt, [83] Saïed's decisions and actions have exacerbated the Tunisian citizens' discontent, which in turn has been further aggravated by the energetic crisis linked to Russia's invasion of Ukraine. The result is that several segments of society, political opponents and the main trade unions have gone the streets to demonstrate. [84]

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[80] B. ESSID, E. CLAESSENSE (2020), *L'access au travail des migrants en Tunisie: du cadre juridique à la pratique*, L'Essentiel, Terre d'Asile-Tunisie, Mai 2020.

[81] M. HOLM, Y. SKHIRI, P. ZETTERBERG (2023), *Political institutions and the gendered use of social media among political candidates: evidence from Tunisia*, in *J. Inf. Technol. Politics*, available online.

[82] M. HOLM, Y. SKHIRI, P. ZETTERBERG (2023), *Political institutions and the gendered use of social media among political candidates*, cit., available online.

[83] Y. SIHER (2023), *Tunisia, la crisi economica tiene l'Europa col fiato sospeso per paura di una nuova destabilizzazione del Mediterraneo*, in *Il Fatto Quotidiano*, available online.

[84] L. FRUGANTI (2023), *Tunisia: come uscire dalla crisi?*, in *ISPI: Istituto per*

The actors of the street protests share their human rights 'field battle' with the rest of the world through social media, showing an intersectional approach marked by different claims: freedom of expression, right to exercise political opposition, women's empowerment, gender equality within the family, at work and in society – in particular reform of inheritance law –, application of the organic law on the elimination of domestic violence, right to work and specifically right to access to the official labour market, improvement of working conditions, social equality, decriminalisation of conditions such as belonging to the LGBT+ community, release of political prisoners, stop to the authoritarian drift of the country and, last but not least, resignation of the President Saïed.

At present, the attractiveness exerted by Europe as a land of freedom, democracy and human rights, faced with concerns and uncertainties linked to Tunisia's present political phase, are magnified by social networks, whose role has gone beyond socialization and the sharing experiences and information.

Social networks have turned into a new power centre. On the one hand, they direct people's life choices, especially young people; on the other hand, they have become a sort of 'complementary', or even 'alternative', site of social, political and legal discussion, where emerging needs linked to changing values tend to converge. This latter aspect might be explained by the fact that social networks represent a space where opinions and ideas seem to make their way more easily than they do in the 'real' space, where they may encounter barriers. Sometimes new needs even arise in the *social* space.

At this stage, it is not possible to say if social networks are destined to prevail over/replace existing instruments of claim. When it comes to the endless Tunisian struggle for human rights, one thing is clear: mobilization over the territory is still strong in the country, despite the harsh response from the Government. Accordingly, although both action over the territory and social sharing seem to be indispensable to ferry Tunisia to the long-awaited democracy, the possibility of resorting to *softer* and *safer* instruments to convey human rights claims should not be discouraged in such a context, where repression is widely used as a means of quelling protests.

Social networks, because of their very characteristics, allow individu-

gli Studi di Politica Internazionale, available online; G. ACCONCIA (2021), *A Tunisi la rivoluzione continua. Donne e comunità Lgbt sono in prima linea*, in *Huffpost*, available online.

als to defend a cause by instantly sharing it with the world, while simultaneously protecting them from the potential negative consequences – physical violence, arrests, political deadlock – connected with the use of classical instruments of claim in some countries, Tunisia included. Additionally, social networks may make room for topics that – for many reasons – struggle to find room in the traditional sites of political and legal debate, enriching themselves with the voices of migrants returning from foreign countries, where they experience different systems of values, principles and rules, and those of the new generations of Tunisians, who see and understand the world through new lenses.

4. Multi-faceted circularity: final remarks on the circular movements of people and contents

Since the Jasmine Revolution, Tunisia's multi-dimensional crisis has been fuelling feelings of disenchantment and frustration among Tunisian young citizens. Many of them have left the country over the years, by embarking on an irregular and risky boat journey through the Mediterranean to reach Europe, which is generally viewed as a place where human rights, freedom and peace are guaranteed.

Two major peaks have been registered in the Tunisian irregular emigration: a major upsurge in the immediate aftermath of the 2011 revolution, and a new phase in the second half of 2017.

Once in Europe, migrants had to face several challenges: from the lack of primary needs to difficulties in interacting with the host society.

Overall, large outflows both in 2011 and 2017 were accompanied by proportionally comparable figures in terms of returns, the majority of which were forced returns.

Upon return, migrants had to deal with unfavourable socio-economic conditions in their country of origin, which affected their reintegration process, strengthening their will to emigrate again in the future.

Challenges faced by returnees include re-adaptation to a legal framework which appeared to be dominated by traditional power dynamics voiced by populist narratives along Islamist/secularist lines.

Twelve years after the Revolution, Tunisian activism confirms that social needs remain unsatisfied. The adoption of laws protecting human rights has not resulted in the protection of such rights. This is the case, *inter alia*, with women's rights. Tunisian Constitution enshrines

the principle of equality of citizens, male and female, before the law. Likewise, Tunisian laws protect women from any kind of violence, guarantee equal access to the labour market and equal treatment of workers, and grant women the right to equal participation in elections. However, analysis reveals that Tunisian authorities are reluctant to implement the law on the elimination of violence against women, that women continue to suffer discrimination in the labour market, that the political scene has a small number of women running for office and that female candidates are confronted with problems such as difficult access to financial resources, including the use of social network as a campaign tool.

Tunisians clamour for a change. They want to see the democratic path begun with the Jasmine Revolution realised, so as to align the domestic law with the general representation of Tunisia as the vanguard of human rights-friendly legislation in the MENA region.

Meeting social needs by ensuring political confrontation, promoting legal debate and guaranteeing citizens' participation to decisions concerning the country continue to be fundamental steps for the democratic transition. However, the role played by social platforms to convey human rights claims and to know social changes should not be underestimated in a future perspective. The number of social media users is rapidly growing in the country. Facebook has been largely dominating the Tunisian social media landscape since Revolution, and other platforms such as Instagram are gaining ground. Furthermore, social networks are increasingly used by government institutions to communicate with citizens.

The spreading of social networks suggests that the concept of 'informational social influence', which refers to the change in behaviour or opinions that occur when people (consumers) are conformed to other people (influencers) because they believe that they have precise and true information,[85] may also serve the cause of human rights and democracy. Social networks give a voice to the ideals of one or more generations, who mostly demand to live in accordance with values such as equality, freedom, tolerance and plurality within modern democratic States that ensure civil, political and social rights to all the people over their territory.

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[85] On the 'informational social influence' see M. DEUTSCH, H.B. GERARD (1955), *A study of normative and informational social influences upon individual judgment*, in *J. Abnorm. Psychol.*, 51, 629 ff.

In conclusion, emigration and return are phases of a migratory circle which has people as protagonists. However, this is one side of a wider circular movement of values, principles and rules, which occurs through instruments such as social networks.

Since the Revolution, Tunisian citizens have been advocating democratic changes in several areas of law. For this purpose, they not only resort to formal procedures laid down by domestic law or demonstrate in the streets, but use social media, especially social networks. In doing so, different instruments and languages serve the democratic cause, which is so strongly felt that Tunisian citizens have proven to be willing to leave their country when faced with the repeated failures of the democratic project.

Strengthening the traditional democracy instruments, widening the room for the new ones and, at the same time, monitoring social platforms in order to identify emerging social needs, might help to promote debate and legal reforms in Tunisia, as elsewhere in the world.

Chapter 24

THE PROTECTION OF INTERNATIONAL MIGRANTS BETWEEN INTERNATIONAL HUMANITARIAN LAW, INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL REFUGEE LAW

Egeria Nalin

ABSTRACT: *The chapter aims to analyse the interaction between international humanitarian law, international human rights law and international refugee law in the context of movements of persons, mainly caused by armed conflicts. As migrants may find themselves in a country involved in an armed conflict, and an armed conflict may determine exodus, international humanitarian law includes important rules for protecting migrants. Moreover, in times of armed conflicts and military occupation, refugee law and international human rights law continue to apply, as recognised by numerous domestic and international tribunals. Thus, all the mentioned provisions may provide specific protection, including against* refoulement*, to international migrants. On those grounds, the chapter will ascertain whether these normative systems relate to each other in terms of complementarity and cross-fertilisation so that their interplay may result in the maximum protection of migrants' rights.*

1. Migrants and armed conflicts

Although one of the primary aims of international humanitarian law (henceforth IHL) is to prevent the forced movement of persons either internally or externally, international migrations frequently find their

cause in armed conflicts if characterised by generalised violence against civilians and by the commission of war crimes, as in Afghanistan, the Central African Republic, the Democratic Republic of the Congo, Somalia, South Sudan, and Syria, among the others. It may also happen that the receiving country of migrants finds itself involved in a war, as recently happened in Ukraine. In these cases, IHL applies to migrants. To our purposes, drawing on the indications provided by the United Nations Office of the High Commissioner of Human Rights (OHCHR), a migrant is "any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence". [1] Since IHL is based on the principle of distinction between combatants and civilians, to the extent to which migrants can be considered as civilians, as they are not – or are no longer – taking an active part in hostilities, they are – regardless of their nationality – covered by the general rules for the protection of the civilian population, especially contained in the Geneva Convention IV of 12 August 1949, relative to the Protection of Civilian Persons in Time of War (GC IV), in Protocol I and II Additional to the Geneva Conventions of 12 August 1949, adopted on 8 June 1977 and relative to the Protection of Victims of International Armed Conflict (AP I) and to the Protection of Victims of Non-International Armed Conflict (AP II). [2]

In addition, as migrants "find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals" (GC IV, Art. 4), they are also "protected persons" under GC IV and are entitled to specific protection.

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[1] Recommended Principles and Guidelines on Human Rights at International Borders, Geneva, 2014, Ch. I, para. 10. For a distinction between migrants and refugee, see *The New York Declaration for Refugee and Migrants*, 16.9.2016, UN Doc. A/RES/71/1, and in the following *Global Compacts for Safe, Orderly and Regular Migration* (19.12.2018, UN Doc. A/RES/73/195) and *Global Compact for Refugees* (affirmed by the General Assembly on 17 December 2018).

[2] See Common Art. 3 GC, Art. 13 GC IV, Art. 2 AP II, Art. 4 AP II. According to the Commentary to AP (Y. SANDOZ, C. SWINARSKI, B. ZIMMERMANN (eds.) (1987), *Commentary on the Additional Protocols*, Geneva, hereinafter *ICRC Commentary APs*, para. 4489), the Protocol refers to "all residents of the country engaged in a conflict, irrespective of their nationality, including refugees and stateless persons". On IHL and the principle of non-discrimination based on nationality, see H. OBREGO GIESEKEN, *The Protection of Migrants Under International Humanitarian Law*, in *IRRC*, 2017, 99(1), 121 ff., especially 126-128.

Finally, they may be regarded as "refugees" under the following articles. According to Art. 44 GC IV, refugees are aliens "who do not […] enjoy the protection of any government". Moreover, Art. 70 GC IV concerns "nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State". Furthermore, according to Art. 73 AP I, they are "persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons". The reference to the "relevant international instruments" contained in Art. 73 AP I must be understood as including the 1951 Geneva Convention relating to the *status* of refugees, as well as the relevant regional Conventions (such as the 1969 Organization of Africans Unity (OUA) Convention Governing the Specific Aspects of Refugees Problems in Africa) and, according to the preferable opinion, acts of soft law (such as the Latin American 1984 Cartagena Declaration on Refugee). Otherwise, the definition of refugee referred to in Arts. 70 and 44 GC IV disregards the mentioned international Conventions to include those "who have been forced by events or by persecution to leave their native land and seek asylum in another country" and that, therefore, do not enjoy the protection of any government.[3] It is also noteworthy that the attribution of the *status* of protected persons confers a level of protection higher than the one guaranteed by Art. 70. Indeed, Art. 70's rationale is to avoid refugees being punished because of their *status* or for leaving their country of origin, and to guarantee that they continue to enjoy the protection offered by the refugee *status*. It therefore prevents nationals of the Occupying Power and refugees in the occupied State from being "arrested, prosecuted, convicted or deported from the occupied territory, except for offenses committed after the outbreak of hostilities, or for offenses under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace". Finally, since Art. 44 GC IV does not require that refugees be recognised as such before the beginning of hostilities, a person who deserted into the adversary's territory during hostilities would be protected under that provision like the ones who had been

[3] See J. PICTET (1958), *Commentary Geneva Convention IV, Relative to the Protection of Civilian persons in Time of War* (hereinafter *Commentary GC IV*), Geneva, Art. 44, 263, and Art. 70, 350.

granted asylum before the beginning of the armed conflict. Indeed, while most migrants are considered civilians under IHL, they may be combatants, depending on their *status* under the Geneva Conventions and AP I,[4] and become migrants in need of international protection as deserters.[5]

As regards protected persons and refugees, IHL established, among others, specific non-*refoulement* obligations.[6] Art. 45 GC IV provides essential restrictions on the right of a Party to the conflict to transfer protected persons. Art. 45 defines transfer as "Any movement of protected persons to another State, carried out by the Detaining Power on an individual or collective basis", including internment in the territory of another Power, the returning of protected persons to their country of residence, or their extradition.[7] Nevertheless, the provision does not apply in case of repatriation to the country of origin of the people who are transferred as it "has the effect of placing the transferees in the position of nationals" and, therefore, entails the termination of the *status* of protected persons.[8] Deportation is also excluded in individual cases, "when State security demands such action".[9] In other cases, "Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention". This prohibition of indirect or

[4] In these circumstances, once in enemy hands, they shall also enjoy protection as prisoners of war (POW).

[5] On the conditions for claiming refugee *status* for deserting soldiers, see UNHCR, *Guidelines on International Protection no. 10, Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 12 November 2014, HCR/GIP/13/10/Corr. 1.

[6] Where applicable, migrants are also protected by the provisions relating to missing and dead persons (Part II, Section III of AP I), by those relating to relief in favour of the civilian population, and to the treatment of persons when in the power of a Party to the conflict (Part IV, Sections II and III of AP I). Moreover, GC IV and AP I contain rules on the reunion of dispersed families and the search for missing and dead ones.

[7] See J. PICTET (1958), *Commentary GC IV*, cit., Art. 45, 266.

[8] *Ibidem*.

[9] If expulsion occurs, it must be carried out under humane conditions, and persons concerned "must be able to present their defense without any difficulty" (J. PICTET (1958), *Commentary GC IV*, cit., Art. 45, 266).

secondary *refoulement*, when the receiving State fails to observe GC IV in an important respect, entails an obligation of the Transferring Power to ensure the fulfilment of these obligations by the receiving State. Hence, if "its efforts remain in vain, the transferring Power may request the return of the protected persons in order to directly resume its obligations under the Convention". After such a request, the receiving State is obliged to comply with it.[10] Notably, the transferring State's obligation to take steps to prevent the receiving State from committing violations also derives from the application of Common Art. 1 GC, implying for all the High Contracting Parties (HCP) the obligation to respect and ensure respect for those Conventions in all circumstances.[11]

Art. 45 IV CG also provides that "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs".[12] It is worth noting that none of the limitations outlined in this Article apply to the extradition issued under treaties concluded before the outbreak of hostilities if protected persons are accused of offenses against ordinary criminal law. Moreover, the provision does not impede "the repatriation of protected persons, or their return to their country of residence after the cessation of hostilities" – although it does not require that the State of residence ensure the reception of migrants in an irregular position, who fled its territory because of the war.

At the same time, Art. 49 GC IV establishes that "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their

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[10] J. PICTET (1958), *Commentary GC IV*, cit., Art. 45, 268 ff.

[11] See, also for further references, L. CONDORELLI, L. BOISSON DE CHAZOURNES (2000), *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, in *IRRC*, 837, 67 ff.; C. FOCARELLI (2010), *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*, in *EJIL*, 21, 125 ff.; GEISS R. (2015), *The Obligation to Respect and Ensure Respect for the Conventions*, in A. CLAPHAM, P. GAETA, M. SASSÒLI (eds.), *The 1949 Geneva Conventions. A Commentary*, Oxford, 111 ff.

[12] In the sense that the notion of persecution should not be understood based on refugees' law, but refers to serious violations of human rights (right to life, freedom, and security) on enumerated grounds, see R. ZIEGLER (2021), *International Humanitarian Law and Refugee Protection*, in C. COSTELLO M. FOSTER, J. MCADAM (eds.), *The Oxford Handbook of International Refugee Law*, Oxford, 221 ff.

motive". The principle is reaffirmed for internal conflicts by Art. 17 AP II, not allowing for the displacement of the civilian population for reasons related to the conflict, unless the security of the civilian population or imperative military reasons so require. In other words, the norm allows the displacement to prevent civilians from being exposed to grave danger, such as an imminent attack or the risk of becoming human shields.[13]

Of course, protected persons who wish to leave are not barred from doing so (unless the security of the population or imperative military reasons require their detention: Art. 49(5) GC IV),[14] but their right to flee does not necessarily imply a duty of reception for third Countries under IHL. Nonetheless, the very violation of IHL committed by the Parties of the armed conflict could entitle those fleeing the war to claim the *status* of refugee[15] or other forms of international protection,[16] as such, also providing an obligation of non-*refoulement*.

2. The interrelationships between international humanitarian law, international human rights law and international refugee law for the protection of migrants

For the 1951 Geneva Convention, the term refugee shall apply to any person who "owing to well-founded fear of being persecuted for rea-

[13] Y. SANDOZ, C. SWINARSKI, B. ZIMMERMANN (eds.) (1987), *ICRC Commentary APs*, cit., Art. 17, AP II, para. 4856 ff.

[14] In this regard, the J. PICTET (1958), *Commentary GC IV*, cit., (Art. 49, 283) affirms: "Thus, two considerations – the security of the population and 'imperative military reasons' – may, according to the circumstances, justify either the evacuation of protected persons (para. 2) or their retention (para. 5). In each case, real necessity must exist; the measures taken must not be merely an arbitrary infliction or intended to serve in some way the interests of the Occupying Power".

[15] For a detailed analysis of the conditions for claiming the *status* of refugee in times of armed conflicts, see UNHCR Guidelines on International Protection no. 12: Claims for refugee *status* related to situations of armed conflict and violence under Art. 1(A)(2) of the 1951 Convention and/or 1967 Protocol relating to the *Status* of Refugees and the regional refugee definitions, 2 December 2016, HCR/GIP/16/12.

[16] C. WOUTERS (2021), *Conflict Refugees*, in C. COSTELLO *et al.* (eds.), *The Oxford Handbook of International Refugee Law*, Oxford, 815 ff. On the relationship between IHL and IRL, see also S. JAQUEMET (2001), *The Cross-Fertilization of International Humanitarian Law and International Refugee Law*, in *IRRC*, 843, 651 ff.

sons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" (Art. 1(A)(2)). The well-founded fear requires a prospective assessment based on the applicant's personal circumstances and the destination country's general situation. The existence of an armed conflict can impact this latter aspect. Furthermore, the individual nature of the fear does not exclude the collective character of the persecution. [17] Actually, the persecution on racial, religious, national, social, or political grounds often represents some of the causes of modern armed conflicts. Finally, applying the relevant IHL rules could be relevant to determine whether the aspiring refugee or person entitled to humanitarian protection has committed war crimes, suitable for excluding access to this *status* (Art. 1(F)(a)).

The impact of armed conflicts on the recognition of refugee *status* is even greater at a regional law level. Art. 1(2) of the 1969 OUA Convention Governing the Specific Aspects of Refugee Problems in Africa provides that "The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside of his country of origin or nationality". [18] In the same sense, under the Latin American 1984 Cartagena Declaration on Refugee, "in view of the experience gained from the massive flows of refugees in the Central American area […] bearing in mind the OAU Convention (Article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human

[17] On the relationship between IHL and the definition of persecution in Art. 1(A)(2) of the Convention on the *Status* of Refugee, see E. FRIPP (2014), *International Humanitarian Law and the Interpretation of 'Persecution' in Article 1A(2) CSRS1*, in *Int. J. Refug. Law*, 26, 382 ff.

[18] IHL significantly influences the definition of military occupation under the OAU Convention: see the UNHCR, *Guidelines on International Protection no. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, HCR/GIP/16/12, cit., para. 55.

Rights […] the 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".

Under European Union law, Art. 15 of the so-called qualification directive guarantees subsidiary protection to civilians fleeing indiscriminate violence in an internal or international armed conflict seriously and individually threatening a person's life. [19]

Finally, according to the jurisprudence of the treaty bodies of the main IHRL Conventions, a general and mandatory prohibition of *non-refoulement* [20] exists when persons are at risk of torture or inhuman and degrading treatment, [21] or if they fear for their own life. Such fear or risk may well derive from situations of generalised violence existing in the country of origin or some areas thereof. [22] The same Conventions pro-

[19] In defining who a civilian is, what indiscriminate violence or an international or non-international armed conflict are, the Court of Justice of the European Union has disregarded IHL and, taking into account the object and purposes of EU Law and the Charter of Fundamental Rights, has provided a broader interpretation (see ECJ, Grand Chamber, judgment 17.2.2009, *Elgafaji and Others*, case C-465/07, for a definition of indiscriminate violence and civilian, judgment 30.1.2014, *Diakité*, case C-285/12, for a definition of armed conflict).

[20] On the prohibition of *refoulement* under the IHRL rules, see, even for other references, G. CELLAMARE (2021), *La disciplina dell'immigrazione irregolare nell'Unione europea*, II ed., Torino, 146-185.

[21] CCPR, General Comment no. 20, 10 March 1992, *Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or degrading Treatment or Punishment)*, A/44/40, para. 9; General Comment no. 31, 26 May 2004, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13, para. 12; ECHR, Grand Chamber, judgment 7.7.1989, application no. 14038/88, *Soering v. United Kingdom*, paras. 88-91. See, also, UN Sub-Commission on the Promotion and Protection of Human Rights, Res. 2005/12, *Transfer of Persons*, 12 August 2005, E/CN.4/2006/2, 25, para. 3.

[22] CCPR, views 23.11.2009 *Kwok Yin Fong v. Australia*, 23 November 2009, CCPR/C/97/D/1442/2005, paras. 9.4, 9.7. See also ECHR, judgment 2.3.2010, application no. 61498/08, *Al-Saadoon v. United Kingdom*, para. 137. See, also, ECHR, judgment 14.2.2017, application no. 52722/15, *S. K. v. Russia*, paras. 55-63, where the Court recognises the existence of general violence in Syria, since "various parties to the hostilities have been employing methods and tac-

vide a prohibition of collective expulsions,[23] which can also apply to people fleeing war.

On such premises, on the one hand, migrants may enjoy protection under IHL; on the other, anyone fleeing an armed conflict or a situation of generalised violence and massive violation of fundamental rights deriving from it may be entitled to seek international protection under the mentioned provisions, or refugee *status* under the 1951 Geneva Convention, thus acquiring the right not to be refouled. Therefore, the question arises of the interrelationship between international human rights law (IHRL), international refugee law (IRL) and IHL for the protection of migrants.[24]

3. Problematic profiles of the concurrent application of international humanitarian law and international human rights law in times of armed conflicts and military occupation: the principle of speciality

In this regard, IHRL and IRL apply both in times of peace and in times of armed conflict.[25] Notably, the Convention on refugee *status* applies to persons fleeing peace or wartime persecution. Furthermore, the state

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tics of warfare which have increased the risk of civilian casualties or directly targeting civilians. The available material discloses reports of indiscriminate use of force, recent indiscriminate attacks, and attacks against civilians and civilian objects" (para. 61). Another extreme case of general violence was found to exist in Mogadishu in 2010: see ECHR, judgment 28.11.2011, applications nos. 8319/07 and 11449/07, *Sufi and Elmi v. The United Kingdom*, para. 248.

[23] Arts. 4, Protocol no. 4 ECHRs; 22(9) American Convention on Human Rights (ACHR) of 22 November 1969; 12(5) African Charter on Human and Peoples' Rights (ACHPR), 27 June 1981; 19, Charter of Fundamental Rights of the EU. For the ICCPR, see CCPR, General Comment no. 15, 11 April 1985, *The Position of Aliens Under the Covenant*.

[24] V. CHETAIL (2014), *Armed Conflict and Forced Migration: A Systematic Approach to International Humanitarian Law, Refugee Law, and International Human Rights Law*, in A. CLAPHAM, P. GAETA (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford, 700 ff.

[25] See, even for further other references, E. GREPPI (2013), *To What Extent Do the International Rules on Human Rights Matter?,* in F. POCAR, M. PEDRAZZI, M. FRULLI (eds.), *War Crimes and the Conduct of Hostilities. Challenges to Adjudication and Investigation*, Cheltenham-Northampton, 38 ff.; R. KOLB, G. GAGGIOLI, P. KILIBARDA (eds.) (2022), *Research Handbook on Human Rights and Humanitarian Law*, Chelteham-Northampton.

of war neither extinguishes nor suspends the application of human rights treaties: the Institut de droit international, in the resolution on The Effects of Armed Conflicts on Treaties, approved at the Helsinki session in 1985, affirmed that principle, unless otherwise provided by the treaty (Art. 4), and the International Law Commission in the Draft articles on the effects of armed conflicts on treaties, approved in 2011, included human rights treaties among those not affected by the conflict (Art. 7 and Annex lett. f)). In addition, the main international conventions on human rights, including the UN Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), allow State to derogate, through a specific procedure, from certain rights contemplated by these treaties in the event of armed conflict, thus confirming that, where no derogation occurs, the treaty provisions continue to apply.[26] Finally, in more general terms, the Security Council constantly recalls parties to an armed conflict to comply strictly with their obligations under IHL, IHRL and IRL.

Therefore, as the migrant may be simultaneously entitled to protection under IHL, IHRL and IRL, we propose to ascertain the interaction between these norms: whether these provisions apply concurrently or some should prevail over the others, and, in this latter hypothesis, based on what principles they should have pre-eminence. Finally, we propose to define which interpretative criteria to apply to resolve any conflicts between these bodies of law in case they apply concurrently but seem to offer conflicting solutions (*i.e.*, they seem to contradict each other).

In this regard, it is noteworthy to recall the International Court of Justice (ICJ) jurisprudence. In its advisory opinion of 8 July 1996 on "Legality of the Threat or Use of Nuclear Weapons", the Court confirmed the applicability of the ICCPR in times of war unless States take measures derogating from their treaty obligations. After recalling that no derogation is permitted for certain rights, such as the right not to be deprived of life arbitrarily,[27] the Court declared that what constitutes an arbitrary deprivation of life in times of war shall be defined by applying the rules of IHL, as they constitute *lex specialis* in times of armed con-

[26] Art. 4, ICCPR; Art. 15, ECHR; Art. 27, American Convention on Human Rights (ACHR). See also Art. 72 AP I, which refers to "other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict", and the second preambular paragraph of AP II, which states that "international instruments relating to human rights offer a basic protection to the human person".

[27] ICJ Advisory Opinion 8.7.1996, para. 25.

flict.[28] In the following advisory opinion of 9 July 2004 on "Legal Consequences of the Construction of a Wall in the Occupied Palestinians Territory", the ICJ confirmed the concurrent application of both IHL and IHRL and that the guiding interpretative principle is that of speciality.[29] Finally, in its judgment of 19 December 2005 on "Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)", the ICJ reaffirmed the dual applicability of the two normative systems and the extraterritorial applicability of IHRL (based on the well-known notion of 'jurisdiction' enshrined in the international conventions on human rights) in the event of military occupation of a foreign territory.[30] In other words, the Court argues that IHL and IHRL apply concurrently in times of armed conflict as they complement each other. However, when they collide, as they seem to regulate the same situations differently, IHRL shall be interpreted, as far as possible, in accordance with IHL, that is, the *lex specialis* designated to rule armed conflicts. In addition, when the normative conflict fails to be remedied by interpretation in conformity, applying the principle of speciality, the Court seems to sanction the prevalence of the IHL norm, namely the law applicable specifically in times of armed conflicts.

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[28] "The test of what is an arbitrary deprivation of life, however, falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life through the use of a certain weapon in warfare is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself": *ibidem*.

[29] ICJ Advisory Opinion 9.7.2004, para. 106: "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to consider both branches of international law, namely human rights law and, as lex specialis, international humanitarian law".

[30] Recalling the mentioned Advisory Opinion *on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (paras. 107-113), the ICJ "concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in occupied territories" (ICJ, *Democratic Republic of Congo v. Uganda*, judgment 19.12.2005, para. 215).

Indeed, the concurrent application of the mentioned law systems may foster greater protection of the human person, given that their field of application *ratione personae* may vary and that they may provide different instruments of protection for those fleeing war, in case of violation of their rights or of the States' duties of protection.[31]

At the same time, the interpretation of IHRL norms in accordance with IHL is consistent with the 1969 Vienna Convention on the Law of Treaties since it establishes that in interpreting a treaty "There shall be taken into account, together with the context: […] (c) Any relevant rules of international law applicable in the relations between the parties" (Art. 31(3)) among which, in the event of armed conflict, IHL assumes peculiar relevance.

Finally, the International Law Commission (ILC),[32] as well as the jurisprudence of the treaty bodies of the main human rights Conventions (*i.e.*, Human Rights Committee,[33] the Inter-American Commission on Human Rights,[34] the European Court of Human Rights[35]) also apply the principle of speciality to resolve conflicts of norms when other means to interpret norms in conformity fail.

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[31] On these aspects, see S. JAQUEMET (2001), *The Cross-Fertilization of International Humanitarian Law and International Refugee Law*, in *IRRC*, 843, 651 ff.

[32] In the sense that the principle of speciality shall be applied when other means to interpret IHRL in a manner consistent with IHL fail, see INTERNATIONAL LAW COMMISSION, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 18 July 2006, A/CN.4/L.702.

[33] CCPR, General Comment no. 31, 26 May 2004, *The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13, para. 11: "As implied in General Comment 29, the Covenant also applies in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive".

[34] IACHR, report no. 109/99, 29 September 1999, *Coard et al. v. United States*, para. 39 ff.

[35] See, among the others, ECHR, Grand Chamber, judgment 18.9.2009, applications nos. 16064/90 and 8 others, *Varnava and Others v Turkey*, para. 185; judgment 16.9.2014, Application no. 29750/09, *Hassan v the United Kingdom*, para. 102; judgment 21.1.2021, Application no. 38263/08, *Georgia v Russia (II)*, para. 92 ff.; Decision 25.1.2023, Application no. 8019/16, 43800/14 and 28525/20, *Ukraine and The Netherlands v. Russia*, para. 718 ff.

Nevertheless, the identification of which norms is more specific should be assessed following a case-by-case analysis and does not necessarily imply a prevalence of the IHL rule, since – as the ILC highlighted – "it is often hard to distinguish what is 'general' and what is 'particular'". [36]

4. The identification of the "special" norm based on the criterion of greater human dignity protection

AUN OHCHR 2011 study on the International Legal Protection of Human Rights in Armed Conflicts recognises the decisive criterion for identifying the special norm between IHRL and IHL with reference to the State's "effective control on the territory or persons". This is the same criterion that justifies the existence of jurisdiction under IHR conventions, allowing for their extraterritorial applicability. According to this theory, the existence of effective control would imply the prevalence of the IHRL norms and, conversely, the absence of effective control would imply the prevalence of IHL norms. This reconstruction does not seem acceptable to us: if the absence of effective control prevents the application of IHRL conventions, its existence does not necessarily exclude the concurrent application of IHL! [37]

Similarly, we cannot support the theory according to which, in case of conflict between IHRL and IHL norms, the latter prevails over the other only if States have derogated from IHRL obligations. Of course, such a derogation suspends the obligation to ensure certain rights. Notwithstanding this, it is not clear why, if no derogation exists, the application of IHL should be sacrificed in any event. [38]

In our opinion, a useful element in identifying which the special (and, thus, prevailing) norm is can be identified by considering the ob-

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[36] Report of the Study Group of the International Law Commission, finalized by Mr. M. KOSKENNIEMI, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 13 April 2006, A/CN.4/L.682 and Add.1, para. 58.

[37] UN Office of the High Commissioner of Human Rights (2011), *International Legal Protection of Human Rights in Armed Conflicts*, Section D.

[38] M. MILANOVIC (2011), *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford, 229-261. See, also, the Joint Partly Dissenting Opinion of Judges Yudkivska, Pinto De Albuquerque and Chanturia, related to ECHR case *Georgia v. Russia II*, cit.

ject and common purpose of IHL and IHRL, rightly recognised by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the "general principle of respect for human dignity", which "in modern times […] has become of such paramount importance as to permeate the whole body of international law".[39] Indeed, references to human dignity are present in the Universal Declaration on Human Rights (UDHR) and in numerous human rights treaties. Moreover, as regard the ECHR, the European Court stated that "the very essence of the Convention is respect for human dignity and human freedom".[40] Finally, the rules on the definition of refugee referred to above appear to be inspired by the purpose of protecting human dignity as well.

In light of this, considering that the main pertinent Conventions contain norms that resolve possible conflicts with other treaties by admitting the application of the more favourable norm granting greater protection,[41] it seems to us that the identification of the special norm

[39] ICTY, judgment 10.12.1998, Case no. IT-95-17/1, *Prosecutor v. Furundžija*, para. 183.

[40] UDHR, Preamble and Art. 1; ACHR, Preamble, Arts. 6 and 11. See, also, ECHR, Grand Chamber, judgment 27.3.1996, application no. 28957/95, *Goodwin v. The United Kingdom*, para. 9: IACtHR, Advisory Opinion OC-4/84 19.1.1986, *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica requested by the Government of Costa Rica*, paras. 55-56. On human dignity see P. DE SENA (2017), *Dignità umana in senso oggettivo e diritto internazionale*, in *Dir. um. e dir. internaz.*, 3, 573 ff.; G. CELLAMARE (2020), *Osservazioni sulla politica dell'UE in materia di rimpatri*, in A. DI STASI, L.S. ROSSI (eds.), *Lo spazio di libertà sicurezza e giustizia a vent'anni dal Consiglio europeo di Tampere*, Napoli, 426 ff.; G. LE MOLI (2021), *Human Dignity in International Law*, Cambridge, 216 ff.; and A. DI STASI in this volume.

[41] See, for instance, Art. 5 of the Geneva Convention relating to the *Status* of Refugees ("Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention") and Art. 5(2) ICCPR ("There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent"). See, also, Art. 75(8) AP I ("No provision of this Article may be constructed as limiting or infringing any other more favorable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1"), and Art. 72 AP I ("The provisions of this Section are additional to […] other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict").

among the various normative systems can be carried out by considering their common objective and purpose, *i.e.* by applying the criterion of greater protection of the dignity of the human person. The same criterion is useful for guiding the interpretation of the rules of one body of law with respect to those of the other.

An example is the obligation to repatriate POWs at the end of hostilities, established by art. 118 GC III. It is now commonly interpreted in accordance with the principle of non-*refoulement* understood broadly. Therefore, States shall not implement the obligation to repatriate "where the prisoners face a real risk of a violation of fundamental rights by their own country" or "when they have a reasonable fear of being punished for the mere fact of having been captured and interned, or when they have deserted or defected".[42] In such cases, POWs shall be entitled to apply for refugee *status* or other forms of international protection when the conditions provided for by the relevant international norms are set out.

Another example of an interpretation "oriented" in favour of greater protection of the migrant person is provided by a reading of the combined provisions of common Arts. 1 and 3 GC, aimed at recognising the existence of a general non-*refoulement* obligation under IHL. As mentioned, an obligation to ensure respect for the Geneva Conventions derives from common Art. 1 GC for all HCPs, whether or not directly involved in the conflict;[43] this also entails an obligation to take positive action to prevent or end IHL violations.[44] As regards common Art. 3

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[42] ICRC, *Commentary GC III 2020*, paras. 4469-4470, available online. In the same sense, J. PICTET (1960), *Commentary. The Geneva Convention III Relative to the Treatment of Prisoners of War* (*Commentary CG III*), 546-547.

[43] According to the ICJ "it follows from [CA1] that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with" and that "all the States parties to the [GC IV] are under an obligation while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention" (Advisory Opinion *on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, cit., paras. 158-159).

[44] J. PICTET (1958), *Commentary GC IV*, cit., para. 38, and J. PICTET, *Commentary CG III*, cit., para. 18: "[t]he proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying

GC, it represents the "minimum yardstick" to be respected in both international and non-international armed conflicts,[45] and establishes that "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria". It follows that under common Art. 1, the HCPs to the GCs are obliged not to return anyone fleeing a country at war, if the return would expose them to the risk of treatments contrary to common Art. 3 provisions.[46] According to this interpretation, the prohibition complements and incorporates the ones enshrined in Art. 45(4) GC IV which, though excluding in any circumstance the transfer of protected persons "to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs", do not constitute "an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities" and for "offenses against ordinary criminal law". The proposed interpretation thus allows a full implementation of the non-*refoulement* principle in compliance with the IHRL absolute prohibition of *refoulement*, if there is a risk of violating the right to life or of the prohibition of torture and inhuman and degrading treatment.

Likewise, the right to leave the territory of a State during hostilities may be limited for the protection of national interest under IHL (Art. 35 CG IV). On the opposite, under IHRL all individuals are entitled to leave any country, but restrictions are permissible when they have a legal basis; they are necessary to protect national security, public order,

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the Conventions are applied universally". On negative and positive obligations deriving from the duty to respect and ensure respect for IHL, see Art. 1, in ICRC, *Updated Commentary to the First Geneva Convention* 2016, par. 158 ff., available online. On the obligation to ensure respect for States not parties to an armed conflict, see, even for further references, E. NALIN (2018), *L'applicabilità del diritto internazionale umanitario alle operazioni di* peace-keeping *delle Nazioni Unite*, Napoli, 71 ff.

[45] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, judgment 27.6.1986, para. 218.

[46] R. ZIEGLER (2014), *Non-Refoulement between 'Common Article 1' and 'Common Article 3'*, in D.J. CANTOR, J.F. DURIEUX (eds.), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Leiden-Boston, 386 ff.; ID. (2021), *International Humanitarian Law*, cit., 238 ff.

public health, morals, or the rights and freedoms of others; finally, they are consistent with the other rights recognised in the relevant instruments (Arts. 12 ICCPR; 2, Protocol no. 4 ECHR; 22 ACHR; 12 ACHPR). Hence, as the formulation of the conditions allowing limitations on the right to leave is stricter and more restrictive under the IHRL, taking into account the common objective of the two normative bodies, the interpretation of the (more generic) requirements under IHL should be carried out in the light of the conditions established under IHRL and, in particular, taking into account the need to protect the fundamental rights of the human person which never admit derogation.

Furthermore, the prohibition of mass transfers and deportations of protected persons, which can be found in IHL within Art. 49(1) GC IV, may also be interpreted in accordance with the prohibition of collective expulsions, enshrined in the relevant IHRL Conventions and which also applies in cases of mass exodus caused by situations of armed conflict. On these bases, displaced persons are allowed to apply for international protection, and States are prohibited from returning them generally on the grounds of public order protection (disturbed by the mass exodus), as they shall examine the specific individual situation of each applicant.

Moreover, the general Common Art. 3 requirement for trials satisfying "judicial guarantees which are recognized as indispensable by civilized peoples" may be interpreted according to the more detailed IHRL norms on fair trial as developed by IHR treaty bodies jurisprudence.

Preventive detention still represents the most problematic case. Arts. 41-43 and 78 GC IV allow the detention of protected persons and, therefore, also of migrants, for imperative reasons of security. As regards IHRL, Art. 9(1) ICCPR provides that "No one shall be subjected to arbitrary arrest or detention", and, under Art. 5(1), ECHR "No one shall be deprived of his liberty" save in six situations.[47] Therefore, ap-

[47] "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offense or when it is reasonably considered necessary to prevent his committing an offense or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of

plying the suggested criteria, in times of war, detention could be considered not arbitrary under Art. 9 ICCPR if it is in accordance with imperative reasons of security of the State. At the same time, Art. 5 ECHR could suggest more restrictive interpreting criteria of the mentioned imperative reasons of security, to limit the application of an "exceptional character" measure.[48] Nevertheless, when on a case-by-case basis, the IHL norm on detention could not be interpreted in a manner consistent with the IHRL ones, taking into account the common object and purpose of those provisions, the principle of speciality should ensure priority to IHL during the active hostilities phase of the conflict and to IHRL during a prolonged military occupation (as the one of the Occupied Palestinians Territory could be).[49] A different interpretative solution, prioritising the more restrictive IHRL norms in any case, risks sacrificing the fundamental aim of IHL to humanise armed conflicts.

bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition".

[48] J. PICTET (1958), *Commentary CG IV*, cit., Art. 42, 258.

[49] Similarly, regarding the different protection of the right to life under IHL and IHRL, IHL shall have priority in the active phase of hostilities, and, as a consequence, the principles of distinction, precaution, proportionality, and the prohibition of specific means and methods of combat apply. Moreover, during military occupation, IHRL applies too, so the protection of the right to life may be further strengthened. See, in this sense, the European Court of Human Rights judgment in the *Varnava* case, cit., para. 185, and the decision in *Ukraine and The Netherlands v Russia*, cit., paras. 719-721 ("In so far as the incidental killing of civilians may not be incompatible with international humanitarian law subject to the principle of proportionality, this may not be entirely consistent with the guarantees afforded by Article 2 of the Convention. It will therefore be for the Court, at the merits stage of the present case, to determine how Article 2 ought to be interpreted as regards allegations of the unintentional killing of civilians in the context of an armed conflict, having regard to the content of international humanitarian law").

Chapter 25

ISLAMIC LAW IN COMPARISON: IMPLICATIONS FOR THE RESOLUTION OF MUSLIM MIGRANTS' CASES AND DISPUTES

Gian Maria Piccinelli

ABSTRACT: *In current societies, transformations connected to an increasing cultural plurality require a reflection on the most appropriate legal instruments to meet the requests for justice in multicultural contexts. Apparently, the same multiculturalism, as a governance system of diversity, gives way to intercultural instruments which are more careful about real integration processes in civil society. Hence the question: can our legal order make room for ethnic-confessional rules to solve intercultural disputes? With particular reference to Muslim communities, the recourse (informal and at intra-community level) to rules derived from the Islamic legal tradition is in competition with the international-private procedural instruments of referral to national laws.*
ADR and out-of-court settlements may provide domestic courts with the basis for decisions which comply with the public policy, allowing a progressive adjustment of Islamic religious rules to secular legal orders modelled on European values, principles, and rules.

1. An ever-changing multi-cultural context

We live in an era of profound transformations triggered by the impact of multiculturalism on our current societies. An era also dense with conflicts between worldviews and systems of rules that do not coincide, but rather collide. But it's also dense with innovative and positive contaminations that push the different socio-cultural systems to rethink institutes and institutions, rules and relations, in order to create spaces for integration and citizenship.

The first cause of these phenomena is undoubtedly connected with the growing migratory flows that bring with them an inevitable confrontation between different existential instances accompanied by value models that originate in different cultural contexts.

Secondly, the effects of diversified identity phenomena have to be considered: on the one hand, the broad identity 'mobility' that, also thanks to the rapid spread of information technologies, allows individuals and groups to embrace cultural models other than their original ones, i.e. to adapt to the different cultures with which they are confronted from time to time; on the other hand, almost as a counterbalance to these adaptations and transformations, the identity 'centring' of groups and individuals that represents a phenomenon of resistance to multiculturalism.

This confrontation gives rise to phenomena of antagonism (as a form of conflict between cultural claims that are necessarily seen as alternatives to each other) that also produce their effects in the field of law and rights. It is a constantly evolving process that focuses on the urgency to find concrete and efficient instruments to guarantee human rights and fundamental freedoms, balancing individual and collective interests related to their protection. These include the need to sustainably articulate the right to cultural identity, which is perennially called for by the demands for integration of the countless otherness' structurally present in the everyday life we live. These demands are further invigorated by the 'universal dimension' of those freedoms that we define as fundamental, such as freedom of conscience and religion, and which, precisely because of this universality, are in no way subject to the criterion of reciprocity.

The dynamic balance resulting from the encounter between the 'universal dimension' and the 'local protection' of the right to cultural identity is also producing a push for the transformation of the very model of multiculturalism. The last decades of the last century were characterised by predominantly publicist instruments for managing multiculturalism. The theories of multiculturalism were centred on the recognition of minority groups as a consequence of the – theoretical – value that liberal democracies placed on the principles of equality, non-discrimination and dignity of the person. [1]

This made it possible to increase the representations of minorities in

[1] W. KYMLICKA (2012), *Multiculturalism: Success, Failure, and the Future*, Transatlantic Council on Migration, Migration Policy Institute, Washington D.C.

the public sphere, also incorporating or limiting the use of their respective symbols and languages.

This phase was followed, in the early years of the present century, by another period. A period in which debates on the use of religious symbols, on the teaching of the specific cultural values of this or that minority, and on the recognition of family models centred on ethno-confessional statuses different from those historically implemented by the majority community, were constantly centred on the role of the State in widening or narrowing the space of recognition. This prevailing political and publicist dimension has consistently turned its attention to the compatibility of minority practices with public order and in public space. This attention has been accompanied by the interest of minorities in receiving recognition in the social and political context of reference. [2]

At the same time, however, in the face of the attempts at assimilation that have frequently been witnessed, minority groups, and religious minorities, have increasingly sought to assert their own peculiar rules and practices in an independent and parallel legal system. Identity recovery, for these communities, has been achieved through experiments in legal pluralism against which, for a long time, Western legal systems have been particularly reactive and resistant. This is a consequence of the arduous and painful construction of the secular nature of the State and its legal system, which has made it possible to make the production, interpretation and application of norms autonomous and independent of religious schemes. Thus, at the beginning of the past decade, the declaration of the failure of multiculturalism entered the European political discourse in an overbearing manner. [3]

The consideration, also in jurisprudence, that accompanied that phase, which has not yet in fact ended (think of the recent ECHR case *Molla Sali v. Greece*), [4] laid the foundations for a transition towards an

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[2] M.A. HELFAND (2011), *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, in *N.Y.U. L. Rev.*, 86, 1231-1305.

[3] On this point, *ex multis*, R. GRILLO (2018), *Interculturalism and the Politics of Dialogue*, B and RG Books of Lewes; V. DA ROLD (2010), *Merkel sente soffiare il vento del populismo e apre un dibattito sul post multiculturalismo*, in *Il Sole 24 Ore*, available online; LIBÉRATION (2011), *Sarkozy estime que le multiculturalisme est un "échec"*, available online.

[4] D. MCGOLDRICK (2019), *Sharia Law in Europe? Legacies of the Ottoman Empire and the European Convention on Human Rights*, in J. CESARI (ed.), *Oxford Journal of Law and Religion*, 8, 517-566.

'intercultural' management perspective of multiculturality.[5]

In fact, the need to settle identity confrontations and the resulting conflicts has led to the adoption of a greater decentralisation compared to previous policies, through a broader bottom-up involvement of civil societies and their ability to open spaces of confrontation that allow for the verification, with operational instruments, of the effectiveness of the protection of diversity and the cultural rights connected to it.[6]

In this way, we are moving away from symbolic integration and forms of jurisdictional competition (which we also find in the English model of the 'Sharia Courts')[7] towards the adoption of an intercultural integration toolbox that, on the one hand, makes it possible to choose between systems of rules that are functionally alternative (within the limits of compatibility with public order) and, on the other, allows the solutions to conflicts to be brought closer to the particular contexts in which they occur and can be recomposed through more flexible extra-judicial tools.

In this perspective, in our contexts, we could consider the demands for justice of communities and subjects marked by a cultural, ethnic or religious identity different from the majority of citizens of the countries in which they reside. The legal standards that characterise the legal tradition of the West, which have as their foundations secularism, the protection of human rights, and the principle of legality, require us to take up the challenge of dialogue between cultures, understood as in their multiple and complex material, symbolic, behavioural and cognitive dimensions. The goal is the realisation of the coexistence of diversities through the construction of new citizenship models.[8] Hence, the challenge is also to offer new instruments of justice, swift and effective, capable of reacting in the face of the stresses that come from more globally interconnected disputes, often characterised by a transnational dimension.

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[5] R. GRILLO (2018), *Interculturalism and the Politics of Dialogue*, cit.

[6] M. INTROVIGNE, P. ZOCCATELLI (dir. by) (2022), *Il pluralismo religioso in un contesto postmoderno*, in CESNUR, https://cesnur.com/il-pluralismo-religioso-italiano-nel-contesto-postmoderno-2/.

[7] A. MAROTTA (2021), *A Geo-Legal Approach to the English* Sharia Courts: *Cases and Conflicts*, Vol. 1, in M. BUSSANI, G. DELLA CANANEA (ed.), *Comparative Law in Global Perspective*, London.

[8] A. MAROTTA (2022), *Modelli di integrazione e forme di cittadinanza in Europa: il contributo del dibattito verso una cittadinanza interculturale nel Regno Unito*', in *Cittadinanza europea*, 81, 89-102.

Before us, we have issues concerning the rights of persons and the family, with growing elements of internationality and interculturality (plurality of religions, citizenship, etc.) and with the need to govern relations between the parties (spouses, children, relatives) in all matters affecting family life,[9] with an often cross-border dimension. Issues that also extend to property rights[10] and criminal law.

2. ADR between the law of the West, the law of Islam and the law of Islamic countries

The growing intercultural dimension of the relations between the different groups that make up our society leads us to question what the most appropriate instruments are to respond to the cultural and legal complexity of our days. The availability, also from a regulatory point of view, of alternative dispute resolution tools opens up the further question of whether it is possible to have recourse, on a voluntary basis, to the application of rules derived from ethno-confessional statutes, possibly linked to foreign legal orders on the model of private international law, and what are their limits.[11] Certainly, without prejudice to their compatibility with public order, which is in any case subject to a con-

[9] G. CATALDI, R. MONTINARO (eds.) (2021), *Società multiculturali e diritto delle relazioni familiari*, Università degli Studi di Napoli L'Orientale, Quaderni del Dipartimento di Scienze Umane e Sociali, Napoli; M.S. BERGER (ed.) (2013), *Applying Shari´a in the West: Facts, Fears and the Future of Islamic Rules on Family Relations in the West*, Leiden; A. BÜCHLER (2012), *Islamic Family Law in Europe? From Dichotomies to Discourse – or: Beyond Cultural and Religious Identity in Family Law*, in *Int. J. L. Context*, 8, Cambridge, 196-210.

[10] Italian Court of Cassation, judgment, 9.11.2022 n. 33021; F. ANGELINI (2022), *Rapporti patrimoniali tra ex coniugi stranieri: qualificazione e accertamento del diritto straniero*, in *Aldricus – Il Portale del Progetto EJNita (Italian Network: Building Bridges)*, Ministry of Justice, available online.

[11] R.S. SHIPPEE (2002), *"Blessed are the Peacemakers": Faith-Based Approaches to Dispute Resolution*, in *ILSA J. of Int. Comparative L.*, 9, 237-255; M.A. HELFAND (2011), *Religious Arbitration and the New Multiculturalism*, cit., 1231-1305; L. BACCAGLINI (2014), *Arbitration on family matters and religious law: a Civil Procedural Law Perspective*, in *Civ. Proced. Rev.*, 3-21; M. BROYDE (2016), *Cultural Complexities and Family Dispute Resolution. Multicultural ADR and Family Law: A Brief Introduction to the Complexities of Religious Arbitration*, in *Cardozo J. Conflict Resol.*, 17, 793-822.

stant evolutionary dynamic due to the effects of the interrelation between its declinations such as internal, proximity, procedural, international, etc. public order.

The significant presence of Islamic communities on Italian, European and most Western countries' territory, often prejudicially perceived as conflictual, requires us to develop, using comparative tools, a reflection on what, today, the meaning and extension of the legal tradition of Islam is today and how this intervenes to effectively regulate the everyday life of Muslims and Islamic communities outside *dar al-Islam* (i.e. Islamic countries). The affirmed imperativeness of the religious juridical datum – as an inescapable system regulating individual behaviour and private and public relations – implies, first of all, an identity-type element. The religious and revealed nature of Islam's law seems to be definitively opposed to the secular nature of law in the democratic State of the West. Given this opposition, which inevitably leads to a conflict between norms whenever it is interpreted in an ideological manner and hiding behind walls of separation, the question that seems appropriate to me concerns the effective capacity to construct instruments of justice that are effective and consistent with the values and principles of Western law and, where this is willing to bring into play its ideal inclusive energies, also of Islamic law (in its distinct expressions: revealed, doctrinal and State). This is an important testbed for verifying the capacity of both traditions in offering adequate answers to the future that awaits us, which I would say is inevitably shared. [12]

To this end, we can take the experience of the English Sharia Courts as an example for a reflection on the forms of recourse to the application of confessional statutes in alternative dispute resolution. [13] In them,

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[12] W. IQBAL (2001), *Courts, Lawyering, and ADR: Glimpses into the Islamic Tradition*, in J.F. HENRY, J. ALLEGRETTI, R.A. BARUCH BUSH, S. COBB (eds.), *Dialogue on the Practice of Law and Spiritual Values*, in *Fordham Urban L. J.*, 28, 1035-1045; A. WAHID (2018), *Using Islamic Law for Alternative Dispute Resolution: Is Sharia Sufficient?*, in *PM World J.*, 7(12), 1-14; M. BUSSANI (2019), *Strangers in the Law: Lawyers' Law and the Other Legal Dimensions*, in *Cardozo L. Rev.*, 40, 3125-3184; W. BRZOZOWSKI (2021), *A silent revolution: How Islamic religious law is paving its way to the European legal orders*, in M. BELOV (ed.), *Peace, Discontent and Constitutional Law: Challenges to Constitutional Order and Democracy*, London.

[13] S. BANO (2012), *Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law*, London; M.M. KESHAVJEE (2013), *Islam, Sharia & Alternative Dispute Resolution: Mechanisms for Legal Redress in the*

on the one hand, we are faced with arbitration typologies in line with what is provided for (in terms of competence) by British ADR law; on the other, we must recognise how the space of religious arbitration has led to a sort of jurisdictional competition with ordinary courts, on the basis that the confessional response may be closer to the conscience of the believing subject (in this case, Muslim). It's a competition whose point of origin could be identified in the confrontation between the external forum and the internal forum (an ethical-legal element historically common to many legal systems), between the formal constraint posed by the positive law of the State and the constraint of conscience that stems from a religious precept, between a theoretically unitary public jurisdiction of the State and a 'private' or 'community' jurisdiction that is based on the health of the soul and claims the superiority of this over other forms of regulation. The result, from a comparative and geo-legal perspective, is a jurisdictional rivalry between Islamic ADR bodies and ordinary courts. But it is necessary to point out how an interesting cooperation between ordinary courts and Sharia Courts has also taken place for the decision of some cases in which the authentic interpretation of a foreign norm related to the Islamic legal tradition was necessary. [14]

Given this example and considering the limits of our legal system, especially with regard to the availability of rights that can be protected through ADRs, I believe that the reflection should focus, above all, on the function and breadth of the so-called 'mild jurisdiction' and on its relationship with the role of control and decision-making of ordinary courts. Even in the case of non-disposable rights, we could in fact imagine a subsidiary role of ADR organisms in preparing solutions and reasons close to the needs of the parties to the dispute, on the basis of rules voluntarily indicated, but also adapted and verified to respond specifically to the conditions and limits set by our system. Subsequently, while maintaining its role of controlling compliance with public order, the judge could still accept the proposed solutions, by verifying the possible existence of situations of unconscionability, leading to the annulment of the solutions signed by one party under excessive pressure from the

Muslim Community, London; J.R. BOWEN (2016), *On British Islam: Religion, Law and Everyday Practice in Shari'a Councils*, Princeton; E. MANEA (2016), *Women and Shari'a Law: The Impact of Legal Pluralism in the UK*, London; A. MAROTTA (2021), *A Geo-Legal Approach*, cit.

[14] A. MAROTTA (2021), *A Geo-Legal Approach*, cit.

group or the other party to apply religious rules that do not comply with the principles of arbitral justice. [15]

When we deal with the legal tradition of Islam, even in its transposition into the positive laws of contemporary States, we are faced with three different levels of normative production: the body of religious-ethical-legal precepts revealed by God (*shari'a*), Muslim law resulting from the interpretation of religious jurisprudents (*fiqh*) and the law of administrative production (*siyasa*) which, with the creation of modern States, has acquired the form of law and the rank of primary source of law (*qanun*).

Despite the absolute immutability of the *shari'a*, whose primary source of knowledge is the *Qur'an*, accompanied by the tradition of the Prophet Muhammad (*sunna*), Islam has managed to build a complete corpus of rules of both a religious and political nature by developing a constantly evolving process of interpretation (*igtihad*), which has allowed it to translate its fundamental values and legal principles into enforceable norms.

In Islamic States, the *shari'a* retains the role of an explicit or tacit source of legislation, thus drawing, at least partially, its contents. But we should remember how the modern process of codification and legalisation has taken place on the basis of European regulatory models, within which processes of interpretation and/or reform of the State norm in the light of the classical legal tradition have sometimes begun (the so-called neo-*igtihad*). [16]

3. Redefining *shari'a*: a challenge for Muslim communities in the West

What we include in the concept of *shari'a*, in reality, is not just a legal content. Rather, it is the 'Straight Path' revealed by God so that the believer can attain salvation. The eschatological, ethical and juridical planes merge to the extent that this Way is perceived and experienced in a normative manner.

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[15] M.A. HELFAND (2011), *Religious Arbitration and the New Multiculturalism*, cit.

[16] E. GIUNCHI (2014), *From Jurists' Ijtihad to Judicial Neo-Ijtihad: Some Introductory Observations*, in E. GIUNCHI (ed.), *Adjudicating Family Law in Muslim Courts*, Abingdon, 1-31.

As revealed divine law, *shari'a* is knowable through the *Qur'an* and the *sunna* of the Prophet Muhammad, which also become sources of Muslim law resulting from the hermeneutic doctrinal process (*fiqh*). The latter coincides with the set of interpretations that have laid the foundations and continuously enriched a plural and non-monolithic legal system, whose rules have been prevalently applied on a personal and not a territorial basis.

The historical rivalry between political power and religious jurists in the Islamic world for control over the production of legislation has, however, seen an increasing prevalence of the former over the latter. Faced with this crisis of authority – which occurred from the 10th/11th century (4th/Vth century since the Hegira), together with the phenomenon that Joseph Schacht [17] called the "closing of the door of *ijtihad*", i.e. of the direct interpretation of revealed sources – the doctrine began to represent *shari'a* as the criterion for the theoretical unification of law (including that produced by politics). It also began to call *shari'a* the results of the human hermeneutic process: this is a representation that has been maintained until today and that superimposes, confusing them, the plane of divine legislative authority, of which *shari'a* is a direct manifestation, and that of the mandate to elaborate norms by way of interpretation conferred on doctrine precisely through *shari'a*.

Henceforth, the term *shari'a* does not only stand for directly revealed principles and precepts, but contains within itself that representation that intends to consecrate – with a reference to divine authority – the result of human creative processes, be they of religious scholars or State legislators. They are, actually, different systems of norms having in common, at least partially, a system of general principles deduced from revelation. Semantic overlap is unavoidable unless the use of the term is carefully contextualised.

This diachronic reconstruction of the use of the term *shari'a* also makes it possible to understand the current rivalry between elements of traditionalisation and factors of modernisation that, especially since the 1970s (in particular since the 1973-74 oil crisis and, later, the 1979 Iranian revolution) has agitated the Islamic world and Muslim communities in the West.

In the face of the consolidation of individual State legal systems on a territorial basis and the development of legislation as a concrete instru-

[17] J. SCHACHT (1995), *Introduzione al diritto musulmano*, ed. by G.M. PICCINELLI, Turin.

ment of reform, the Muslim law has reinforced the representation of its theoretical universal dimension, by omitting its historical plurality and becoming the bearer of a virtually unitary legal tradition. In the manner in which it has been theorised, it truly is a tradition that is in itself ahistorical, in the sense that it is the result of abstract and casuistic compilations drawn up by authoritative jurists within the different schools, but which do not take into account their actual application to the concrete case, nor the numerous and changing practices that have developed in the different lands of Islam. In its historical dimension, the universality of the *shari'a* has constantly been confronted on the ground with the diversity of its doctrinal interpretations, the wide variety of judicial applicative solutions, the interference of political power, and, today, the multiplicity of legislative solutions that States put in place and to which the varied outcomes of jurisprudential paths are linked.

For this reason, the entry of *shari'a* within some constitutions of Muslim States (*e.g.* Art. 2 of the Egyptian constitution, also reproduced in the recent 2012 and 2014 texts, states that "the principles of *shari'a* are the main source of legislation") can take on a character homologous to the one that human rights play with respect to the law of the West. [18] They are both (*shari'a* and human rights, with their universalising and conflicting representations) meta-State, meta-constitutional elements, to which the constitution refers by fixing in them an abstract principle of legality with respect to the exercise of political power and the power to produce legal norms. The constitution is, in any case, the law of the State, albeit of a higher rank, and it defines the competences that allow the opening and closing of the valve of referral to the *shari'a* for Muslim States, realising a definitive primacy of positive law (*qanun*) over religious law. [19]

The observation of this incessant dialectic, which has represented the propulsive energy for the historical development and constant adaptation of the (theoretically unitary) legal system of the Islamic umma, raises the question of which theoretical and operational profiles of Islam's legal tradition can be traced to which the variegated positive law systems that refer to it can be traced in whole or in part.

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[18] A. PREDIERI (2006), *Shari'a e Costituzione*, Bari; M. BUSSANI (2010), *Il diritto dell'Occidente: Geopolitica delle regole globali*, Turin.

[19] G.M. PICCINELLI (2013), *Continuità del formante dottrinale nell'Islam? Riflessioni sulla classificazione del diritto dei paesi islamici*, in *Annuario di diritto comparato e studi legislativi*, 369-390.

4. *Shari'a*: which source for the law of Muslim States?

The process of legal acculturation, through the transposition of private and public law models, has led to the contrast between the traditional Islamic State, with its widespread feudal canons linked to the substantial sacralisation of constituted power, and the modern State in the Islamic tradition.[20] While the conflict between the two State models, at a theoretical level, appears radical, multiple conciliatory solutions can be found in the constitutional practice of Islamic countries. Independent Muslim States have continued to draw on the legal experience of Europe and its accomplished systems of institutions, progressively proceeding to adapt these institutional solutions, already widely tested, to their own social and legal context.

The heterogeneity of the results of the adaptation process can be analysed through two principles that underpin modern constitutionalism: the principle of legality, on the one hand, and the principle of democracy and popular sovereignty, on the other.

The principle of legality requires that the exercise of political power as a whole and in every part of any system of political, social and economic cooperation with constitutional legitimacy must be exercised in accordance with, and through a general system of, principles, rules and procedures. The 'constitution' becomes the essential keystone in this system of principles, rules and procedures that underpins the coherence of other laws, institutions and administrative bodies. In a broader sense, the 'constitution' is itself the system of principles, rules and procedures, operating as a filter towards other systems of principles, external and metapositive, that directly influence the ideological-cultural foundation underlying the actions of the legislature, the government, judges and citizens.

The principle of popular sovereignty – consubstantial with respect to democracy in the Western model – places citizens at the centre of the constitutional system by operating, through the mechanism of representation and the system of democratic freedoms, on the development of the principles, rules and procedures conforming the actions of individuals and the State.

According to classical Islamic legal doctrine, all political action rests on the principle of *wilāya*, the delegation of authority by God, who is the seat of absolute sovereignty and from whom all forms of authority

[20] G.M. PICCINELLI (2013), *Continuità del formante dottrinale nell'Islam?*, cit.

descend.[21] If God, the One, has revealed His Way, the *shari'a*, then every man, sovereign or subject, ruler or ruled, in whatever capacity he exercises authority, in order to legitimately consider himself a member of the Community founded by Muhammad, must submit all his actions to the divine Law. The sole and absolute sovereignty of God (*là hukm illà li-Allah*) does not, in fact, require sacrificing coherence to political unity, but, vice versa, to first give coherence to political action according to the principles of the *shari'a*. The notion of wilaya, on the other hand, explicitly recalls the institution of representation (in the civilistic sense) with which it is also linguistically confused: just as the representative cannot exceed the limits set by the represented and must act in the latter's interest, so it is with the relationship between God and the authority He Himself constituted.

The question that arises is whether it's possible to reconcile the classical vision of *shari'a* with a modern vision consistent with the organisation of the modern State and the autonomous logic of positive State law. And, in this sense, it is possible to recover in the history of Islam some elements that could be functional to the realisation of a model of 'Islamic democracy' and, at the same time, to integrate with the institutional models prevailing in the West.[22]

The return to the Qur'anic ideal of *shura* or mutual consultation is at the centre of the political debate in several States with reference to the possibility of opening a new ijtihad, the renewal of the interpretation of the *shari'a* and the legal-religious sources. Such a perspective appears to be accepted not only in the modernist and secular segments of Muslim societies, but also within some more radical groups. Islamists in Pakistan, Bangladesh, Malaysia, Indonesia, Iran, Egypt, Jordan, Algeria, Tunisia, Morocco and other Muslim countries have now accepted the legitimacy, on an Islamic basis, of popular elections with universal suffrage, the electoral process, multi-partitism and the election of people's representatives. In these cases, it is not the existence, but the extent of popular sovereignty that is under discussion.[23]

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[21] A. IBN TAYMIYYA (2002), *Il buon governo dell'islam*, introduzione e traduzione a cura di G.M. PICCINELLI, Bologna; E. COTRAN, A.O. SHERIF (eds.) (1999), *Democracy, the Rule of Law, and Islam*, London-The Hague-Boston.

[22] A. AN-NA'IM (2008), *Islam and the Secular State. Negotiating the Future of Shari'a*, Harvard-London.

[23] M. AHMAD (2002), *Islam and Democracy: The Emerging Consensus*, in *The Milli Gazette* [online edition, India], 3; C. MCDANIEL (2003), *Islam and*

The formation of parliamentary assemblies in Muslim States makes it possible to imagine a transfer of the power of *ijtihad* from the traditional jurist, who acted individually, to the modern State jurist (the legislator, but also the judges) in order to realise innovative forms of synchronic and collegial *ijma'* (the *communis opinio* among Muslim jurists that grants authority to a given doctrine). The difference lies not only in the different procedure, but also in the involvement of 'lay' subjects, i.e. those who do not have the legal-theological training required of the doctrine of the past, but who are equally, albeit collegially, called upon to produce norms or interpret them. Hence the discussion about the need for an evolution in the interpretation of *shari'a* to cope with the social, economic, technological and environmental changes taking place as a result of globalisation, the fundamental principles of Islam being the cornerstone in the construction of modern Islamic societies.

The inclusion of *shari'a* among the primary sources of legislation is a formula that dates back to Abderrazzaq al-Sanhūrī (1895-1971), the father of the Egyptian Civil Code, which has become a prestigious model in the codification process of Arab countries.[24]

In Egypt, the debate on the constitutional role of *shari'a* became heated after 1980, following the amendment of Art. 2 of the Constitution, when "the principles of *shari'a*" became "the main source of legislation."

In another coeval constitutional amendment, in Pakistan, the Federal Shariat Court acquired the power to review every law or administrative act or jurisprudential decision under Muslim law (Constitution Amendment Order, 1980).

On the other hand, the Afghan Constitution of 2004, abrogated with the Taliban's return to power in 2021, stipulated in Art. 3 that "no law may be contrary to the precepts and rules of the Sacred Religion of Islam.".

The same provision is adopted in Iraq with the 2005 Constitution, where no law may violate the principles of Islam, democratic principles, and fundamental rights and freedoms (Art. 2.1).

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the Global Society: A Religious Approach to Modernity, in *Brigham Young Un. L. Rev.*, 507-540.

[24] F. CASTRO (1984), *ʿAbd al-Razzāq Aḥmad al-Sanhūrī: primi appunti per una biografia*, in *Studi in onore di F. Gabrieli nel suo LXXX compleanno*, I, Rome, 173-210; E. HILL (1987), *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ʿAbd Al-Razzaq Aḥmad Al-Sanhuri, Egyptian Jurist and Scholar. 1895-1971*, Cairo.

In the constitutional declamatory context, 'Islam' and '*shari'a*' take on a mutually homologous meaning, as systems of rules and ethical-religious values that are placed at the foundation of the State and identify its belonging to a broader legal tradition.

At the same time, where the process of the constitutional foundation of the State has been fully realised, the constitution itself is an instrument of 'separation', and therefore of secularism (at least theoretically), between the sphere of ethical-religious values of Islam and the State legislative and administrative system. The absence of a secularisation of the social basis of the State, however, requires a different and more careful analysis, taking into account the individual national contexts regarding the actual outcomes of the *shari'a – qanun* dialectic and the greater or lesser resistance of the former with respect to the instances of change in its historical interpretation.

Using as a taxonomic criterion the relationship between the provision of *shari'a* at the constitutional level – which makes it possible to identify a metapositive sphere of principles and values that becomes the keystone of the State legal system[25] – and the effective autonomy of State legislatures, we could point to three groups of countries in which:

1. *Shari'a* and Islam have an effective prevalence in the system of sources of production and cognition of the State qanun, with a direct – though probably not exclusive – participation of the religious jurisprudence at all levels of elaboration, interpretation and application of norms. Iran, in this group, represents a significant example: legislative production by an elected parliament but governed by the principle of *wilayat al-faqih*, syndication of Shariah legitimacy on laws by the religious leadership, the obligation of courts to decide according to law on the basis of the opinion (*fatwa*) of a religious jurist.
2. The *shari'a* and Islam compete with the *qanun* giving rise to a multiplicity of theoretical (constitutional and declamatory) and operational (legislative and jurisprudential) solutions. The application of rules derived, in their content, from the Islamic tradition can be found in

[25] W.M. BALLANTYNE (1986), *The States of the GCC: Sources of Law, the Shari'a and the extent to which it applies*, in *Arab. L. Quart.*, 1(1), 3-18; C. MALLAT (1993), *Islam and Public Law: classical and contemporary studies*, London-Dordrecht-Boston; C. BENNER LOMBARDI (1998), *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Shari'a in a Modern Arab State*, in *Columbia JTL*, 81-123; G.M. PICCINELLI (2013), *Continuità del formante dottrinale nell'Islam?*, cit.

personal status, civil and commercial law, with elements also in banking and tax law. The case of Egypt is paradigmatic: legislative power of the parliament elected by the people, the possibility of prior control by the *muftī* (only in certain cases) and scrutiny of legitimacy, also from a *Shi'aitic* perspective, by the 'secular judge' of the Supreme Court.

3. The *qanun* definitively prevails over the *shari'a* and Islam, which, even if they sometimes receive theoretical constitutional and/or legislative recognition, do not play an effective operational role. The application of traditional rules is generally limited to personal status and the interpretation of law by the judge follows hermeneutic canons alien to the tradition of Muslim law. We can take Tunisia as an example, at least until 2020.

The second group is of greater interest in order to verify the space reserved for the recovery / permanence / desistance of rules that are based on meta-legal and meta-State elements and that move in the intersection between general principles, customs and the socio-legal tradition of a given territory and its community.[26] On the contrary, a space is opened for the translation of *shari'a* principles into rules applicable according to methods typical of positive State law, with the consequent introduction of a category of modern *shari'a* in dialectical competition with the traditional reference to a concept of *shari'a* whose application would remain de facto homogeneous in time and space.

5. *Shari'a* and religious ADR for Muslim communities in the West

If, on the other hand, we shift our gaze to what is happening in the secularised West, the broad debate on multiculturalism has been made more heated and confrontational by the repositioning of the identity of a section of those who profess Islam.

This repositioning of Muslim communities has occurred in the wake of the spread of a highly politicised and 'fundamentalist' representation of Islam, which has almost dominated the last two decades of the last century, bringing into the debate also the question of the definition and (eventual) application of *shari'a*.

In democratic and secular contexts, such as those of the European Union countries, in which pluralism and freedom of choice are a com-

[26] A. PREDIERI (2006), *Shari'a e Costituzione*, cit.

mon good and an inalienable part of the shared legal culture, confessional choices are mostly forms of voluntary belonging.[27] This does not exempt one from recognising that there are imposed and not voluntary identity paths.

Tradition is fundamental in the construction of Islamic orthopraxis, and this, in turn, is the main constitutive element of Muslims' identities and the formation of their subjectivities. Tradition also plays a fundamental role in confronting diversity – within Islam – between the identity representations that Muslims themselves adopt and that may be antagonistic to each other. In turn, its central in the confrontation with the majority non-Muslim surrounding society. As already mentioned, the so-called sharia courts (which have established themselves in the UK as an alternative means of Shariah-based litigation) represent a method of recovering the legal tradition developed (in an abstract way) on the basis of classical Muslim law.[28]

In multicultural contexts, the question of the use of religious symbols as instruments of manifestation of an individual's identity belonging remains open and central to the debate. The decisions of the European Court of Human Rights on the subject[29] have affirmed a substantial semantic deconstruction of the symbols themselves, recognising them as having a dual meaning: active (carried and worn as a statement of one's faith) and passive (entrusted with a historical-cultural value in reference to the religious roots of a given society). An evaluation that goes hand in hand with the definition of religious experiences on the basis of the faith-practice binomial, and with the attempt to circumscribe the spaces of legitimacy in which the democratic State can set limits to the exercise of the associated freedoms of religion, conscience, association, worship, etc.

The free choice of a Muslim woman to wear the veil, with its different fashions hiding as many geopolitical representations, can be perceived as an expression of Islamicity lived in adherence to the moral values of Islam and a means through which she intends to communicate her diversity and autonomy in the public space. At the same time, the same situation may be an indication of homologation to a traditional religious model imposed and adopted uncritically. These assessments are

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[27] J. CESARI (ed.) (2015), *The Oxford Handbook of European Islam*, Oxford.

[28] A. MAROTTA (2021), *A Geo-Legal Approach*, cit.

[29] *Leyla Sahin c. Turchia* [GC], ric. n. 44774/98, 10 November 2005.

consistent with both a Western and an Islamic context. Contextualisation must consider that there are European countries that sanction the wearing of the veil and Islamic countries that punish those who do not wear it. It will also be necessary to examine the concrete instruments that individual legislators put in place to protect cultural and religious pluralism, to guarantee gender equality, and to favour women's free access to work, education, and communication, to facilitate their social visibility.

In relation to identity, for a Muslim, there is a need to find a balance between the public space and the sphere of conscience that allows consistent communication to the outside world (work, school, society, etc.). It is often a matter of updating lived Islam so that it becomes compatible with universal values and the values of the society in which it lives, even if it comes into conflict with historicised interpretations, and normative Islam full of cultural interdictions and stereotypes. It is a process of transformation that does not necessarily indicate a rupture. The choice of the veil by women, the recourse to halal food (i.e. lawful according to religious canons and certified through special procedures involving Muslim legal experts) or to Islamic Finance for property matters, can be read in this perspective.[30]

On this basis, we can only hint at certain legal institutions that we historically define as 'Islamic' *tout court*, but which today in reality must be considered in relation to the discipline specifically elaborated by each national legal system (in the perspective of deferral proper to private international law), and which also represent an element of identity, so much so that they may be the object of informal applications (with rules taken from the classical legal tradition) within Muslim communities residing in non-Islamic contexts.

In the sphere of family law, it is necessary to recall that marriage has a contractual basis even in contemporary legal systems.[31] Different rights and duties between spouses are often attached to the contract, due to the effects of a strongly patriarchal interpretation of revealed

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[30] G.M. PICCINELLI (2022), *Development and Perspectives of Islamic Economics in the West: banking and Finance*, in R. TOTTOLI (ed.) *Islam in the West*, London, 514-530.

[31] R. ALUFFI BECK-PECCOZ (2006), *Il matrimonio nel diritto islamico*, in S. FERRARI (ed.), *Il matrimonio. Diritto ebraico, canonico e islamico: un commento alle fonti*, Turin, 181-246; R. ALUFFI BECK-PECCOZ (1990), *La modernizzazione del diritto di famiglia nei paesi arabi*, Milan.

sources. An interpretation that, through the influence of the Islamic legal tradition, as well as a sociological resistance to overcoming that family model, may also come to influence the application of family codes (personal status) by judges in Muslim countries.

There are some stumbling blocks that are difficult to remove, such as the Muslim woman's sole impediment to marriage with a non-Muslim, or the male potestative right to repudiation It is evident, in both cases, the conflict with our public order for violation of the principle of moral and legal equality between spouses and the prohibition of discrimination on the basis of gender. An issue that also involves the potential polygynous bonds that may result from the recognition of Islamic marriage. Even if on this point, many Islamic States are making significant efforts to mitigate the phenomenon and offer more effective protection to 'additional wives', especially in dissolution and child custody, with a reform also of the institution of the wilaya, the husband's authority over his wife and the father's over his children.

If we look more specifically at the dissolution of marriage, we note that some States are progressively introducing, in favour of women, alternative institutions to male repudiation. This is the case of the *khul'*, which consists of a ritual procedure at the end of which the judge pronounces the dissolution at the woman's request, subtracting her from a more lacerating judgment on the merits (as in the case of divorce for damages), albeit after having imposed an economic ransom on her.

Resorting to this institution to facilitate the dissolution of the marriage at the request of the woman could become an area of intervention of the amicable justice system in view of a judicial decision that takes into account the legal-cultural specificities of the Muslim family. In fact, the conflict between the spouses may be resolved by means of a patrimonial compensation offered by the wife to the husband, who, if deemed suitable by the judge, may no longer oppose the declaration of dissolution. A possible arbitrator could bring the matter within the overall regulation of property issues between the parties and, verifying compatibility with Italian law, functionally adapt the rules of *khul'* to the consensual separation (once the husband has accepted the sum of 'redemption' from the wife also in relation to the payment of the *mahr*, the nuptial gift owed by the husband and an essential element of the contract under penalty of nullity), proposing to the judge a solution that balances the identity and conscience needs of the family with the inalienable confrontation with internal public order.

This rationale could be progressively extended to include institu-

tions such as the monogamy clause (express termination clause in favour of the woman in the event of her husband's second marriage), as well as issues relating to filiation, from child custody through *kafala*.[32]

In all these areas, where the unavailability of the rights around which the dispute has arisen is prevalent, mediation and other procedures to achieve mutually agreed solutions in family disputes should be seen as supplementing and not replacing ordinary judicial procedures.

In family disputes that have elements of internationality, moreover, alternative rites should take into account existing national and international law, so as to prepare the ground for an agreement consistent with domestic law on the matter.

[32] Italian Court of Cassation, judgment 16.9.2013, no. 21108; Italian Court of Cassation, 2.2.2015, no. 1843.

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Part V

COORDINATION OF EU MEMBER STATES IN MIGRATION MANAGEMENT

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Chapter 26

MANAGING MIGRATORY FLOWS IN THE EU THROUGH TEMPORARY PROTECTION: ISSUES AND PERSPECTIVES IN THE UKRAINIAN CASE

Angela Festa

ABSTRACT: *Temporary protection (TP), which first appeared in international discourse in the 1970s as a practical response to large-scale refugee movements, was introduced into the European Union legal order by Directive 2001/55/EC. Since its entry into force, even though some Member States invoked it, the instrument had never been activated, leading some scholars to believe that the law was a dead letter. However, on 4 March 2022, a few days after the start of the Russian aggression against Ukraine, the Council of the European Union unanimously decided to activate it for the first time to provide immediate protection to those fleeing the war. This unprecedented decision is remarkable and demonstrates that the EU can efficiently and promptly manage mass influxes of migrants, provided there is the political will to do so. However, the Ukrainian case also highlights some critical points of managing migratory flows through temporary protection. Indeed, TP is only an interim solution that cannot be extended beyond three years, and with the conflict lasting longer than expected, it alone might not prove sufficiently adequate to deal with the situation.*

1. Introduction

When it comes to the coordination of EU Member States in the management of migratory flows, the position taken by the Council of the

European Union in favour of people fleeing the conflict in Ukraine [1] can probably be considered the most virtuous example in the history of European integration of a rapid, coherent, and effective intervention.

In fact, only eight days after the start of the Russian aggression, Member States, in a single act, provided immediate and harmonised protection for the identified mass influx of displaced persons from Ukraine, establishing temporary protection (TP) under Directive 2001/55/EC (TPD). [2]

This unprecedented move – described as "historic" by the EU Commissioner for Home Affairs, Ylva Johansson – took on the connotation of a real foreign policy act in which the EU took a clear stance on the conflict. The political significance of the act was emphasised, *inter alia*, by the fact that the decision (in parallel to a series of sanctions against Russia) was taken unanimously (not simply by a qualified majority, which would have been sufficient for approval) standing in contrast to the securitarian and containment approach that has characterised the European response to the so-called migration crisis for a long time. [3] Moreover, even those Member States that have been the most hostile to receiving migratory flows in recent years have shown very strong solidarity. [4]

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[1] Council Implementing Decision 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Art. 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71, 4.3.2022, 1-6. Cf. S. CARRERA, M. INELI-CIGER (2023), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy*, San Domenico di Fiesole.

[2] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12, 7.8.2001, 12-23. Cf. M. INELI-CIGER (2018), *EU temporary protection directive*, in ID. (ed.), *Temporary Protection in Law and Practice*, Leiden, 149-167; A. SKORDAS (2016), *Temporary Protection Directive 2001/55/EC*, in K. HAILBRONNER, D. THYM (eds.), *EU Immigration and Asylum Law*, Munchen, 1055-1108; K. KERBER (2002), *The Temporary Protection Directive*, in *European Journal of Migration and Law*, n. 4, 193-214.

[3] These include, among others, cooperation with non-EU countries such Libya to prevent asylum-seekers from reaching the EU in the first place, the agreement with Turkey, pushbacks from EU territory, and the policy of detaining asylum seekers.

[4] A. ANGELI (2022), *L'emergenza umanitaria legata al conflitto in Ucraina nei paesi del Gruppo di Visegrád*, in *Forum di Quaderni Costituzionali*, 3, 99 ff.

The decision is also remarkable from a legal point of view, since it has led to the activation of an instrument that some scholars believed to be a dead letter.[5] Since its entry into force more than 20 years ago, Directive 2001/55/EC had never been applied (even though some Member States invoked it)[6] leading the European Commission to consider repealing it.[7] The decision is therefore striking and demonstrates that the EU is capable to manage mass influxes of migrants, provided there is the political will to do so.[8]

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[5] M. NOTARBARTOLO DI SCIARA (2015), *Temporary Protection Directive, dead letter or still option for the future? An overview on the reasons behind its lack of implementation*, in *Eurojus*, available online.

[6] During the so-called "Arab Spring" in 2011, Italy requested the activation of the Directive, but the Commission and many Member States did not recognise the existence of the conditions for its application. An activation request was also made in relation to the war in Syria in 2015. Cf. H. DENIZ GENÇ, N. ASLI ŞIRIN ÖNER (2019), *Why Not Activated? The Temporary Protection Directive and the Mystery of Temporary Protection in the European Union*, in *International Journal of Political Science and Urban Studies*, 1-18; M. INELI-CIGER (2016), *Time to Activate the Temporary Protection Directive*, in *European Journal of Migration and Law*, 1-33; ID. (2015), *Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and Its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean*, in C. BAULOZ *et al.*, *Seeking Asylum in the European Union*, Leiden, 225-246.

[7] And replace it, within the framework of the new Pact on Migration and Asylum, with a new mechanism focusing on the concept of "immediate protection" in the face of large arrivals capable of creating crisis situations at the EU's external borders. See European Commission, Proposal for a Regulation on crisis and force majeure situations in the field of migration and asylum, COM(2020) 613 final, 23.9.2020.

[8] G. MORGESE (2022), *L'attivazione della protezione temporanea per gli sfollati provenienti dall'Ucraina: Old but Gold?*, in *BlogDUE*, available online; E. COLOMBO (2022), *Il Consiglio adotta la decisione di esecuzione della direttiva sulla concessione della protezione temporanea: lo strumento più adatto per far fronte all'afflusso massiccio di sfollati ucraini*, in *BlogDUE*, available online; A. DI PASCALE (2023), *L'attuazione della protezione a favore degli sfollati dall'Ucraina*, in *Diritto, Immigrazione e cittadinanza*, 1, 1-72; M. DI FILIPPO, M.A. ACOSTA SÁNCHEZ (2022), *La protezione temporanea, da oggetto misterioso a realtà operativa: aspetti positivi, criticità, prospettive*, in *Ordine internazionale e diritti umani*, 926-956; C. CUTTITTA (2022), *I primi sei mesi dell'attuazione della protezione temporanea negli Stati membri: luci ed ombre*, in *Eurojus*, 3, 57 ff.; A. CRESCENZI (2022), *La crisi ucraina e l'attivazione della direttiva 55/2001 sulla protezione temporanea: trattamenti preferenziali e doppi standard*, in *Ordine internazionale e diritti umani*, 1160-1176.

In concrete terms, the impact of the decision has been exceptional: it has been able to guarantee – one year after its entry into force – automatic and collective protection to over 4 million people,[9] granting a minimum standard of harmonised rights, including temporary residence permits, access to education, the labour market and other social services.[10] Furthermore, it enabled Member States to effectively address a unique emergency in the short term,[11] overcoming the limitations of the Geneva Convention and the procedural difficulties associated with its requirement for individual examination of applications.

However, this historic unity of purpose, while laudable, may not be sufficient to address the humanitarian crisis resulting from the ongoing conflict. Indeed, TP is not applicable for the entire duration of the circumstances that led to it, but only for a maximum of three years, and is designed as a "return-oriented protection mechanism".[12]

Given that hostilities have not ceased at the time of writing, and their persistence continues to force thousands of people to flee their homes,[13] it is time to reflect on the possible next steps to take to address the situation.

With this in mind, this chapter reconstructs the protection offered in the Ukrainian case under Directive 2001/55/EC and questions its adequacy to deal with the ongoing humanitarian crisis, reflecting on the futuristic scenarios that may arise when the temporary protection expires and the most problematic implications of this regime emerge.[14]

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[9] To be noted is that although this is a form of recognition that does not require administrative procedures for its implementation, the national authorities still have to check the identification of the beneficiaries, that they actually belong to the categories of beneficiaries, and that there are no obstructive conditions for reasons of danger and security.

[10] See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (2022), *National legislation implementing the EU Temporary Protection Directive in selected EU Member States*, available online.

[11] It is estimated that this is the largest influx since World War II.

[12] J. DURIEUX (2014), *Temporary Protection: Hovering at the Edges of Refugee Law*, in *Netherlands Yearbook of International Law*, 232.

[13] In the first quarter of 2023, around 100,000 entries per month were registered, which, if constant, would result in another million people entering the country.

[14] F.R. PARTIPILO (2022), *Op-Ed: "The War in Ukraine and the Temporary Protection Directive: Tackling a short-lived conflict or a protracted humanitarian disaster?"*, in *Eulawlive*, available online.

2. Defining the EU temporary protection regime: a brief analysis of Directive 2001/55/EC

As mentioned, in response to the large-scale displacement of Ukrainians fleeing the Russian invasion, the European Commission proposed for the first time on 2 March 2022 the activation of Directive 2001/55/EC on temporary protection, considering it the most appropriate instrument to address the humanitarian crisis caused by the conflict. The Council agreed on the Decision on 3 March and formally adopted it on 4 March 2022.

This Directive, conceived in the context of the 1999 Kosovo crisis, was designed with the specific aim of dealing with large numbers of arrivals that could have a negative impact on the efficient operation of the asylum system. By introducing a set of derogations from the ordinary forms, consisting of refugee *status* and subsidiary protection, the Directive offers immediate assistance on a collective basis, while at the same promoting a balance of efforts among Member States, with a solidarity scheme that provides both financial support to the countries most affected by the influx and the transfer of beneficiaries to other Member States through agreed mechanisms. Temporary protection is therefore an emergency instrument for whole categories of beneficiaries and is only applied in the event of a "mass influx" of displaced persons.

Mass influx is defined in Art. 2(d) of the Directive as the "… arrival in the [EU] of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the [EU] was spontaneous or aided, for example through an evacuation programme". [15] In the absence of clear numerical references, the UN Refugee Agency (UNHCR) considers it necessary to take into account one or more of these elements in defining the concept, i.e., the high number of people arriving at the international border, the rapidity of such arrivals, the inadequate reception or response capacity of the host country, and the inability of the international protection system to cope with the situation.

As far as the definition of displaced persons is concerned, Art. 2(c) includes in a non-exhaustive list "… third-country nationals or stateless persons who have had to leave their country or region of origin, or have

[15] N. ARENAS (2005), *The Concept of 'Mass Influx of Displaced Persons' in the European Directive Establishing the Temporary Protection System*, in *European Journal of Migration and Law*, 7(4), 435-450.

been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:

(i) persons who have fled areas of armed conflict or endemic violence;
(ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights".

It is for the Council of the European Union (i.e., the Home Affairs Ministers of Member States), acting on a proposal from the Commission, to determine the existence of a mass influx of displaced persons (Recital 14 and Art. 5 of the Directive). The Council acts by qualified majority; the European Parliament must be informed of the decision, but does not have a vote.

The decision must specify the category of beneficiaries of temporary protection, its starting date and duration, and the information provided by Member States on their capacity to receive displaced persons.

The implementation of the Directive entails, according to Art. 4, the granting of protection for a period of one year, which may be automatically extended by the Commission for six-month periods for a maximum of one year. The Council, acting by a qualified majority on a proposal from the Commission, may also decide to extend the period of protection for a further year. Thus, according to the wording of the provision, temporary protection may last for a total of up to three years. This does not preclude the possibility of early termination if the state of emergency in the areas of origin of the displaced persons ceases to exist before the expected date, thereby allowing safe and stable return to the countries of origin (Art. 6(1)(b) and (2)).

In terms of content, the Directive provides for protection against *refoulement* and basic minimum rights, including the granting of a residence permit, access to employment or self-employment, access to adequate housing,[16] social and health care,[17] and facilitation of family reu-

[16] Member States "shall ensure that persons enjoying temporary protection have access to suitable accommodation or, if necessary, receive the means to obtain housing" (Art. 13, para. 1).

[17] Member States "shall make provision for persons enjoying temporary protection to receive necessary assistance in terms of social welfare and means of subsistence, if they do not have sufficient resources, as well as for medical

nification. Temporary protection allows unaccompanied minors to benefit from legal guardianship and access to the education system. [18]

The right to apply for international protection is also guaranteed, although Member States have the option of postponing the processing of such applications once temporary protection has expired. [19]

3. The first activation: objective, subjective, and temporal scope

The protection granted in the Ukrainian case is based on the legal framework just outlined, but has its own peculiarities because, as we shall see, it is partly based on a special regime reserved for Ukrainian nationals by Annex II of Regulation (EU) 2018/1806. [20] However, in order to reconstruct its content, it is necessary to refer to the Council Decision activating it (Council Implementing Decision EU 2022/382). [21]

As regards territorial application, the Decision stipulates that TP applies to all Member States except Denmark, which although not legally bound by the Directive (Recital 26), has introduced a similar scheme with the Special Act on temporary residence permits for persons displaced from Ukraine.

From a subjective point of view, the Council has determined that TP is mandatory for the following groups of persons:

(a) Ukrainian nationals residing in Ukraine before 24 February 2022;

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care" – which "shall include at least emergency care and essential treatment of illness" (Art. 13, para. 2). Member States must also "provide necessary medical or other assistance to persons enjoying temporary protection who have special needs" (Art. 13, para. 4).

[18] For education, Member States must grant those under 18 "access to the education system under the same conditions as nationals of the host Member State", but may restrict this to the state education system, while admission of adults to the general education system is optional (Art. 14).

[19] Art. 17 of the Directive.

[20] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from this requirement, OJ L 303, 28.11.2018, 39.

[21] S. PEERS (2022), *Temporary Protection for Ukrainians in the EU? Q and A*, in *Eu law analysis*; V. DI COMITE (2022), *La protezione temporanea accordata dall'Unione europea alle persone in fuga dall'Ucraina: aspetti positivi ed elementi critici della decisione (UE) 2022/382*, in *La Comunità internazionale*, 3, 493 ff.

(b) stateless persons, and nationals of third countries other than Ukraine who enjoyed international protection or equivalent national protection in Ukraine before 24 February 2022;
(c) family members of the persons referred to in points (a) and (b), even if they are not Ukrainian citizens. [22]

There are also certain categories of persons for whom the Council has provided that Member States shall apply either this Decision or adequate protection under their national law: in particular, persons and nationals of third countries other than Ukraine who can prove that they were legally residing in Ukraine before 24 February 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law, and who are unable to return safely and durably to their country or region of origin.

Finally, it is left to the discretion of Member States whether to include among the beneficiaries of this protection stateless persons or third-country nationals other than Ukrainians who are legally resident in Ukraine (e.g., third-country nationals in Ukraine for a short period of time to study or work), leading to criticism that they are treated less favourably than Ukrainian citizens (Art. 2(3)). [23]

The Preamble also calls for the protection to be extended "to those persons who fled Ukraine not long before 24 February 2022 as tensions increased or who found themselves in the territory of the Union (e.g. on

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[22] The Decision contains a definition of family members covered by temporary protection, "in so far as the family was already present and residing in Ukraine before 24 February 2022":
(a) the spouse of a person referred to in paragraph 1(a) or (b), or the unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its national law relating to aliens;
(b) the minor unmarried children, whether born in or out of wedlock or adopted, of a person referred to in paragraph 1(a) or (b) or of his or her spouse;
(c) other close relatives who were living together as part of the family unit at the time the circumstances of the mass influx of displaced persons arose, and who were at that time wholly or mainly dependent on a person referred to in paragraph 1(a) or (b).

[23] The preamble states that "in any event" this group of fleeing people should "... be admitted into the Union on humanitarian grounds without requiring, in particular, possession of a valid visa or sufficient means of subsistence or valid travel documents, to ensure safe passage with a view to returning to their country or region of origin".

holidays or for work reasons) just before that date and who, as a result of the armed conflict, cannot return to Ukraine". [24]

From a substantive point of view, as regards Ukrainian citizens, Recital 16 of the Council's Implementing Decision clarifies that they, "as visa-free travellers, have the right to move freely within the Union after being admitted into the territory for a 90-day period" within a period of 180 days. On this basis, "they are able to choose the Member State in which they want to enjoy the rights attached to temporary protection and to join their family and friends across the significant diaspora networks that currently exist across the Union".

The Preamble is silent on the position of non-Ukrainians in this respect. However, Recital 15 notes that Member States have agreed not to apply Art. 11 TPD, which provides that "a Member State shall take back a person enjoying temporary protection on its territory, if the said person remains on, or, seeks to enter without authorisation onto, the territory of another Member State during the period covered by the Council Decision". Therefore, the addressees of the Decision can move to a second EU country and enjoy a similar residence permit, if not temporary protection. This recognises a kind of freedom of movement for displaced persons, as proposed, *inter alia*, by the European Parliament in its advisory opinion under Art. 67 TEC at the time of the adoption of the Directive. [25]

As a consequence, the Decision, which aims to increase the freedom of choice of displaced persons, does not define a redistribution mechanism and therefore relies on a *de facto* redistribution of the persons concerned. [26]

In terms of time, the duration of temporary protection, initially agreed by the Council for one year, was first automatically extended for another year, until March 2024, and then, for a third year, until March 2025. [27]

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[24] Preamble, point 14. To better explain and clarify the provisions of the Council Implementing Decision, the Commission issued Operational Guidelines on 21 March 2022. These guidelines deal with who is and who is not eligible for temporary protection, but also with what to do when people present outdated identity documents, how to proceed with the registration of unaccompanied minors, how to assist with the return of third country nationals who are not eligible for temporary protection.

[25] European Parliament, Advisory Opinion of 13 March 2001.

[26] D. THYM (2022), *Temporary Protection for Ukrainians. The Unexpected Renaissance of "Free Choice"*, in *VerfassungsBlog*, available online.

[27] Council Implementing Decision (EU) 2023/2409 of 19 October 2023 ex-

4. The "duration" as a critical point

With the conflict lasting longer than expected and the protection already extended to its maximum, it is precisely the parameter of "duration" that emerges as one of the most critical points of the tool in question.

If its temporary nature is based, as stated in the preamble to the Directive (point 13), on the need to deal promptly and effectively with an exceptional situation, the very fact that it is linked to a time factor could cause practical difficulties.

Contrary to what one might reasonably expect, indeed, the duration is parameterised to the emergency phase only under a precise time threshold, given that the protection expires in a certain period, which may not exceed three years.[28] It follows that, in the worst case, protection will cease at the end of the maximum period already guaranteed with the conflict still ongoing, and as the Directive does not provide for common measures to be adopted after its expiry,[29] the general legislation on aliens will apply.

These general laws apply "without prejudice" to certain specific provisions of the Directive. In particular, Art. 3 states that temporary protection shall not prejudice recognition of refugee *status* under the Geneva Convention, as an application for asylum shall be allowed at any time (Art. 17), although Member States would suspend the processing of asylum applications during the TP period.[30]

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tending temporary protection as introduced by Implementing Decision (EU) 2022/382, OJ L 2023/2409, 24.10.2023, 1-2.

[28] Moreover, the three-year period itself is the result of a political compromise: the preparatory work shows that there was a great deal of resistance in the form of States that wanted to apply protection for a period of less than one year.

[29] This was criticized by the Committee of the Regions, which stated that the Directive should also have provided for a concerted and coordinated procedure between Member States on repatriation.

[30] According to Art. 18 of the Directive, when a person applies for international protection, EU Regulation 604/2013 determines the Member State responsible for examining the application. However, the declaration attached to the Decision encourages the State in which the application is lodged to assume responsibility on the basis of the discretionary clause in Art. 17(1). This should at least alleviate the pressure on the Member State responsible under the Dublin criteria when faced with mass influxes.

Temporary protection is also without prejudice to the rules on subsidiary protection, which must be granted to a "third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country".[31]

However, both the recognition of refugee status and the granting of subsidiary protection status require an individual examination of the request in order to determine the conditions for application,[32] with all the consequences that this entails in terms of pressure on asylum systems.

The option which, in the logic of the Directive, seems to be the main and most appropriate solution for TP beneficiaries is then the return of the person, possibly voluntary but otherwise forced,[33] as provided for in the Return Directive.[34]

However, as the TPD text clearly states, return is possible as long as

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[31] Art. 2(f) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011, 9-26.

[32] However, it should be noted that the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection may exceptionally be considered to be established where the level of indiscriminate violence characterising the armed conflict taking place reaches such that there are substantial grounds for believing that a civilian returned to the country or region concerned would, by reason only of his/her presence on the territory of that country or region, run a real risk of being exposed to that threat. ECJ, Grand Chamber, judgment 17.2.2009, *Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie*, Case C-465/07.

[33] M. INELI CIGER (2023), *What happens next? Scenarios following the end of the temporary protection in the EU*, in *EU Immigration and Asylum Law and Policy*, in *MPC Blog*, available online.

[34] 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, 24.12.2008, 98-107.

it takes place under "safe and stable conditions", but neither the Directive nor the Council's implementing act defines these conditions.

The Commission, in the Operational Guidelines for the implementation of Council Implementing Decision 2022/382, argued that the reference to safe and stable conditions should be read in the light of Art. 2(c) of the Directive, which refers to situations of armed conflict or endemic violence and to the serious risk of systematic or generalised violations of human rights in the country of origin, but also in the light of Art. 6 and the documented risk of persecution or other inhuman or degrading treatment or punishment.[35]

In order to ensure a stable return, the person concerned should be able to enjoy active rights in his or her country or region of origin that "enable him or her to have prospects of meeting basic needs in that country/region and the possibility of reintegrating into society". In determining whether return takes place "under safe and stable conditions", Member States should take into account the general situation in the country or region of origin.

Considering both the risk posed by the conflict and the possibility of reintegration through the satisfaction of basic needs, the Commission stipulates that the person concerned must provide *prima facie* evidence of the impossibility of a safe and stable return to his or her country or region of origin at the individual level. For this purpose, the assessment should take into account the existence of a significant link with the country of origin, the specific needs of vulnerable persons and minors, in particular unaccompanied minors and orphans, based on the principle of the best interests of the child.

All considered, what if return under "safe and stable conditions" is not possible?

5. What happens next? Exploring possible legal avenues for the future

As we have seen, beneficiaries of temporary protection can apply for asylum on an individual basis. In the meantime, they would be entitled

[35] European Commission, Communication from the Commission on Operational Guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Art. 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, 21.3.2022, C 126 I/1.

to remain on the territory of the Member State as applicants for international protection. They may also be eligible for subsidiary protection, again on an individual basis. As recalled in the Commission Guidelines, both beneficiaries and non-beneficiaries of temporary protection could also benefit from family reunification under Directive 2003/86/EC if they are family members of a third-country national residing legally in a Member State and fulfilling the conditions laid down in this Directive. They may enjoy the rights under Directive 2004/38/EC if they are family members of a Union citizen who has exercised his/her freedom of movement. Member States may also allow families with children attending school in a Member State to benefit from residence conditions allowing the children concerned to complete the current school year (Art. 23).

Member States could also grant citizenship or permanent or temporary residence to former beneficiaries of temporary protection as a group, although this would depend on Member States' national laws and policies on citizenship and residence.

However, given the sheer number and scale of the phenomenon, and the composition of the group – mostly women and minors – a unified European approach would be highly desirable to ensure access to durable solutions for the protected groups.

In this respect, there could be many possible avenues for the European institutions.

One legal avenue could be to grant TP beneficiaries a group *prima facie* Refugee Status Determination (RSD) procedure. *Prima facie* RSD is a tool recognised by the UNHCR for granting refugee status "on the basis of readily apparent, objective circumstances in the country of origin", and is particularly useful "in situations of large-scale displacement in which individual status determination is impractical and unnecessary". As opposed to individual procedures, the *prima facie* RSD alternative may be more practical and could be applied to those from certain parts of Ukraine most affected by the conflict. Indeed, the transition to RSD procedures after TP is being discussed by the European Parliament. As well as *prima facie* RSD, subsidiarity protection on a *prima facie* basis would also be possible as a new type of protection justified by the need to protect the interested parties from the serious harm to which they would be exposed in the event of repatriation.

Another and more desirable avenue would be that of promoting access to legal channels of stay in Member States for former beneficiaries

of temporary protection, facilitating the transition to alternative legal statuses, such as long-term resident (LTR).

In this context, worth noting is that the Commission has adopted a proposal for a Directive on the status of third-country nationals who are long-term residents,[36] which aims at facilitating the acquisition of long-term resident status, in particular by reducing the required period of residence from five to three years and by allowing third-country nationals to cumulate periods of residence in different Member States in order to fulfil the residence requirement.

The proposal also clarifies that all periods of legal residence should be fully counted, including periods spent as a student, or under temporary protection.

Therefore, if the proposal is adopted, beneficiaries of temporary protection who fulfil the conditions for acquiring long-term resident status will be able to obtain long-term residence in the EU.

Moreover, given that LTR status confers on holders the right of permanent residence and equal treatment with nationals of Member States in many respects, thus, granting long-term resident status to temporarily protected groups could enable them to integrate into the host society and ensure they can be protected from forced return, while at the same time gaining access to essential rights and entitlements without any time limit.

6. Conclusions

Russia's invasion of Ukraine has unleashed the largest wave of refugees in Europe since World War II. According to UNHCR, more than 8 million Ukrainian refugees have fled to another European country since the start of the war, and up to 4 million people have benefitted from temporary protection in an EU country as at March 2023. Poland, Germany, and the Czech Republic host the highest number of Ukrainian refugees per capita.

These extraordinary figures are even more impressive when considering that the majority of those leaving were women and children, as Ukrainian men aged between 18 and 60 were banned from leaving the country in case they were needed for the draft.

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[36] A. DI STASI (2022), *La prevista riforma della direttiva sul soggiornante di lungo periodo: limiti applicativi e sviluppi giurisprudenziali*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli, 433-460.

The immediate and coherent response of the European institutions, through the activation of a never-before-used instrument, made it possible to deal with an exceptional situation in the short term. While this raises obvious questions about the double standards applied to others fleeing war or persecution, it is nonetheless welcome. More than a year after the TPD was activated, the scheme has proven successful: over 4 million people have entered the EU without legal or practical obstacles and enjoy a common status.

The decision to use TP was undoubtedly based on several factors: unlike in other contexts, the element of mass influx was immediately apparent, and since Ukraine shares an external border with the European Union, this inevitably led even the most hostile Member States to show very strong solidarity. At the same time, when the Directive was activated, there was a widespread and optimistic belief that this was a war that could be resolved quickly thanks to a swift diplomatic solution and that the beneficiaries of protection would soon return to their country voluntarily. [37]

However, the persistence of the conflict and the temporary nature of the protection call for reflecting on other solutions including the legal stabilisation of those who will not be able to return safely to their country of origin.

Indeed, it is clear that the longer the conflict continues, the more uncertain the prospects for return, and that repatriation will not be the general solution, given the likely alternation of acute periods of fighting and bombing, but also the temporary deterioration of living conditions due to the lack of electricity and heating or other essential goods.

On the other hand, the longer the period of protection, the stronger the ties established in the host country and the less interest there is in returning. It is already known that a good percentage of the 4 million do not want to return in their country of origin.

In this context, it should be noted that the planned reform of temporary protection does not address the problem either, since the measures envisaged to deal with crisis situations are always temporary and do not provide for mechanisms to link to other stable systems. [38]

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[37] M. INELI-CIGER (2022), *5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022*, in *EU Immigration Law Blog*, available online.

[38] R. PALLADINO (2022), *Il nuovo status di protezione immediata ai sensi della proposta di regolamento concernente le situazioni di crisi e di forza maggiore:*

RSD *prima facie* and subsidiarity protection *prima facie* would then be possible legal solutions capable of extending international protection on a collective basis, overcoming the limitations of individual applications.

But these would be temporary solutions. It may be more helpful to promote the integration of those who wish to remain on European soil through the path of long-term resident status. In any case, as the current legal framework does not allow for these pathways, regulatory interventions would be necessary, and they should start as soon as possible, well before the end of TP.

luci ed ombre, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO, *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli, 593-616; E. PISTOIA (2022), *Dalla protezione temporanea alla protezione immediata. L'accoglienza degli sfollati dall'Ucraina come cartina tornasole della proposta di trasformazione*, in *FSJ*, 2, 101-123.

Chapter 27

THE NEW EU ACTION PLAN AGAINST MIGRANT SMUGGLING AS A "RENEWED" RESPONSE TO THE EMERGING CHALLENGES

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ABSTRACT: *This chapter analyses the EU Action Plan 2021-2025 to combat migrant smuggling, proposing a reinforced framework at the EU level and a set of actions in different areas to combat the phenomenon, strengthening the European approach to migration management as presented in the Pact on Migration and Asylum, in cooperation with countries of origin and transit. In particular, the Plan promotes a "renewed" response to migrant smuggling with respect to the 2015-2020 Plan to address the persistent challenges as well as those emerging in the current landscape, such as digital smuggling, financial investigations, asset recovery, document fraud, and the instrumentalisation of migration by State actors for political ends to destabilise the European Union and its member States (i.e., organised State-sponsored smuggling of migrants into the EU from Iraq, the Republic of the Congo, Cameroon, Syria). In this context, the added value of the Plan lies in the provision of concrete measures necessary to combat and prevent smuggling and to ensure that the fundamental rights of migrants, especially those in vulnerable situations such as children, unaccompanied minors, and women, are fully protected.*

1. Introduction: the reasons for a renewed EU Action Plan against migrant smuggling

Migrant smuggling is a cross-border criminal activity that puts the lives of migrants at risk, showing disrespect for human life and dignity

in the pursuit of profit, and undermines the migration management objectives of the EU and the fundamental rights of the people concerned.

In this context the renewed EU Action Plan (2021-2025) against migrant smuggling [1] sets out the key pillars and concrete actions needed to counter and prevent smuggling, ensuring that the fundamental rights of migrants are fully protected, thereby determining a strong European response to migrant smuggling [2] inside and outside the EU. [3]

The Action Plan contributes to the implementation of the New Pact

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[1] Communication, *A renewed EU action plan against migrant smuggling* (2021-2025), 29.9.2021, COM/2021/591 final. See G. LICASTRO (2022), *Traffico di migranti: il nuovo piano d'azione (UE) di contrasto 2021-2025*, in *Quest. giust.*, 1 ff.; A. FALLONE (2021), *Understanding the Future of European Union Counter-Smuggling Policy: The Renewed EU Action Plan against Migrant Smuggling (2021-2025)*, *STG Policy Analysis*, 19, 1 ff., available online.

[2] *Ex multis* see A. SCHLOENHARDT (2021), *Smuggling of Migrants and Refugees*, in C. COSTELLO, M. FOSTER, J. MCADAM (eds.), *The Oxford Handbook of International Refugee Law*, Oxford, 535 ff.; V. MILITELLO, A. SPENA (2019), *Between Criminalization and Protection. The Italian Way of Dealing with Migrant Smuggling and Trafficking within the European and International Context*, Leiden-Boston; L. SCHIANO DI PEPE (2019), *Human Trafficking and Migrant Smuggling at Sea. Safety Aspects and Role of the European Union*, in K. ZOU (ed.), *Maritime Cooperation in Semi-Enclosed Seas*, Leiden-Boston, 131 ff.; S. CARRERA, E. GUILD (eds.) (2016), *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU*, Centre for European Policy Studies, available online; M. CARTA (2016), *La disciplina del traffico di migranti: prospettive di riforma nel sistema UE*, in *Federalismi.it*; G. PALMISANO (ed.) (2008), *Il contrasto al traffico di migranti nel diritto internazionale, comunitario e interno*, Milano.

[3] The EU's competence in combatting irregular migration is set out in Art. 79(1) and (2)(c) of the Treaty on the Functioning of the European Union (TFEU). As per Art. 80 TFEU, the 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 the financial implications, among the Member States. Insofar as migrant smuggling is a criminal phenomenon, the EU enjoys competence with regard to police and judicial cooperation in criminal matters in accordance with TFEU Chapters 4 and 5, Title V 'Area of Freedom, Security and Justice'. In 2002, the EU adopted rules to clamp down on migrant smuggling. Directive 2002/90/EC establishes a common definition of the offense of facilitation of unauthorised entry, transit and residence, while Framework Decision 2002/946/JHA reinforces the penal framework to prevent this crime by setting out minimum rules for sanctions. Adopted together, these two instruments complement each other.

on Migration and Asylum,[4] supporting the objectives of the EU Security Union Strategy,[5] the EU Strategies to tackle Organised Crime 2021-2025[6] and on Combatting Trafficking in Human Beings 2021-2025[7] that will be implemented in full synergy.

Indeed, great progress has been achieved at EU level[8] with regard to dismantling some of the criminal networks, as a consequence of the establishment of the Europol's European Migrant Smuggling Center,[9] and its Information Clearing House; the strengthening of operational cooperation among EU Member States' law enforcement agencies, partner countries, and relevant EU Agencies, such as the European Union Agency for Criminal Justice Cooperation (Eurojust) that is a key actor in the enhancement of the judicial response to migrant smuggling; the European Multidisciplinary Platform Against Criminal Threats (EMPACT) improving the criminal intelligence, information exchange and operational cooperation among Member States and with third partners;[10] the establishment of the Joint Operational Team (JOT) Mare, launched to combat irregular migration in the Mediterranean,[11]

[4] Communication, 23.9.2020, COM/2020/609 final.

[5] Communication, 24.7.2020, COM/2020/605 final.

[6] Communication, 14.4.2021, COM/2021/170 final.

[7] Communication, 14.4.2021, COM/2021/171 final.

[8] See *EU Action Plan against migrant smuggling (2021-2025)*, roadmap 1.3.2021: "Migrant smuggling is a global phenomenon, organised by criminal groups which operate across borders. This has a large impact and implications for the security of the European Union as a whole. It is therefore essential that the strategic direction on tackling migrant smuggling is framed at EU level".

[9] The establishment of Europol's European Migrant Smuggling Centre in 2016 is a milestone in the enhancement of law enforcement cooperation. The Centre provides operational support to Member States in their investigations, bringing together investigators from Member States, providing analysis and participating in action days, where Europol staff cross-check operational information on smuggling cases.

[10] One of its priorities is disrupting criminal networks along the main routes towards and within the EU, focusing on those networks whose methods endanger people's lives (such as concealment in trucks and lorries, and using unseaworthy vessels), offering services online and making use of document fraud.

[11] Hosted at Europol headquarters in The Hague, JOT Mare tackles organised criminal groups combining Europol's unique intelligence resources and Member States' capabilities to carry out coordinated and intelligence-driven actions against the facilitators, as well as ensuring intensified exchanges of in-

using information of the European Border Surveillance System (EUROSUR),[12] as well as the Regulation on the European network of immigration liaison officers,[13] that reinforced the gathering and sharing of information. Nevertheless, migrant smuggling remains a serious challenge that needs to be continuously, concertedly, and collectively tackled further.

According to the European Union Agency for Law Enforcement Cooperation (Europol), more than 90% of the irregular migrants who reach the EU make use of smugglers, either during parts or all of their journey, and two thirds of them do not meet the criteria for being granted international protection and will eventually need to be returned.

Furthermore, restrictive measures in the context of the COVID-19 pandemic made migrant smuggling more complex, leading to an increased involvement of criminal networks, higher prices, and ultimately higher profits.

Among other things, the European Council, in its conclusions of 24-25 June 2021,[14] as well as in the conclusions of 29-30 June 2023,[15]

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telligence with Frontex and close cooperation with Interpol, national experts seconded to JOT Mare will facilitate the necessary cooperation between Europol and the services of participating EU Member States.

[12] Regulation 2019/1896/EU, 14.11.2019, OJ L295, 1 ff. and Commission Implementing Regulation 2021/581/EU, 12.4.2021, OJ L124, 3 ff. See G. LICASTRO (2021), *Il regolamento di esecuzione (UE) 2021/581 della Commissione di EUROSUR*, in *DPCE Online*, 2, 1241 ff.; ID., *L'adozione del nuovo piano d'azione (UE) di contrasto al traffico di migranti (2021-2025) e l'incidenza del regolamento di esecuzione (UE) 2021/581 della Commissione di EUROSUR*, in *Ind. pen.*, 3, 833 ff.

[13] Regulation 2019/1240/EU, 25.7.2019, OJ L198, 88 ff.

[14] European Council meeting (24-25 June 2021) – Conclusions, Council document EUCO 7/21, 25.6.2021. The main difference between migrant smuggling and trafficking in human beings is that in the former migrants willingly engage in the irregular process by paying for the services of a smuggler to cross an international border, in the latter, people are trafficked for exploitation purposes, victims in need of assistance and support, and not necessarily cross-border activities. The two phenomena are often linked as smuggled people can become victims of traffickers for labour, sexual or other exploitation. On this issue, see M. VENTRELLA (2018), *Smuggling of Migrants by Sea: EU Legal Framework and Future Perspective*, USA, which argues that although smuggling and trafficking are two separate crimes, they can overlap. Consequently, the law on human trafficking can be extended to smuggled migrants when there is an overlap.

[15] European Council meeting (29 and 30 June 2023) – Conclusions, Council

reaffirmed the importance of the fight against smugglers, raised serious concerns on the developments on some migratory routes requiring urgent action and called for a whole-of-route approach to tackle them, including by eradicating migrant smuggling and trafficking in human beings.

In summary, as we will see, this renewed EU Action Plan against migrant smuggling builds on and promotes the continued implementation and renewal of the successful actions launched under the previous EU Action Plan 2015-2020,[16] while strengthening the EU's response to the new and evolving reality and practices emerging along the migratory routes, in cooperation with countries of origin and transit, in the spirit of partnership and mutual responsibility.

2. The persistent and emerging challenges in the European-wide fight against migrant smuggling: the instrumentalisation of irregular migration by State actors

The renewed European-wide fight against the smuggling of migrants must respond not only to persistent but also newly emerging challenges.

In this context, a recently observed phenomenon is the instrumentalisation of migration by State actors, namely the increasing role of States in artificially creating and facilitating irregular migration, using migratory flows as a tool for political purposes to destabilise the European Un-

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document EUCO 7/23, 30.6.2023. In particular, the President of the European Council on the external dimension of migration noted that the European Union remains committed to breaking the business model of traffickers and smuggling networks, including instrumentalisation, and to tackling the root causes of irregular migration so as to better address the flows of migrants and avoid that people embark on such perilous journeys. The migratory situation at the EU's external borders and within the EU was reviewed in a comprehensive way, and work undertaken so far in the framework of a European response was noted. The Council Presidency and the Commission informed the European Council about the steady progress in implementing its conclusions of 9 February 2023 (Special European Council), with a focus on the external aspects of migration and their financing mechanisms. The Council and the Commission will continue to closely monitor and ensure the implementation of the European Council conclusions and report accordingly.

[16] Communication, *EU Action Plan against migrant smuggling (2015 - 2020)*, 27.5.2015, COM/2015/285 final. Based on the Communication, *A European Agenda on Migration*, 13.5.2015, COM/2015/240 final.

ion and its Member States. Consider, for example, Belarus retaliating to EU sanctions by organising the State-sponsored smuggling of migrants into the EU by plane from several third countries and mainly from Iraq, as well as from the Republic of the Congo, Cameroon, Syria, amongst others. [17]

The expressions used to describe the actions of third countries, such as "facilitating irregular migration" and "using human beings to create pressure at the EU's external borders" highlight the "dehumanisation" of migrants, presenting them as a threat due to their irregular situation.

Therefore, close cooperation and continued vigilance are key to protecting the external borders, preventing and responding to irregular migration facilitated by State actors, a response that needs to be strengthened in dialogue with partner countries. [18]

Indeed, the EU has already established successful cooperation frameworks with partner countries that contribute to the fight against irregular migration and smuggling. However, the actions and efforts are fragmented, and smuggling remains a growing concern for both the EU and partner countries. A more coordinated and structured approach is needed to enhance synergies, maximise the effectiveness of existing tools and address new challenges.

Therefore, the Renewed Action Plan, building on the previous plan, emphasises working with "partner countries", adopting a whole-of-route approach combining international cooperation and coordination with the partners and among Member States. This coordination takes the form of "Anti-Smuggling Operational Partnerships with partner countries along migratory routes, [19] as part of the comprehensive, bal-

[17] Belarus also announced on 28.6.2021 that it would suspend the readmission agreement with the EU and refuse to take back those irregular migrants who transited through Belarus. Migrant smugglers have taken advantage of the situation, notably of the actions of the Belarusian authorities, offering illicit services and online guidance to migrants on how to illegally reach Belarus and to irregularly cross the EU external border to Lithuania, Latvia, or Poland.

[18] This plan also cites the EU Migration Preparedness and Crisis Management Network (Blueprint network) as a way to coordinate Member States' responses to the instrumentalisation of migration.

[19] The Renewed Action Plan emphasises the success of the Africa-Frontex Intelligence Community in 30 African nations. To support the activities of these so-called 'Anti-Smuggling Operational Partnerships', the European Commission is keen to commit EU funding instruments such as the Asylum Migration and Integration Fund (AMIF), the Border Management and Visa Instrument

anced, tailor-made and mutually beneficial migration partnerships",[20] where the implicit meaning of "mutually beneficial" is the containment of potential irregular migration toward the European Union.[21]

Under the fourth pillar of the Action Plan 2015-2020, the Commission supported bilateral and regional operational cooperation against migrant smuggling for a stronger and closer cooperation with partner countries. This cooperation included support to law enforcement, judicial cooperation, capacity building in border management, information and awareness raising campaigns. These regional and national Common Operational Partnerships[22] facilitated joint action and provided capacity building for law enforcement and judicial authorities in partner countries, supporting the exchange of best practices and information.

Thus, the EU continues to support the regional dialogue and processes that promote cooperation to prevent and combat migrant smuggling (e.g., the follow-up to the 2018 Niamey Declaration).[23]

(BMVI) and the Global Europe/Neighbourhood, Development and International Cooperation Instrument (NDICI).

[20] Migration partnerships aim at improving migration governance and management, supporting refugees and host communities in partner countries, building economic opportunities, promoting decent work and addressing the root causes of irregular migration, stepping up cooperation on return, readmission and reintegration, while developing legal pathways and attracting skills and talent to Europe. Countering migrant smuggling forms an important part of these partnerships. Support is adapted to the context of a third country and may include measures related to legal framework, prevention measures and operational support and is provided with close involvement of relevant international organisations and making full use of the EU networks of immigration liaison officers in third countries.

[21] European Council conclusions, 24-25 June 2021, pt. 12: the European Council noted that these tailored partnerships will be "*an integral part of the European Union's external action*" (emphasis added).

[22] Common Operational Partnerships are flexible cooperation frameworks to fight against organised crime networks engaged in migrant smuggling and trafficking in human beings, tailor made to the needs of the partner country. One or more Member States work alongside law enforcement, judiciary and other relevant authorities of a partner country, in cooperation with EU agencies and international organisations. Support may comprise of training, mentoring, exchange of information and provision of equipment.

[23] At regional level, the Joint Valletta Action Plan supported the enhancement of migration governance between Europe and Africa. Since 2018, the Niamey process supports cooperation between the EU, its Member States and

Moreover, the recent EU approaches to migration have focused on the same use of third-country partnerships to externalise migration management and the anti-smuggling policy.

In fact, this externalisation is not a new phenomenon, but its implementation has expanded in recent years,[24] relying on a logic of containment, and restricting the movement of individuals seeking protection.[25] The risk is that without adequate safeguards or guarantees from third country partners, externalisation also jeopardises respect for the fundamental rights of migrants.

In any case, the renewed Action Plan lists "close cooperation and solidarity among Member States as well as continuous and broad dialogue and coordinated engagement with countries of origin and transit on the prevention of irregular migration" as strategies to address this issue.

In this context, another important priority indicated in the renewed Action Plan and recent European migration management and counter smuggling policy is the expansion of return operations repatriating irregular migrants and rejecting asylum applicants deemed ineligible for protection. On this point, the Renewed Action Plan argues that return operations contribute to "reducing the incentives for irregular migration" noting that "sustainable reintegration" can offer a "new start to people who return to their countries of origin".

2.1. A response to new challenges in digital smuggling, financial investigations, and document fraud

The renewed response must also be able to adjust rapidly to the constantly evolving criminal landscape, such as to address digital smuggling, financial investigations, asset recovery, and document fraud.

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countries in West and North Africa to prevent and combat migrant smuggling and trafficking in human beings. In addition, the Regional Operational Centre in Khartoum (ROCK), established in 2019 with assistance from the EU, supported law enforcement cooperation and information sharing.

[24] See, for example, the cooperation between Spain and Morocco that dates back to the turn of the 21st century. The 2015 European Agenda on Security also emphasised cooperation with third countries to counteract human smuggling and the European Council repeated in its June 2018 Conclusions the need to expand partnerships and cooperation with nations in the Western Balkans and Africa.

[25] On the "right of exit", to leave any country, including your country see F. DE VITTOR (2014), *Il diritto di traversare il Mediterraneo… o quantomeno di provarc*i, in *Dir. um. e dir. internaz.*, 1, 77 ff.

First, digital smuggling is a new challenge for law enforcement and judicial authorities, as smugglers increasingly use digital services and tools, such as social media and mobile applications for recruitment, communication and money transfers, pick-ups and handover of migrants, providing route guidance, sharing pictures and videos of documents and tickets, and even monitoring law enforcement activities. [26]

The increased digitalisation brought about by the pandemic has also significantly impacted migrant smuggling. Since the beginning of the COVID-19 pandemic, criminals have adapted to the new rules and restrictions in the way they recruit, transport, and exploit victims and the most vulnerable, and they continue to thrive in spite of these changes.

For this reason, the plan emphasises the need to increase social media monitoring to disrupt migrant smuggling networks involved in digital smuggling.

In this regard Frontex [27] should deploy its monitoring capabilities in social media to improve the risk analysis regarding future irregular migratory movements, as well as the support of the Internet Referral Unit of Europol and of Eurojust in facilitating Member States and ensuring the collection of electronic evidence, especially in relation to encrypted communications.

In addition, specialised training should be provided, including with the support of the European Union Agency for Law Enforcement Training (CEPOL) and the European Judicial Training Network, and the availability of technical equipment and software for investigative units should be ensured.

In fact, the Commission has called on the European Parliament and Council to finalise negotiations on the e-Evidence package, [28] which will

[26] See Report of Frontex and Europol "*Digitalisation of migrant smuggling. Digital tools and apps enabling facilitation*", Brussels, 29.9.2021, dedicated to the digitalisation of migrant smuggling. The report looks at the development of digital tools and services that enable all stages of migrant smuggling, such as advertising, recruitment, communication, guidance, and payment. Thus far, the tools most frequently detected in the context of migrant smuggling are commonly available apps, such as Facebook and WhatsApp.

[27] The European Border and Coast Guard Agency (Frontex): patrols the EU's external border, collects data and intelligence regarding smuggling routes and the practices of criminal networks, provides support through satellite imagery in cooperation with other EU Agencies, and through operations in non-EU countries.

[28] Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters, Strasbourg, 17.4.2018,

provide national law enforcement and judicial authorities with tools adapted to the specificities of the digital world and will foster the efficient investigation and prosecution of all crimes involving electronic evidence.

Second, any investigation into a migrant smuggling case should include a financial investigation – as the primary objective in parallel with regular investigations on suspects, *modus operandi*, and routes – in order to trace, seize, and recover criminal assets, bearing in mind that migrant smuggling generates large amounts of criminal profits.

However, this is made difficult by the use of unregulated financial channels and the links between criminal networks and legitimate business structures.

For these reasons, and as affirmed in the Action Plan, financial investigations and asset recovery procedures should be enhanced at national, European, and international level, in line with the EU Strategy to tackle Organised Crime 2021-2025. In particular, Member States should systematically conduct financial investigations and asset recovery in organised crime investigations with the support of Europol's Financial and Economic Crime Centre and Eurojust.

Finally, the Action Plan focuses on identity and document fraud to reduce the number of visas issued by embassies of Member States on the basis of stolen and/or falsified identity documents. [29]

For this purpose, as also affirmed in the Action Plan, Member States should use new information systems to identify falsified documents, [30] promote the use of new technologies to detect document fraud, control the issuance and delivery of passports, the modernisation and computerisation of civil registries, as well as possible training activities, and pursue a closer collaboration between document issuing and document

COM/2018/225 final, and Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, Strasbourg, 17.4.2018, COM/2018/226 final.

[29] For example, see the "Yoghi" Investigation that began in 2015, when Spanish investigators arrested a suspect in Spain accused of couriering false documents between Madrid and Athens, facilitating the illegal entry of migrants – mainly Syrians, Afghans and Iraqis – to and within Europe and the Schengen area.

[30] False and Authentic Documents Online (FADO), the Frontex Interpol Electronic Document System (FIELDS), Profiling of False Identity Documents (PROF ID) and the Europol forensic laboratory.

control authorities, including by performing checks on Interpol's Stolen and Lost Travel Documents (SLTD) database.

Moreover, the role of the Frontex Centre of Excellence for Combatting Document Fraud should be strengthened,[31] including through the deployment of document fraud experts within the framework of Frontex operational activities in Member States and third countries; and as part of the Anti-smuggling Operational Partnerships, cooperation to combat identity and document fraud with partner countries should also be pursued.

In any case, the digitalisation of visa procedures[32] announced in the New Pact on Migration and Asylum will significantly reduce the risks of forgery and fraud.

2.2. The protection of fundamental rights with particular regard to vulnerable migrants and irregular migrant workers

Compared to the previous plan, the renewed Action Plan 2021-2025 focuses more on vulnerable migrants including women, children, and unaccompanied minors, who are exposed to violence, extortion, exploitation, rape, abuse, theft, kidnapping, and even homicide,[33] and unable to seek help due to their irregular status.

In the case of women, criminal networks are increasingly organising sham marriages as part of sophisticated fraud schemes, generating profit by luring mainly women in vulnerable positions into an activity that appears to earn them "easy money" but instead traps them in a web of exploitation and abuse. Vulnerable migrants are also victims of crime and may have difficulties in accessing justice.[34]

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[31] Frontex established the Centre of Excellence for Combatting Document Fraud in 2018 to assist Member States in spotting and counteracting various illegal uses of fraudulent documents. It has developed a reference manual for border guards containing images of passports, identity cards, and visas to help them determine whether the document in front of them is genuine.

[32] To reduce security risks related to counterfeited and stolen visa stickers, visas will be issued in digital format (a visa sticker will no longer be affixed to the travel document). The digitalization of the Schengen visa will be handled by the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA).

[33] Global study on smuggling of migrants (United Nations Office on Drugs and Crime, 2018).

[34] A. FALLONE, *Understanding the Future of European Union Counter-*

As it is known, under the Victims' Rights Directive,[35] all victims of crime enjoy a series of rights, including support and protection, which should be safeguarded under all circumstances, and in this context providing protection and assistance to smuggled vulnerable migrants is key, with a particular attention to children and women, including within the framework of the EU strategies on victims' rights 2020-2025,[36] Combatting Trafficking in Human Beings 2021-2025, and the EU Strategy on the rights of the child.[37]

In addition, the protection of fundamental rights in police and judicial proceedings needs to be ensured, with specific attention to cases where migrants are victims of trafficking.

In this regard the EU Action Plan 2015-2020 had already set out concrete steps to improve the prevention of migrant smuggling and assistance to vulnerable migrants, thus making progress in the implementation of this pillar.

In particular, with view to enhancing the prevention of migrant smuggling and assistance to vulnerable migrants, the Commission launched information and awareness-raising campaigns in key partner countries, to inform potential migrants about the risks of smuggling and irregular migration.[38]

As reiterated in the Action Plan, people with special needs should be identified as a priority upon arrival on EU territory and referred to adequate support by appropriate entities. The role of the future pre-entry screening,[39] with the support of EU agencies, notably Frontex and the

Smuggling Policy, cit., 4: "Although it states that 'the fundamental rights of migrants are often gravely violated and migrants are often unable to seek help due to their irregular status', the Renewed Action Plan includes no improved mechanism for migrants to access justice and report abuse at the hands of Member States' or partner-countries' border security personnel".

[35] Directive 2012/29/EU, *establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, 25.10.2012, OJ L315, 14.11.2012, 57 ff. In this regard, see Recital 38 and Art. 22 "Individual assessment of victims to identify specific protection needs".

[36] COM/2020/258 final.

[37] COM/2021/142 final.

[38] Based on the information gained during past campaigns, and a study the Commission carried out on this topic the Commission is developing a toolkit with good practices and recommendations on the research and design of campaigns, their delivery and working methods.

[39] COM/2020/612 final.

European Asylum Support Office (EASO), is important in this respect. In the meantime, EU agencies will continue to support Member States, in particular with the procedures for identification and referrals, in line with the Reception Conditions Directive[40] and Asylum Procedures Directive.[41]

Furthermore, to prevent migrant smuggling and trafficking within the EU,[42] asylum authorities should increase their monitoring activities within and around reception centres for asylum seekers, who are targeted by smugglers to identify potential victims and arrange transportation to the destinations where children – especially unaccompanied minors – and other vulnerable persons will be exploited.

As underlined in the new Action Plan, the fundamental rights of migrants must be safeguarded at all times, starting precisely with those in vulnerable situations.

In addition to the protection of fundamental rights, the Action Plan also focuses on the rights of irregular migrant workers. Indeed, one of the key drivers of irregular migration, is the possibility for irregular migrants to find work in the informal economy, hence gaining resources that can support the subsistence of family members in their country of origin.

For this reason, the Action Plan also foresees the effective implementation of the Employers Sanctions Directive 2009/52/EC[43] as an important deterrent of irregular migration and to protect the rights of irregular migrant workers.

In particular, the Employers Sanctions Directive sets out the rules on sanctions for employers of irregular migrants, establishing minimum standards and mechanisms to detect illegal employment. Other measures include protecting the rights of irregular migrants, establishing mecha-

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[40] Directive 2013/33/EU, *laying down standards for the reception of applicants for international protection (recast)*, 26.6.2013, OJ L180, 29.6.2013, 96 ff.

[41] Directive 2013/32/EU, *on common procedures for granting and withdrawing international protection (recast)*, 26.6.2013, OJ L180, 29.6.2013, 60 ff.

[42] Smuggling does not stop at the external borders of the EU. Smuggling networks continue to exploit routes within the EU from Spain, Italy, or Greece to France, Germany, and others, facilitating the movement of irregular migrants by land, on foot, or in vehicles, boats, and planes. A common modus operandi is the concealment in closed compartments or the use of rental cars.

[43] Directive 2009/52/EC, *providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, 18.6.2009, OJ L168, 30.6.2009, 24 ff.

nisms to claim back outstanding wages,[44] facilitate complaints that can reveal situations of illegal employment, issue temporary residence permits to victims of particularly abusive employers to allow them to take part in criminal proceedings, carry out effective inspections in the economic sectors most at risk of illegal employment.

Together with the renewed EU Action Plan, the Commission also adopted a Communication on the Employers Sanctions Directive that considers the practical application of the Directive and identifies the necessary measures to strengthen implementation by focusing on three main actions: sanctions against employers, measures to protect the rights of irregular migrants, and conducting inspections.[45]

With regard to sanctions, alongside stepping up the measures to prevent irregular migration in the first place, the effective prohibition of the employment of irregular migrants remains a key element in the fight against irregular migration.

Sanctions against employers should counterbalance the economic gains of employing irregular migrants, reflect the seriousness of the offence, and proportionally respond to the severity of the violation increasing in cases of particularly exploitative working conditions (e.g., persistent violations, significant number of irregular migrants hired, and employment of victims of human trafficking).

Based on these principles, the Directive defines minimum standards for financial and criminal sanctions against employers, and sets additional administrative measures to counter illegal employment, such as loss of public benefits or exclusion from public contracts. However, Member States have flexibility in determining the actual level of sanctions, depending on the specific national situation, severity of the violation or whether the employer is a natural or a legal person and may also introduce higher standards than the minimum ones laid down in the Directive.

With regard to the protection of the rights of irregular migrants, Arts. 6(2) and 13 of the Employers Sanctions Directive grant irregular migrants a set of rights to ensure they are adequately informed about their entitlements from illegal employment, can lodge complaints against labour violations and claim back unpaid wages.

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[44] See "European Platform to enhance cooperation in tackling undeclared work", the working group of the newly established European Labour Authority.

[45] Communication, *on the Application of Directive 2009/52/EC, providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals*, 18.6.2009, COM/2014/0286 final.

Finally, the inspections carried out by Member States under Art. 13(1) of the Directive are the main tool to detect employers hiring irregular migrants and situations of exploitation. Based on the results of inspections, employers can be held accountable and sanctioned. [46]

Member States should report annually and in a timely manner on the inspections and their outcomes, [47] and improve collection of data on the application of the complaints mechanisms and their outcomes. [48] At the same time, the Commission intends to set up a reporting system and database, with the support of the European Migration Network, for information and data collection on sanctions, use of protective measures and inspections and to define clear criteria and requirements for reporting in cooperation with Member States.

In conclusion, this directive allows the EU to strengthen its response to illegal employment as a driver of irregular migration and a source of exploitation and abuse.

3. International and European sanctions against smugglers acting on the migratory routes

The renewed Action Plan also has the merit of setting out concrete actions to counter smuggling.

It underlines that the fight against the facilitation of irregular migration requires the optimal implementation of methods to sanction migrant smugglers, especially those that lead criminal networks. This calls for effectively addressing and improving the implementation of the applicable legal frameworks by Member States and partner countries based on the UN Protocol on Smuggling of Migrants by Land, Sea and Air, [49] supplementing

[46] Art. 14 Employers Sanctions Directive.

[47] For example, total number of proceedings opened and closed, fines and criminal sanctions imposed.

[48] For example, number of back payment claims, results of claims, number of proceedings opened against employers.

[49] L. SALVADEGO (2021), *The Smuggling Protocol and the Criminalization of Humanitarian Activities at Sea*, in S. FORLATI (ed.), *The Palermo Convention at Twenty. The Challenge of Implementation*, Leiden-Boston, 98 ff.; A. SPENA (2021), *Smuggled Migrants as Victims? Reflecting on the UN Protocol against Migrant Smuggling and on its Implementation*, *ivi*, 43 ff.

the UN Convention against Transnational Organized Crime[50] and, within the EU, the "Facilitators package".[51]

The UN Protocol relates to the prevention, investigation, and prosecution of smuggling as well as the protection of the rights of persons who have been the object of such offences. This was the first international instrument to provide a common definition of "migrant smuggling", the scope of which is to directly or indirectly obtain a financial or other material benefit.[52]

It obliges States Parties to establish as criminal offences smuggling of migrants and other forms of activity that support such smuggling, while migrants should not become liable to criminal prosecution for having been smuggled. To address migrant smuggling, either UN sanctions or autonomous sanctions by the EU can provide a tool to impose sanctions on responsible individuals or entities, such as a travel ban or a freeze on financial assets or the prohibition to make funds or economic resources available.

The EU[53] transposes into EU law sanctions agreed by the UN,[54] and can also make use of the autonomous tools at its own disposal whenever appropriate.

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[50] Adopted by the UN General Assembly, 15.11.2000, with Resolution 55/25, entry into force 29.9.2003 in accordance with Art. 38. See F. FRANCESCHELLI (2006), *Tratta di esseri umani e traffico di migranti: l'Italia ratifica la Convenzione ONU del 2000*, in *Dir. uomo*, 1, 62 ff.

[51] Council Directive 2002/90/EC, *defining the facilitation of unauthorised entry, transit and residence*, 28.11.2002, OJ L328, 5.12.2002, 17 ff., and Council Framework Decision 2002/946/JHA, *on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence*, 28.11.2002, OJ L328, 5.12.2002, 1 ff.

[52] Smuggling of migrants is defined in Art. 3 of the Protocol as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national". In the 2017 paper on the Concept of "Financial or Other Material Benefit" in the Smuggling of Migrants Protocol, the United Nations Office on Drugs and Crime (UNODC) describes such financial or other material benefit as the very purpose of migrant smuggling, "*the reason behind the growing involvement of organized criminal groups in conduct that often puts the lives of vulnerable migrants in great jeopardy*". See A. MANTOVANO (2008), *Il traffico dei migranti: un nuovo business delle reti del crimine transnazionale*, in *Dir. uomo*, 3, 10 ff.

[53] The EU acceded to the Protocol in 2006 (Council Decision 2006/616/EC, 24.7.2006, OJ L262, 22.9.2006, 24 ff.; and Council Decision 2006/617/EC,

In this regard, the EU Global Human Rights Sanctions Regime pursuant to Council Regulation 2020/1998/EU[55] and Decision 2020/1999,[56] adopted on 7 December 2020, has equipped the EU with a framework that allows it to target those responsible for, involved in, or associated with serious human rights violations and abuses worldwide. These new sanctions regime covers, among others, trafficking in human beings, as well as abuses of human rights by migrant smugglers to the extent that these abuses are widespread, systematic or otherwise of serious concern as regards the objectives of Common Foreign and Security Policy.[57]

Moreover, within the EU, the "Facilitators package"[58] defines the criminal offence of facilitation of unauthorised entry, transit or residence and sets out the related criminal sanctions and requires Member States to appropriately sanction anyone who intentionally assists a third-country national to enter or transit through an EU country or, for financial gain, to reside there. Its primary aim is to respond to criminal

24.7.2006, OJ L262, 22.9.2006, 34 ff.), and all EU Member States, except Ireland, have ratified it.

[54] On 7.6.2018, the Security Council Committee concerning Libya added six human traffickers and smugglers operating in Libya to its Sanctions List of individuals and entities subject to the asset freeze, travel ban and other measures. On 14.6.2018, the Council of the EU transposed these measures into EU law.

[55] Council Regulation 2020/1998/EU, *concerning restrictive measures against serious human rights violations and abuses*, OJ L410, 7.12.2020, I, 1 ff.

[56] Council Decision (CFSP) 2020/1999, OJ L410, 7.12.2020, I, 13 ff. This Decision provides for the freezing of funds and economic resources of, and the prohibition to make funds and economic resources available to, natural or legal persons, entities or bodies responsible for, providing support to, or otherwise involved in serious human rights violations or abuses, as well as those associated with the natural and legal persons, entities and bodies covered. The natural and legal persons, entities and bodies subject to the restrictive measures are listed in the Annex to Decision (CFSP) 2020/1999.

[57] Set out in Art. 21 Treaty on European Union.

[58] Council Directive 2002/90/EC, *defining the facilitation of unauthorised entry, transit and residence*, 28.11.2002, OJ L328, 5.12.2002, 17 ff., and Council Framework Decision 2002/946/JHA, *on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence*, 28.11.2002, OJ L328, 5.12.2002, 1 ff. These instruments were adopted together and are commonly referred to as the "Facilitators Package". See also, Commission Guidance on the implementation of EU rules on the definition and prevention of the facilitation of unauthorised entry, transit, and residence (2020/C 323/01), 1.10.2020.

networks responsible for migrant smuggling. Underlining that the facilitation offence as set out in Art. 1(1) of the Facilitation Directive is broader than the Protocol insofar as financial gain is not a constituent component of the irregular entry or transit facilitation offence. Financial gain – together with participation in a criminal organization or endangering the lives of the people who are the subjects of the offence – is listed under the aggravating circumstances set out in Art. 1(3) of Framework Decision 2002/946/JHA.

However, its effectiveness in reaching its objectives remains partial.[59] For example, certain aspects of the instrument need to be clarified, such as the definition of the offence, by providing more legal certainty over the distinction between criminal facilitation and humanitarian assistance,[60] given that Directive 2002/90/EC which is part of the Facilitators package, allows Member States to exempt humanitarian assistance not mandated by law to be criminalised.[61] Instead other key aspects of the package, such as the general approximation of the penal framework

[59] See SWD/2017/117 final.

[60] To respond to the increasingly difficult environment for non-governmental organisations and individuals when assisting migrants, including in the context of search and rescue operations at sea, the Commission provided guidance (COM/2020/6470 final, cit.), clarifying that humanitarian assistance mandated by law (for example, within the framework of search and rescue operations) can never be criminalised and invited Member States that have not already done so to use the opportunity to distinguish between humanitarian assistance (not mandated by law) and activities that aim to facilitate irregular entry or transit, allowing for the exclusion of the former from criminalisation. See G. LICASTRO (2020), *Traffico di migranti: una mirata sintesi sulle linee guida della commissione sulla direttiva sul favoreggiamento*, in *Giust. pen.*, 12, 687 ff.

[61] Art. 1(2) of the Directive provides for the possibility of exempting unauthorised entry and transit from being criminalised, when carried out for humanitarian assistance purposes. K. ARROUCHE, A. FALLONE, L. VOSYLIUTE (2021), *Between Politics and Inconvenient Evidence. Assessing the Renewed EU Action Plan Against Migrant Smuggling*, CESP Policy Brief, 1 ff., available online, 1: "The EU's counter-smuggling policies equate irregular migration to a crime, while disregarding that safe, orderly and regular pathways for refugees and other migrants are hard to access. The Renewed EU Action Plan Against Migrant Smuggling (2021-2025) exacerbates the risks that refugees and other migrants face by penalising those who assist them. Civil society actors, family members and communities that act out of compassion or provide basic services in transit and destination countries continue to be investigated and prosecuted as 'migrant smugglers'".

of the Member States[62] have been evaluated with positive and neutral considerations.

In any case, despite some differences, the Protocol and Facilitators Package remain coherent with each other, constituting an effective legal framework against migrant smuggling at the international and European level.

4. Conclusions

The EU Action Plan 2021-2025, building on the previous Action Plan, aims to further strengthen the EU's response to migrant smuggling over the next five years.

In this regard, the Action Plan 2015-2020 sets out for the first time a comprehensive and multidisciplinary EU approach which combines increased external action, more effective control of EU external borders, and internal aspects, in compliance with international law, EU principles and values, and the protection of fundamental rights,[63] to transforming migrant smuggling networks from "low risk, high return" operations into "high risk, low return" ones.[64] It also sets out concrete actions under four main pillars: improving law enforcement and judicial response to migrant smuggling; gathering and sharing information; improving the prevention of migrant smuggling and assistance to vulnerable migrants; and reinforcing cooperation with partner countries. Progress has been made in the implementation of all four pillars.

Building on this foundation, the new Action Plan addresses a number of key challenges, notably more targeted cooperation with the main third-countries of origin and transit, through measures related to the legal framework, preventive measures, operational support, financial in-

[62] All Member States with the exception of Denmark and Ireland. In accordance with Council Implementing Decision 2020/1745/EU (*on the putting into effect of the provisions of the Schengen* acquis *on data protection and on the provisional putting into effect of certain provisions of the Schengen acquis in Ireland*, 18.11.2020, OJ L393, 23.11.2020, 3 ff.), Ireland shall put the Facilitators package into effect and apply it, on a provisional basis, as from 1 January 2022 at the latest.

[63] Special Council meeting (9 February 2023) – Conclusions, Council document EUCO 1/23, 9.2.2023, III "Migration".

[64] With these terms, the European Agenda on Migration, identified the fight against migrant smuggling as a priority.

vestigations, asset recovery, and document fraud, while also addressing new emerging phenomena in the fight against smuggling, including "digital smuggling", which exploits social media platforms, mobile applications, and encrypted communication tools to offer illegal services, organize logistics, and secure profits.

As noted, migrant smuggling networks are highly dynamic, and while the EU has taken significant steps in the fight against smugglers in recent years, persistent and new challenges have emerged, requiring reinforced actions and a renewed comprehensive approach.

A persistent challenge is the flexibility of smugglers and criminal organizations, namely the ability to alter their *modus operandi* and routes in the face of external factors. For example, during the COVID-19 pandemic, smugglers proved agile, adapting quickly to ensure the continuity of their business by reverting to other, often more dangerous, routes and using different means of transport.

In addition, smuggling has gone digital with the proliferation of online activities and the vast amount of information available in different languages and locations, making it an increasingly challenging task to monitor, analyse, and respond to smuggling activities.

This is why the previous EU counter-smuggling policy called for a deeper evaluation of contemporary policy priorities.

Notable in this respect is that, as migrant smuggling undermines orderly efforts to manage migration, the prevention and combating migrant smuggling are firmly embedded in migration and asylum policies, interlinked with and flanked by other measures (e.g., against employers of illegally staying third-country nationals). Cooperation with third-countries of origin and transit along migratory routes towards the EU is a central element of the Action Plan, with the aim of preventing people from leaving their country of origin, for example, by supporting border management to prevent departures and transit, and developing information campaigns to discourage migration to Europe.

Therefore, this Action Plan proposes a reinforced framework at the EU level and a set of actions in different areas to combat migrant smuggling, thereby strengthening the comprehensive European approach to migration management as presented in the Pact on Migration and Asylum.

In this respect, the Action Plan follows the "whole of route approach", as the fight against migrant smuggling starts in third-countries of origin and transit, and continues within the EU. This is a shared challenge for the EU, its Member States, and partner countries alike.

However, the EU counter-smuggling policy – in the broader context

of EU migration policy, that prioritises externalisation via third country partners – addressing the State-led instrumentalisation of migration, and increasing return operations, would seems to indicate a shift towards containment and exclusion.

The renewed Action Plan contains encouraging policy examples, such as "providing protection to those in need, addressing the root causes of irregular migration, creating job opportunities and promoting decent work, promoting legal migration and safe legal pathways to Europe", but at the same time continues to prioritise containment over mobility.

In any case, the added value of the Plan lies in the provision of concrete measures needed to counter and prevent smuggling, and to ensure that the fundamental rights of migrants – especially the most vulnerable, such as children, unaccompanied minors, and women – are fully protected, in the hope that the counter-smuggling policy will prioritise the protection of human life and dignity before the protection of sovereign borders.

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Chapter 28

THE ROLE OF THE NEW FRONTEX IN CONTRASTING IRREGULAR IMMIGRATION ALONG THE ATLANTIC ROUTE

Ivan Ingravallo

ABSTRACT: *This chapter deals with the so-called Atlantic (or West African) route, which has been used on several occasions by migrants to reach the Canary Islands, part of the territory of the European Union. This is an extremely dangerous route that gave rise to an emergency, in the periods 2005-2006 and 2020-2022, also due to the shortcomings of the Spanish authorities in managing a significant number of arrivals in a limited period. In the past, the European Border and Coast Guard Agency (the so-called new FRONTEX) collaborated with Spain to control incoming migratory flows. This collaboration has intensified due to the new competencies and powers attributed to the Agency by regulation 2019/1896. In this context, negotiations are ongoing to conclude agreements with Senegal and Mauritania, to limit migratory flows through the Atlantic route. These negotiations are based on the model agreement between the European Union and third countries to allow the new FRONTEX to carry out operational activities in the non-EU territory. Specific attention is paid to this model agreement and its provisions relating to protecting fundamental rights during the Agency's operational activities.*

1. Introduction

The European Union, as well as its Member States, makes use of various tools to limit the flows of irregular immigration, which find application both in areas removed from state sovereignty (such as the high seas) and through collaboration with third states, when flows take place on their territory, including the relevant sea areas. These states apply

rules and procedures to prevent ineligible non-EU citizens from reaching the territory of EU states. This so-called deterritorial action can consist either in the externalisation of border controls, by moving them from the external borders of the Member states to those of third countries, or in an extraterritorial activity taking place when third states accept the exercise of administrative activities by the personnel sent by the European Union to their territory. [1]

For these activities to take place, both the European Union and its member states have concluded specific bilateral treaties with third countries. [2] As far as the Union is concerned, they include the action of the European Border and Coast Guard Agency (the so-called new FRONTEX) which, together with the border and coast guard authorities of the EU states, constitutes the European Border and Coast Guard.

This Agency has undergone a profound change in less than two decades. Its establishment occurred in 2004 as the European Agency for the Management of Operational Cooperation at the External Borders of the Member states of the European Union. [3] In a few years, from an instrument mainly having limited coordination and monitoring functions, it turned into an integrated body with the national authorities, equipped with significant operational functions and a solid structure in terms of human, financial, and technical resources. This took place through numerous acts that alternated in a sometimes-disorganised way, in particular regulations 863/2007, [4] 1168/2011, [5] 2016/1624. [6] Based on the most

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[1] On the topic, see, among others, A. DEL VALLE GÁLVEZ (2020), *Inmigración, derechos humanos y modelo europeo de fronteras. Propuestas conceptuales sobre 'extraterritorialidad', 'desterritorialidad' y 'externalización' de controles y flujos migratorios*, in *REJC*, (2), 145 ff.

[2] It will not be possible to elaborate on the question of the attribution of a possible international offense committed during the deterritorial action of the Agency.

[3] Regulation (EC) 2007/2004, *establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, 26.10.2004, OJ L349, 25.11.2004, 1 ff.

[4] Regulation (EC) 863/2007, *establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers*, 11.7.2007, OJ L199, 31.7.2007, 30 ff.

[5] Regulation (EU) 1168/2011, *amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, 25.10.2011, OJ L304, 22.11.2011, 1 ff.

recent reform regulation – Regulation no. 2019/1896[7] –, the Agency has received even more operational powers as well as a substantial allocation of personnel and resources to exercise them.[8]

In recent years, numerous treaties have been concluded between the European Union and certain neighboring third countries so that the Agency could carry out certain activities there to prevent irregular immigration towards the Member states. They included the so-called Balkan route. It is worth mentioning the treaties concluded with Albania,[9] Montenegro[10] and

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[6] Regulation (EU) 2016/1624, *on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC*, 14.9.2016, OJ L251, 16.9.2016, 1 ff. This regulation also tacitly repealed Regulation 1168/2011.

[7] Regulation (EU) 2019/1896, *on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624*, 13.11.2019, OJ L295, 14.11.2019, 1 ff. The legal basis of regulation 2019/1896 includes Arts. 77(2)(b) and (c), TFEU, about the management of external borders ("the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: [...] b) the checks to which persons crossing external borders are subject; [...] d) any measure necessary for the gradual establishment of an integrated management system for external borders") and 79(2)(c) TFEU, relating to the common immigration policy ("the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: [...] c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation").

[8] On the topic, see M.Á. ACOSTA SÁNCHEZ (2019), *Reglamento 2019/1896/UE sobre la guardia europea de fronteras y costas: ¿Frontex 3.0?*, Documento de Opinión IEEE, no. 111/2019; D. VITIELLO (2020), *Le frontiere esterne dell'Unione europea*, Bari, 93 ff.; G. CAMPESI (2022), *Policing Mobility Regimes. Frontex and the Production of the European Borderscape*, Abingdon, 98 ff.; I. INGRAVALLO (2022), *L'evoluzione dell'Agenzia europea della guardia di frontiera e costiera*, in V. FAGGIANI (coord.), *Desafíos y límites de la política migratoria en Europa y América. Perspectivas de derecho comparado*, Cizur Menor, 75 ff.

[9] *Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania*, signed on 5 October 2018, entered into force on 1 May 2019.

[10] *Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro*, signed on 7 October 2019, entered into force on 1 July 2020.

Serbia[11] under Regulation no. 2016/1624, and those with Moldova[12] and North Macedonia under Regulation no. 2019/1896.[13] In 2022, the Council authorised negotiations to sign similar agreements with Bosnia-Herzegovina and, as we will see, also with some African states not bordering the European Union, in particular Senegal and Mauritania. The latter's objective is to intervene on the so-called Atlantic route (or West African route) through which migrants departing from north-western Africa try to reach the Canary Islands.

After highlighting the characteristics of the Atlantic route, this chapter will examine the main profiles of a future agreement between the European Union and the African states involved in this route as regards the activities of the new FRONTEX. Particular attention will be paid to the limits to the Agency's deterritorial action deriving from international and European standards that protect the rights of migrants, including those in an irregular condition.

2. The peculiarities of the so-called Atlantic route

The Atlantic route of immigration to the European Union has different characteristics compared with the others.[14] The European Border and

[11] *Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia*, signed on 18 November 2019, entered into force on 1 May 2021. On this topic, see T. LUJIC, F. SCHARDEY (2022), *European Union-Extraterritorialisation in the Western Balkans: The Case of the Frontex-Serbia Status Agreement*, in F. CASOLARI, M. GATTI (eds.), *The Application of EU Law beyond Its Borders*, CLEER Papers 2022/3, The Hague, 111 ff., highlight the evolution from the previous "working arrangements" to the current "*status* agreements" concluded by the Union with third states in order to regulate their collaboration with the Agency.

[12] *Agreement between the European Union and the Republic of Moldova on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Moldova*, signed on 17 March 2022, entered into force on 1 November 2022.

[13] *Agreement between the European Union and the Republic of North Macedonia on operational activities carried out by the European Border and Coast Guard Agency in the Republic of North Macedonia*, signed on 26 October 2022, entered into force on 1 April 2023.

[14] According to the latest FRONTEX report, *Risk Analysis for 2022/2023*, September 2022, 10, in 2021 the Atlantic route was the third most used, after

Coast Guard Agency reports it as one of the most active, also due to the difficulty of effectively countering – especially in an ultraperipheral region – the criminal organisations that manage the smuggling of migrants.

Despite being by the sea,[15] this route does not pass through the Mediterranean but through the Atlantic Ocean and is characterised by greater risks for the safety and life of migrants, who over the last two decades have been victims of numerous episodes of shipwreck.[16] Migrants embark from the coasts of Senegal, Western Sahara, Morocco and, to a lesser extent, Mauritania, and Gambia. Often with small and light boats (cayucos), they try to reach the Canary Islands, a Spanish archipelago located off the coast of north-western Africa,[17] hundreds of kilometers away from Morocco and Western Sahara, which become thousands as one descends towards Mauritania and Senegal, thus also increasing the risk of shipwreck.

On several occasions, this route has risen to the headlines for episodes of massive influx of migrants to the Canary Islands. Among them is the one that occurred in 2005-2006 with the so-called Cayucos Crisis, when over 30,000 people arrived;[18] the second, in 2020-2022, was also caused by the difficult socio-economic situation due to the spread of the

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that of the Central Mediterranean and the Western Balkans, with over 22,000 migrants arriving in the Canary Islands.

[15] A. DEL VALLE GÁLVEZ, *Inmigración, derechos humanos*, cit., 157, states that "el sistema de fronteras Schengen parece tener una falla extraordinaria en las fronteras marítimas exteriores europeos" and suggests "abandonar el mar como lugar de control" and of "afrontar la realidad de la conformación de un nuevo espacio fronterizo al sur del mediterráneo-Sahel, que necesita una nueva política de fronteras exteriores para esta área sahariana" (161).

[16] The data are those collected by the International Organization for Migration and some non-governmental organizations, such as Caminando Fronteras and la Comision Española de Ayuda al Refugiado (CEAR). See also the recent Global Initiative against Transnational Organized Crime report: L. BIRD RUIZ-BENITEZ DE LUGO, *North-West Passage. The Resurgence of Maritime Irregular Migration to the Canary Islands*, December 2022.

[17] For an analysis that also includes issues of international law of the sea, see V.L. GUTIÉRREZ CASTILLO (2014), *The Struggle against Irregular Migration at Sea at the Canary Islands*, in A. DEL VECCHIO (ed.), *International Law of the Sea. Current Trends and Controversial Issues*, The Hague, 59 ff.

[18] S. CARRERA, *The EU Border Management Strategy. FRONTEX and the Challenges of Irregular Immigration in the Canary Islands*, CEPS Working Document no. 261, March 2007, available online.

COVID-19 pandemic[19] and the intensification of controls along the Mediterranean routes departing from North Africa.[20] A new element of the latter influx concerns the increase in the number of Moroccans who travel along the Atlantic route, joining the migrants from sub-Saharan Africa.

The 2005-2006 crisis was tackled by the Spanish government also with the collaboration of the then-FRONTEX, through some operations, in particular those called Hera I (aimed at identifying irregular migrants and determining their country of origin), Hera II and Hera III (aimed at controlling irregular immigration along the Atlantic route),[21] the conclusion of bilateral agreements between Spain and third countries of transit and departure of migrants, as well as with operational plans and projects aimed at this area. The bilateral cooperation was gradually joined by the one carried out by the European Union, which is relevant not only from an operational point of view – in November 2020 the Agency sent a team of experts –,[22] but also from a political one,[23] relating to confrontation and negotiation with the countries of the area, aimed at limiting irregular migration and at developing and implementing investments in this area, coupling the

[19] According to R. RODRÍGUEZ SALINAS (2022), *Política migratoria en lasis-las Canarias: violaciones de derechos humanos durante la pandemia*, in *Der. PUCP*, 89, 37 ff.: "La ruta de Canarias incluso llegó a ser en 2020 la másrecorrida en Europa" (50). He inserts the situation of the Canary Islands in the "política europea de contención en las islas" of migrants, "con el fin de ejecutar su devolución a los países de origen" (66).

[20] M.Á. ACOSTA SÁNCHEZ (2022), *La crisis migratoria de 2020 en las Islas Canarias: algunas opciones de solidaridad europea*, in *AEDI*, 455 ff., reports the "deficiencias estructurales en las islas, que no fueron corregidas con ocasión de la crisis de los años 2005-2006" (459). For a different assessment, see I. GONZÁLEZ GARCÍA (2022), *La ruta migratoria de África Occidental hacia Canarias. De la crisis de los cayucos de 2006 a la crisis migratoria 2020-2021. Análisis y valoraciones*, in *Rivista OIDU*, (2), 373 ff.

[21] These were the first operational actions of FRONTEX, which took place under the then-regulation 2007/2004. On the subject, see S. CARRERA, *The EU Border Management*, cit.; M.Á. ACOSTA SÁNCHEZ, A. DEL VALLE GÁLVEZ (2006), *La crisis de los cayucos – la Agencia Europea de Fronteras (FRONTEX) y el control de la inmigración clandestina*, in *TDP*, 86, 19 ff.

[22] I. GONZÁLEZ GARCÍA (2022), *La ruta migratoria de África Occidental*, cit., 390 also points out operational conflicts between the new FRONTEX and the Spanish authorities.

[23] V.L. GUTIÉRREZ CASTILLO (2014), *The Struggle against Irregular Migration*, cit., 64.

sending of financial aid to the effectiveness of the action to combat immigration.[24]

The difficulty of intervening on this route also depends on the peculiar situation of Western Sahara, a territory occupied by Morocco in February 1976 (and, up to 1979, also by Mauritania), at the end of the Spanish colonial domination (it was once defined as Spanish Sahara) and based on the disputed Trilateral Agreements of Madrid of 14 November 1975, concluded between Spain, Morocco, and Mauritania. The occupation of Western Sahara violates the principle of self-determination of the Saharawi people recognised, *inter alia*, by the UN General Assembly since 1966, by the International Court of Justice in 1975[25] and more recently reaffirmed by the Court of Justice of the European Union.[26] As far as is relevant here, the persistence of the dispute, which leaves the question of the fate of the Saharawi people[27] and this territory unresolved,[28]

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[24] According to I. GONZÁLEZ GARCÍA (2022), *La ruta migratoria de África Occidental*, cit., 396, "ni el renfuerzo del control fronterizo por parte de España (con la ayuda de la UE y de Marueccos como socio prioritario), ni la cooperación al desarrollo por parte de los Estados europeos han tenido éxito hasta ahora en la lucha contra la inmigración irregular procedente de Africa".

[25] ICJ, advisory opinion 16.10.1975, para. 162. L. CONDORELLI (1978), *Le droit international face à l'autodétermination du Sahara Occidental*, in *Com. int.*, 3, 396 ff.

[26] ECJ, Grand Chamber, judgment 21.12.2016, *Council v. Front Polisario*, case C-104/16 P, para. 92. See U. VILLANI (2018), *La Cour de justice de l'Union européenne et le droit à l'autodetermination du peuple sahraoui*, in *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, 1007 ff.

[27] In February 1976 the Polisario Front (Frente popular para la liberación de Saguía el Hamra y Río de Oro), a national movement for the liberation of the Saharawi people, supported by Algeria, proclaimed the Arab Democratic Republic of Saharawi and, since then, has continued to fight from exile for the self-determination of this people. The Sahrawis live partly under Moroccan domination, partly as refugees abroad, especially in Algeria, and Morocco has built a barrier of about 2000 km in Western Sahara to defend itself against attacks by the Polisario Front.

[28] On 30 August 1988 Morocco and the Polisario Front accepted the principles contained in a proposal for good offices formulated by the Secretary General of the UN and the Organization of African Unity, relating to the ceasefire and the organisation of a *referendum* to determine the fate of this area. On 29 April 1991 the Security Council unanimously approved Resolution No. 690, with which it established the United Nations Mission for the *Referen-*

also affects a possible agreement between the European Union and Morocco as regards boats carrying migrants departing from Western Sahara, since the Union does not recognise the legitimacy of the governing power exercised by Morocco over this territory. Bilateral cooperation with this state, in fact, includes numerous profiles, from legal ones to those relating to joint activities and the financing of collaborative projects, but does not contain any reference to the Western Sahara issue.[29]

3. The model agreement relating to the Agency's operational activities in a third country

As already mentioned, in July 2022 the Council authorised the opening of negotiations with Senegal and Mauritania to conclude agreements to allow the new Frontex to carry out some operational activities on these third states' territories. In this case, for the first time, they involve states outside the European continent that do not border the territory of the EU member states.

According to Art. 73(3) of Regulation no. 2019/1896, in the circumstances requiring the deployment of border management teams from the Agency standing corps to a third country where the members of the teams will exercise executive powers, a *status* agreement shall be concluded by the Union with the third country concerned based on Art. 218 TFEU. The negotiating basis is a model *status* agreement, which Art. 76 of Regulation no. 2019/1896 instructed the Commission to prepare and which was disclosed in a communication dated December 2021.[30] The model *status* agreement shall set out the scope of the operation, provisions on civil and criminal liability, the tasks, and powers of

dum in Western Sahara (MINURSO). The mandate of this operation has been extended several times (most recently with resolution no. 2654 of 27 October 2022, approved with the abstentions of Kenya and Russia); however, significant differences remain between Morocco and the Polisario Front regarding the *referendum* management.

[29] Compare EU Doc. 11948/2/21, Rev. 2, 18.2.2022, *Operationalization of the Pact – Action plans for strengthening comprehensive migration partnerships with priority countries of origin and transit. Draft Action Plan: Morocco.*

[30] Communication, *Model status agreement as referred to in Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624*, 21.12.2021, COM(2021) 829 final.

the members of the teams, measures related to the establishment of an antenna Office and practical measures related to the respect of fundamental rights. According to the same Art. 73(3) of Regulation no. 2019/1896 model *status* agreement shall ensure that fundamental rights are fully respected during those operations and provide a complaint mechanism (see next paragraph).

The text of the model agreement disclosed in 2021 articulates the organisational and operational profiles relating to the role of the Agency in coordinating operational cooperation between the EU Member states and third countries, including on the territory of this country. The operational activity is initiated at the request of the third state and is attributable to two different types of intervention, both involving the deployment of border management teams (formed from the European Border and Coast Guard Agency standing corps): a joint operation, that is an action coordinated or organised by the Agency to support the national authorities of the third country responsible for border control; a rapid border intervention, that is an action aimed at responding to a situation of a specific and disproportionate challenge at the borders of the third country by deploying border management teams in the territory of a third country for a limited period to conduct border control together with the national authorities of the third country responsible for border control.

According to the model agreement, both types of intervention follow an operational plan agreed upon on a case-by-case basis between the Agency and the third state concerned. As for the Agency, they are managed by a Coordinating Officer appointed by its Executive Director. The Officer may be assisted by antenna Offices on the territory of the third country to facilitate and improve the coordination of operational activities and to ensure the effective management of the human and technical resources of the Agency.

4. The respect for fundamental rights in the Agency's operational activities in a third country

Fundamental rights are variously included in the activities of FRONTEX, and their relevance has emerged progressively from Regulation no. 2007/2004 to Regulation no. 2019/1896.[31] This has significantly in-

[31] The 2004 regulation contained only one reference to fundamental rights, while in the 2019 regulation they are referred to over two hundred times.

novated the previous discipline also as regards the protection of fundamental rights, committing the Agency through numerous provisions relating both to its structure and its functioning, and to the operational activities it carries out, including those carried out in collaboration with non-EU countries, and finally to the control procedures and mechanisms (both internal and external to the Agency, having an administrative and/or judicial nature).[32]

In this last regard, it is useful to recall the figure of the Fundamental Rights Officer, an individual and independent body envisaged for the first time with Regulation no. 1168/2011.[33] Its mandate includes several competencies, such as: promoting the Agency's respect of fundamental rights and monitoring the Agency's compliance with fundamental rights, including by conducting investigations into any of its activities; providing opinions on the operational plans drawn up for the operational activities of the Agency and on working arrangements; carrying out on-the-spot visits to any operational activity, including in third countries; selecting and managing the fundamental rights monitors. The latter are employed as statutory staff by the Agency and shall constantly assess the fundamental rights compliance of operational activities, provide advice and assistance in that regard, and contribute to promoting fundamental rights as part of European integrated border management. The Agency shall ensure that the Fundamental Rights

[32] I. INGRAVALLO (2022), *Il rispetto dei diritti fondamentali nell'azione dell'Agenzia europea della guardia di frontiera e costiera*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.), *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli, 111 ff.

[33] The Fundamental Rights Officer is appointed by the Management Board, after consultation with the Consultative Forum (Art. 109, regulation 2019/1896), which is another independent body regulated for the first time in regulation 1168/2011, providing independent advice in fundamental rights matters where requested by other organs of the Agency (Art. 108, regulation 2019/1896) and tasked to prepare an annual report of its activities. Its composition – decided by the Management Board based on a proposal from the Fundamental Rights Officer – includes some EU agencies (EASO, FRA), the UNHCR and some international governmental and non-governmental organizations: the Council of Europe, the International Organization for Migration, the OSCE (in particular its ODIHR), the Office of the UN High Commissioner for Human Rights, the Amnesty International European Institutions Office, the Churches' Commission for Migrants in Europe, the International Commission of Jurists, the Jesuit Refugee Service Europe, the Red Cross EU Office, Save the Children and the Council of Bars and Law Societies of Europe.

Officer and the fundamental rights monitors can act autonomously and independently.[34]

The 2019 reform regulation recognises how the extended tasks and competence of the Agency "should be balanced with strengthened fundamental rights safeguards and increased accountability and liability, in particular in terms of the exercise of executive powers by the statutory staff" (recital 24); in this respect, it has both negative (not to violate fundamental rights) and positive (monitoring that other subjects do not violate fundamental rights) obligations. Art. 1 of Regulation no. 2019/1896 tasks the European Border and Coast Guard, including the Agency, with managing the external borders "in full compliance with fundamental rights",[35] while Art. 5(4) states that the Agency "shall contribute to the continuous and uniform application of Union law, including the Union *acquis* on fundamental rights […] at external borders".[36]

Based on Regulation no. 2019/1896, the Agency monitors the respect of fundamental rights in the context of activities at the external borders and return operations;[37] it is called upon to cooperate in this

[34] To this end on the Management Board approved decision no. 6/2021 (20 January 2021), adopting special rules to guarantee the independence of the Fundamental Rights Officer and his or her staff, available online.

[35] See Art. 3(2): "Fundamental rights, education and training […] shall be overarching components in the implementation of European integrated border management".

[36] More in detail, according to the following Art. 80(1) the European Border and Coast Guardshall guarantee "the protection of fundamental rights in the performance of its tasks under this Regulation in accordance with relevant Union law, in particular the Charter, and relevant international law, including the 1951 Convention relating to the *Status* of Refugees, the 1967 Protocol thereto, the Convention on the Rights of the Child [the particular condition of vulnerability of foreign minors, especially unaccompanied minors, motivates the numerous provisions of regulation 2019/1896 which call upon the Agency and the Member states, individually and in collaboration with each other and, if necessary, with the third states, to ensure greater protection for minors; the same is to be said for victims of trafficking] and obligations related to access to international protection, in particular the principle of non-*refoulement*".

[37] According to Art. 31(1) in fact, the Agency "shall ensure the regular monitoring of all Member States' management of the external borders and return through liaison officers of the Agency". The subsequent Art. 50(3) establishes that the participating EU states and the Agency "shall ensure that the respect for fundamental rights, the principle of *non-refoulement*, the proportionate use of means of constraints and the dignity of the returnee are guaranteed during

respect with the EU Fundamental Rights Agency; it includes them in the training activity aimed at national border guards of the Member states and third countries; it ensures their respect, protection and promotion when it is called upon to manage the external borders personally. In this regard, Art. 38(3)(l) which applies to all Agency operations, also includes "general instructions on how to ensure the safeguarding of fundamental rights during the operational activity of the Agency" among the indispensable elements of the operational plans for joint operations at the external borders.

As mentioned, the legal discipline on fundamental rights protection is included in the training of the Agency's statutory staff employed by its teams: border management teams, migration management support teams and return teams (Art. 55(3)).[38] The Agency shall ensure that its statutory staff "discharge their duties as members of the teams in accordance with the highest standards and in full compliance with fundamental rights" (Art. 55(4)).[39] The personnel of the teams, in carrying out their duties, are required to fully respect the fundamental rights and human dignity, especially of vulnerable people, following the principles of proportionality and non-discrimination, understood in a very broad sense.[40] In the event of a violation, the staff is subject to the disciplinary

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the entire return operation"; while under para. 6: "If the Agency has concerns regarding the respect of fundamental rights at any stage of a return operation, it shall communicate them to the participating Member States and to the Commission".

[38] The subsequent Art. 62(2) reiterates that the Agency guarantees that "all statutory staff to be deployed as members of the teams have received adequate training in relevant Union and international law, including on fundamental rights, access to international protection, guidelines for the purpose of identifying persons seeking protection and directing them towards the appropriate procedures […], prior to their initial deployment in operational activities organised by the Agency". See also para. 5, which includes a similar obligation for statutory staff and all staff who participate in return operations or return interventions, as well as para. 6, which establishes that the Agency shall establish and further develop common core *curricula* for the training of border guards and provide training at European level for instructors of the border guards of Member states, including fundamental rights.

[39] Compare Art. 82(3): "While performing their tasks and exercising their powers, members of the teams shall fully ensure respect for fundamental rights and shall comply with Union and international law".

[40] Art. 31(4) regulation 2019/1896.

measures provided for by the Statute of EU officials or by the rules of the state to which it belongs, depending on its classification as statutory staff employed by the Agency or as non-statutory staff.

As far as is relevant here, various provisions of Regulation no. 2019/1896 commit the Agency and the Member states of the Union to observe EU law even when cooperation with a third country takes place in its territory (Art. 71(3); Art. 73(1)), thus taking the form of extra-territorial application, all the more appropriate in cases where the Union tends to outsource border controls [41] and directly carries out an operational activity on the territory of third states. [42] Based on Art. 71(2) of the 2019 reform regulation, the Agency provides third countries with technical and operational assistance "including with regard to the protection of fundamental rights". This is confirmed in the cooperation agreements between Member states and third countries and in those just considered, concluded between the Union and a third country, relating to the *status* of the Agency and its personnel.

The model agreement examined above confirms this approach of greater attention to respect for the human rights of migrants, which is pivotal when the Agency and its staff act on the territory of a third country. In this regard, if the Agency's Executive Director considers that the requested operational activity would likely entail or lead to serious and/or persistent violations of fundamental rights or international protection obligations, then he or she shall not launch the operational activity. The Executive Director shall decide not to launch an operational activity if he or she considers there to be justified cause to suspend or terminate it under the relevant provisions of Art. 18 of the model agreement. [43]

Other relevant provisions concern the operational plan which, pursuant to Art. 4(3) shall set out in detail the organisationl and procedural aspects of the operational activity, including a description of the tasks,

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[41] L. MARIN (2020), *The Cooperation between Frontex and Third Countries in Information Sharing: Practices, Law and Challenges in Externalizing Border Control Functions*, in *Eur. Public Law*, (1), 157 ff.

[42] D. VITIELLO (2020), *Le frontiere esterne*, cit., 117 ff.

[43] Respectively Art. 3(2) and (4) of the agreement model. According to Art. 18(4): "If the Agency's executive director considers that violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist have taken place or are likely to take place in relation to an operational activity performed under this Agreement, he or she shall withdraw the financing of the relevant operational activity, and/or suspend or terminate it, after informing the third country".

including those requiring executive powers, responsibilities, including the respect for fundamental rights (lit. d) and a reporting and evaluation scheme containing benchmarks for the evaluation report, including the protection of fundamental rights (lit. i). The operational plan agreed upon with the third state hosting the Agency's activity shall include general instructions on how to ensure the safeguarding of fundamental rights during the operational activity personal data protection and obligations deriving from applicable international human rights instruments (lit. l), as well as procedures whereby persons in need of international protection, victims of trafficking in human beings, unaccompanied minors and other persons in vulnerable situations are directed to the competent national authorities for appropriate assistance (lit. m), without however indicating in what it consists, nor what are its characteristics.

The model agreement also contains specific provisions regarding the fundamental rights monitors of the Agency: they are included in the teams deployed by the Agency (Art. 4(3)(e)); they cooperate with the Coordinating Officeras regards the protection of fundamental rights (Art. 7(2)(b)); they are supported by the antenna Offices, where established (Art. 6(4)(f)). Art. 9 of the model agreement provides that the Agency's Fundamental Rights Officer shall assign at least one fundamental right monitor to each operational activity to, *inter alia*, assist and advise the Coordinating Officer. They wear insignia that allow for their identification; they shall monitor compliance with fundamental rights and provide advice and assistance on fundamental rights in the preparation, conduct and evaluation of the relevant operational activity. This shall include following the preparation of operational plans and reporting to the Fundamental Rights Officer; conducting visits where operational activities take place; cooperating and liaising with the Coordinating Officer and providing advice and assistance to him or her; informing the Coordinating Officer of and reporting to the Fundamental Rights Officer on any concerns regarding possible violations of fundamental rights relating to the operational activity. [44]

Concerning the protection of fundamental rights, another significant provision is Art. 8 of the model agreement, according to which, in performing their obligations under this Agreement, the Parties undertake to act in compliance with all applicable human rights law instruments [45] and

[44] On this topic, also see Art. 44(3) and Art. 110 of regulation 2019/1896.

[45] The list may include the 1950 European Convention on Human Rights,

team members shall, in the performance of their tasks and the exercise of their powers, fully respect fundamental rights, including access to asylum procedures and human dignity, and shall pay particular attention to vulnerable persons, acting in a proportionate and non-discriminatory manner (it benefits from broad immunities and privileges and is generally expected to comply with applicable EU law and international law).

The same provision entrusts the Fundamental Rights Officer to monitor each operational activity's compliance with applicable fundamental rights standards. The Fundamental Rights Officer, or his or her deputy, may conduct on-the-spot visits to the third country; he or she shall also provide opinions on the operational plans and inform the Agency's Executive Director about possible violations of fundamental rights relating to operational activity. Regarding the Consultative Forum, the Parties agree to provide it with timely and effective access to all information concerning the respect for fundamental rights concerning any operational activity performed under the *status* agreement, including through on-the-spot visits to the operational area.

As mentioned, – and as required by Regulation no. 2019/1896 – the model agreement includes a complaints mechanism that each Party shall activate to process allegations of breaches of fundamental rights committed by their staff in the exercise of their official functions during an operational activity performed under the agreement. However, it is not an individual reporting mechanism that can be activated directly by migrants.

5. Conclusions

This chapter has shown the relevance and peculiarity of the so-called Atlantic route through which migrants, citizens of sub-Saharan states and, increasingly, citizens of Morocco, try to reach the Canary Islands and, therefore, the territory of the European Union. This is an extremely dangerous route where several shipwrecks have taken place. Over the

the 1951 United Nations Convention Relating to the *Status* of Refugees and the 1967 Protocol thereto, the 1965 Convention on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, the 1984 UN Convention Against Torture, the 1989 UN Convention on the Rights of the Child, the 2006 United Nations Convention on the rights of persons with disabilities and the Charter of Fundamental Rights of the European Union.

last two decades, a predominantly Spanish management of relations with non-EU states of origin, transit and departure of migrants has been accompanied by that of the EU, through the deterritorial activities carried out by the so-called new FRONTEX. To this end, negotiations are underway to conclude bilateral agreements between the EU and both Senegal and Mauritania, inspired by the model agreement disclosed by the European Commission in December 2021 and already used in other circumstances.

Examination of the model agreement shows a detailed discipline concerning the organisational profiles of these activities and how the Agency's staff is authorised to carry them out on the territory of third countries. As for the fundamental rights of migrants, the model agreement includes numerous references, both to the rules to be respected and to the role of observers of fundamental rights. Subsequent practice will demonstrate if and to what extent this discipline will be effectively applied; nevertheless, it is necessary to be vigilant to avoid outsourcing and extraterritoriality producing a weakening of migrants' rights. Already in the past, in fact, the Agency has been criticised by various institutions and bodies of the European Union – expression of multiple forms of control –, such as the European Parliament, the Court of Auditors, the European Ombudsman and the European Anti-Fraud Office, because, although there is no evidence of its direct action in push-backs or collective expulsions, it has been aware of the violations of the migrants' fundamental rights and has failed to prevent them from reoccurring in the future. [46]

The effective and rigorous application of high standards of protection of fundamental rights introduced with the 2019 reform regulation and envisaged by the model agreement will have to ensure that similar behaviours will not happen again and that the Agency's action, even when carried out on the territory of third states, will fully respect the rights of migrants. The model agreement commits both the European Union and third countries to respect the fundamental rights safeguarded by the main international treaties. It will therefore be important to monitor that this commitment is followed up by its effective application.

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[46] As for the European Parliament, it is worth mentioning the *Working document, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations (rapporteur Tineke Stirk)*, presented on 14 July 2021 by the FRONTEX Control Working Group (*FRONTEX Scrutiny Working Group*) of the Commission on Civil Liberties, Justice and Home Affairs (LIBE), established in February 2021, available online.

Chapter 29

THE EU'S REGIONAL DEVELOPMENT AND PROTECTION PROGRAMMES (RDPPS): EFFECTIVE OR TOO AMBITIOUS (AND AMBIGUOUS) PROTECTION TOOL?*

Giuseppe Morgese

ABSTRACT: *The chapter analyses the EU's Regional Protection and Development Programmes (RDPPs), which have replaced the previous Regional Protection Programmes (RPPs) since 2014, to improve the conditions of both Syrian and African refugees and local communities in host countries. After a short introduction, Paragraphs Two and Three briefly examine RPPs and RDPPs, with Paragraph Four assessing the latter in light of some recent evaluation reports. Finally, in the Conclusions, these programmes' positive and negative aspects are assessed, in light of future developments of the external dimension of EU asylum.*

1. Introduction

In a legislative framework mainly focused on containment and control of irregular immigration and readmission of persons with no legal *status* to stay in the Member States, the European Union (EU) has over the years put in place some measures aimed – at least in its declared intentions – at developing durable solutions for protracted refugee situations within the framework of the so-called external dimension of asylum [1]

*This Chapter was finalised on 31 January 2023.

[1] In line with Art. 78(2)(g) TFEU, according to which the EU may conclude "partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection". Recently V. MORENO-LAX (2022), *The Informalisation of the External Dimension of EU Asylum Policy: the Hard Implications of Soft Law*, in E.L. TSOURDI,

and showing 'external' solidarity (*i.e.*, to alleviate the burdens of third countries hosting refugees). Within such measures, a pivotal role is played by Regional (Development and) Protection Programmes (RPPs/ RDPPs), launched in 2005 to "enhance the capacity of areas close to regions of origin to protect refugees".[2] The importance of these programmes lies in helping to create for refugees the conditions for one out of the above-mentioned durable solutions (*i.e.*, repatriation, local integration, resettlement).[3] As such, they aim to ensure the most orderly protection possible for refugees in their regions of origin (or transit) without placing an excessive burden on host communities.

This chapter will outline the main features of 'old' RPPs and 'new' RDPPs, highlighting the elements of socio-economic development in the host territories that the former, unlike the latter, are provided with. Then, some considerations on the effectiveness of RDDPs will be made following recent reports, to eventually point out whether such programmes are truly effective or rather represent a too ambitious (and ambiguous) means of protection.

2. The "old" Regional Protection Programmes (RPPs)

An early attempt to set up extra-EU protection areas, where national asylum capacities could be increased to provide durable solutions to refugees and asylum seekers, can be traced back to some 2003 UK position papers referring to the idea of "Regional Processing Areas".[4]

To the latter, which in the UK's intentions would protect people in

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P. DE BRUYCKER (eds.), *Research Handbook on EU Migration and Asylum Law*, Cheltenham, 282 ff. On possible solutions to protracted displacement, see L. GIGLIO, N. STIENNON, J. HENDERSON, S. DER KINDEREN, A. PAPADOPOULOU, P. KLANSØ, K. STARUP, A. ANDERSON-GOUGH, S. ALS, R. BAHL (2014), *Finding Solutions to Protracted Displacement: The EU's Role and Ways Forward*, Discussion Paper, DOMAID project, available online.

[2] Communication, *on Regional Protection Programmes*, 1.9.2005, COM(2005) 388 final, 3. In general see G. MORGESE (2017), *I programmi di (sviluppo e) protezione regionale dell'Unione europea: uno strumento efficace per i rifugiati africani?*, in *Federalismi.it*, 1, 2 ff.

[3] Communication, *on Regional Protection Programmes*, cit., 3.

[4] *A new vision for refugee*, 7.3.2003, and *New international approaches to asylum processing and protection*, 10.3.2003, both available online. See G. NOLL (2003), *Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones*, in *Eur. J. Migr. Law*, (3), 303 ff.

need 'after' EU States had rejected them for being deemed undeserving of a national protection *status*, the European Commission opposed the different idea of setting up *ad hoc* projects "in regions facing protracted refugee situations, with a view to increasing, effective protection, thereby reducing secondary movements to EU Member States"[5] (*i.e.*, 'before' most of the journey had even taken place). In a subsequent Communication, the Commission proposed RPPs to be developed in partnership with third countries in areas recognised as strategic,[6] thus acknowledging these programmes "as a key policy tool to address protracted refugee situations globally".[7]

Under a specific mandate from the European Council,[8] the Commission adopted a specific Communication in 2005,[9] according to which RPPs would have enhanced the capacity of areas close to regions of origin to protect refugees and create the conditions for one of the three durable solutions for each beneficiary in cooperation with the United Nations High Commissioner for Refugees (UNHCR) and targeted third countries. RPPs were supposed to be flexible, situation-specific, consistent with EU humanitarian and development policies and other relevant activities, and consisting of practical actions aimed at delivering tangible benefits both in terms of protection of refugees and support for host communities.[10] As for financing resources, RPPs would not be based on a new financial framework but on existing programmes dedicated to cooperation with third countries. Finally, it is worth mentioning that since 2006 the governance of RPPs has wit-

[5] Communication, *Towards more accessible, equitable and managed asylum systems*, 3.6.2003, COM(2003) 315 final, 19. See M. GARLICK (2006), *The EU Discussions on Extraterritorial Processing: Solution or Conundrum?*, in *Int. J. Refug. Law*, 3-4, 617.

[6] Communication, *Improving access to durable solutions*, 4.6.2004, COM(2004) 410 final, 17 ff.

[7] *Ivi*, 21.

[8] The Hague Programme, *Strengthening Freedom, Security and Justice in the European Union*, adopted by the European Council on 4/5.11.2004, OJ C53, 3.3.2005, 1 ff. As pointed out by M. GARLICK (2011), *EU "Regional Protection Programmes": Development and Prospects*, in M. MAES, M.-C. FOBLETS, P. DE BRUYCKER (eds.), *External Dimension of EU Law and Policy*, Leuven, 374-375, the European Council did not follow up on any of the Member States' proposals to externalise the examination of asylum applications.

[9] Communication, *on Regional Protection Programmes*, cit.

[10] *Ivi*, 4.

nessed the setting up of a Steering Committee with representatives from the relevant Commission DGs, UNHCR, interested Member States, and other stakeholders. [11]

The 2005 Communication underlined the opportunity, in the first phase, to launch so-called "pilot" RPPs, in which targeted regions would have been identified on several factors, but mainly on the need to focus on a delimited area and build on experience from previous already-funded actions, taking account of the need to assure added value and an evaluation mechanism. [12] Accordingly, the Communication indicated two pilot regions: [13] a transit region in the area of the Newly Independent States (NIS) and a region of origin in the Great Lakes area of sub-Saharan Africa. [14]

The "Pilot RPP in the NIS" started in 2005 to help targeted third countries (Ukraine, Moldova, and Belarus) enhance their capacities in terms of timely identification, access to asylum procedures, local integration, and prospects for durable solutions. Although projects belonging to this RPP were financed under the AENEAS and TPMA programmes, their implementation has mainly been carried out by the UNHCR and local actors, covering a broad spectrum of capacity-building measures for concerned third States. [15]

In contrast, the designation of the "Pilot RPP in the African Great Lakes Area" [16] resulted from the fact that Tanzania, at the time, hosted a large number of refugees from Burundi and the Democratic Republic of Congo. It therefore seemed necessary to set up capacity-building ac-

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[11] A. PAPADOPOULOU (2015), *Regional Protection Programmes: an Effective Policy Tool?*, Discussion Paper, DOMAID project, 8, available online.

[12] Communication, *on Regional Protection Programmes*, cit., 5.

[13] M. GARLICK (2011), *EU "Regional Protection Programmes"*, cit., 382-383.

[14] In the medium term, further RPPs in Afghanistan, the Horn of Africa, and North Africa were foreseen.

[15] Including border procedures, reception, identification and registration of asylum seekers, legal advice and social assistance through local NGOs, and technical assistance. Such projects benefited from the simultaneous implementation of other (non-RPP) projects also financed by EU resources. See R. CORTINOVIS (2015), *The External Dimension of EU Asylum Policy: Gaining Momentum or Fading Away?*, in *Ismu Paper*, 9-10, available online.

[16] According to M. GARLICK, *The EU Discussions on Extraterritorial Processing*, cit., 626, some would have expected a pilot RPP in Libya or, in any case, located in North Africa. See also M. GARLICK (2011), *EU "Regional Protection Programmes"*, cit., 378-381.

tions in favour of approximately 90,000 refugees (out of a total of about 350,000 refugees in the country), to integrate them with other EU humanitarian aid operations in the region thus concretising planned resettlement actions.

In 2009, an external evaluation highlighted both positive and critical elements of pilot RPPs.[17] As for the former, it was found that relevant projects did contribute to a certain extent to the objectives set out in the 2005 Communication: while the aim of increasing protection has seen good progress, efforts to promote local integration have had limited results in the NIS area, and in Tanzania they were mostly successful.[18] On the other hand, several shortcomings of pilot RPPs were pointed out in terms of lack of flexibility vis-à-vis changing field conditions, lack of a specific budget line, low visibility of the projects, inadequate involvement of targeted third countries, poor resettlement in terms of response from the Member States,[19] and limited coordination with other humanitarian and development initiatives due to the lack of a real EU strategic coordination.[20]

Following up on the European Council's request,[21] in 2010 the Commission stated its intention to improve and extend RPPs to two other African regions (North Africa and the Horn of Africa);[22] at the same time, in the 2011 Global Approach to Migration and Mobility (GAMM) it acknowledged the previously limited use of RPPs and the opportunity for their strengthening, with a specific focus on "building up protection capacity and asylum systems in partner countries and regions" and adding "an enhanced resettlement component […] to

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[17] GHK (2009), *Evaluation of Pilot Regional Protection Programmes*, Final Report, available online.

[18] Some UNHCR reports (accessed by A. PAPADOPOULOU (2015), *Regional Protection Programmes*, cit., 10) highlighted progress in terms of awareness and understanding of border officials for the need to access the asylum procedure.

[19] A. PAPADOPOULOU (2015), *Regional Protection Programmes*, cit., 10.

[20] R. CORTINOVIS (2015), *The External Dimension of EU Asylum Policy*, cit., 10.

[21] Stockholm Programme, *An open and secure Europe serving and protecting citizens*, adopted by the European Council on 4/5.12.2008, OJ C115, 4.5.2010, 1 ff., para. 6.2.3.

[22] Communication, *First Annual Report on Immigration and Asylum (2009)*, 6.5.2010, COM(2010) 214 final, 6.

each RPP as a sign of international solidarity and a key instrument for pursuing orderly access to durable solutions in the EU".[23]

The *RPP in the Horn of Africa* became operational in late 2011 in Djibouti, Kenya, and Yemen and was financed by the TPMA programme. It was built on pre-existing humanitarian assistance and mixed migration management projects in Kenya and Yemen, with the overall objective of improving the protection and care provided to asylum seekers in the area. In Yemen, the focus was on screening, registering, and addressing the first needs of new arrivals; training NGOs on the ground; providing social services and special assistance to vulnerable refugees; enhancing professional and educational skills for students in the camps; and resettlement procedures for some refugees in European and non-European countries. In Djibouti, activities focused on training national authorities on protection issues; building up a reception centre at the border with Somalia; strengthening educational activities in the reception camps; and starting-up small economic activities. Finally, in Kenya RPPs projects were mainly addressed to guarantee security and appropriate living conditions in the reception camps, providing *inter alia* support to the efforts of UNHCR, the Kenyan government and local NGOs to train and increase the presence of police forces as well as to improve infrastructures and educational activities; it should also be noted that resettlement operations resulted in the transfer of almost 9,000 refugees from Kenya to other countries.

The "RPP in North Africa" was funded by the PTAM programme to enable UNHCR to implement projects from 2012 to 2015 in Egypt, Libya, and Tunisia. This transit-region RPP aimed to improve capacities in the three targeted countries to identify, register, screen, and return asylum seekers if practicable. In Egypt, activities were in line with previous AENEAS-funded actions and focused on capacity-building and training of public authorities, mass information campaigns, and voluntary return.[24] As for Tunisia, the focus was on developing an appropriate national asylum system through the training of legal practitioners and journalists, the provision of medical supplies to hospitals, information campaigns, support to local NGOs to carry out refugee *status*

[23] Communication, *The Global Approach to Migration and Mobility*, 18.11.2011, COM(2011) 743 final, 18.

[24] Some projects were postponed due to the instability resulting from the uprisings against the Mubarak regime in Egypt and, in general, the "Arab Spring" events.

recognition procedures in reception camps and some resettlement operations. Finally, activities in Libya – which started with a delay in the second half of 2012 due to the serious instability following the end of the Gaddafi regime – dealt with the monitoring of protection conditions, registration and recognition procedures in a territory still today suffering from severe access difficulties to applicants detained in formal and informal camps as well as to documentation on asylum procedures.

3. The "new" Regional Development and Protection Programmes (RDPPs)

At the end of 2013, in response to the Lampedusa tragedy of the 3rd of October, the Commission adopted the Communication on the Mediterranean Task Force,[25] which *inter alia* reiterated the need to strengthen the existing RPPs. It was particularly noted that the latter could only be successful if they could have relied on "longer-term engagement and funding […] both from the EU and the national level" and if their implementation had been "accompanied by strong political dialogue and advocacy efforts on refugee protection and protracted refugee situations with national authorities in third countries" and, finally, if coordination between the EU, the Member States, UNHCR and NGOs involved had been increased.[26]

More importantly, the Communication reaffirmed the EU's willingness, already expressed in the Joint Communication on the Syrian crisis,[27] to put in place a programme "aimed at strengthening the long-term capacity of the countries neighbouring Syria to help them to deal with refugees" and confirmed that, in one of the most displaced areas in recent years, it would have operated a new "Regional Development and Protection Programme (RDPPs)".[28]

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[25] Communication, *on the work of the Task Force Mediterranean*, 4.12.2013, COM(2013) 869 final.

[26] *Ivi*, 12.

[27] Joint Communication, *Towards a Comprehensive EU Approach to the Syrian Crisis*, 24.6.2013, JOIN/2013/22 final.

[28] Communication, *on the work of the Task Force Mediterranean*, cit., 12. The new denomination already resulted from the Communication, *4th Annual Report on Immigration and Asylum (2012)*, 17.6.2013, COM(2013) 422 final, 14, and, more generally, from the Communication, *A European Agenda on Migration*, 13.5.2015, COM(2015) 240 final, 5.

The "RDPP in the Middle East" (RDPP ME) started in July 2014. Phase I was a four-year multi-donor[29] initiative to implement projects in Jordan, Lebanon, and Iraq.[30] The RDPP ME was built from a study commissioned by the Danish government,[31] and the latter State led its overall implementation in partnership with the EU, governments, civil society, NGOs, and UN agencies. The distinctive feature of this programme (as reflected in its name) is that the relevant projects concerned not only capacity-building in the asylum sector but also the development of local host communities, in line with the GAMM strategy.[32] In other words, building on the shortcomings of previous RPPs and in line with similar views by other International Organisations,[33] the EU has acknowledged that, in situations of protracted displacement, refugee-related humanitarian assistance cannot be separated from the parallel activation of socioeconomic development measures for the benefit of both refugees and host communities.[34]

Phase I has been implemented through 45 strategic partnerships in the region and consists of projects[35] that can be grouped into four macro-areas: research (aimed at assessing and analysing the impact of displacement on refugees and host communities); protection (in line with previous RPPs, to strengthen the protection of refugees through legal support, community empowerment, and conflict mitigation, better ca-

[29] It was supported by the European Commission (DEVCO), Ireland, the Netherlands, the United Kingdom, the Czech Republic, Switzerland, Norway, and Denmark.

[30] See https://www.eeas.europa.eu/node/7895_en.

[31] R. ZETTER, H. RUAUDEL, S. DEARDORFF-MILLER, E. LYYTINEN, C. THIBOS, F. SKADKÆR PEDERSEN (2014), *The Syrian Displacement Crisis and a Regional Development and Protection Programme: Mapping and Meta-Analysis of Existing Studies of Costs, Impacts and Protection*, available online.

[32] Communication, *The Global Approach to Migration and Mobility*, cit., 18.

[33] M. HENDOW (2019), *Bridging Refugee Protection and Development. Policy Recommendations for Applying a Development-Displacement Nexus Approach*, ICMPD Study, available online, 15 ff.; and R. ZETTER (2020), *From Humanitarianism to Development: Reconfiguring the International Refugee Response Regime*, in T. BASTIA, R. SKELDON (eds.), *Routledge Handbook of Migration and Development*, Abingdon, 353 ff.

[34] The link between protection and development was reaffirmed in the Communication, *Lives in Dignity: from Aid-dependence to Self-reliance Forced Displacement and Development*, 26.4.2016, COM(2016) 234 final, 2.

[35] A detailed list is available at https://www.rdpp-me.org/phase-i.

pacities of national institutions for protection and asylum, and combating child labour); advocacy and political dialogue (aimed at improving and upholding refugees' rights); and the most significant socio-economic development component (to enhance economic opportunities and livelihood capacity of the vulnerable population through employment generation and business development). [36]

Phase II was launched in October 2018, ran until December 2022 and was supported by the Czech Republic, Denmark, the EU, Ireland, and Switzerland. While its overall objective was to ensure that refugees and host populations access their rights, are safe and self-reliant, and that refugees were guaranteed a durable solution, the RDPP ME focused on three thematic areas: livelihoods towards durable solutions, upholding and expanding protection space, and applied research and advocacy. [37]

The impetus to move along this new approach – *i.e.*, integrating development measures in refugee-related humanitarian actions – also affected African RPPs. The Justice and Home Affairs Council of October 2014 called for the development of "new and reinforced Regional Development and Protection Programmes in North Africa and the Horn of Africa and fully implement the existing Regional Development and Protection Programme in the Middle East". [38] Such request was followed up in the Commission's European Agenda on Migration of May 2015, which stressed that "the EU should step up its support to the countries bearing the brunt of displaced refugees. Regional Development and Protection Programmes will be set up or deepened, starting in North Africa and the Horn of Africa, as well as by building on the existing one in the Middle East", with an EU budget of € 30 million for the period 2015-2016. [39] The Action Plan of the EU-Africa Valletta Summit of Migration of November 2015 specified that such RDPPs should have been up and running by mid-2016. [40]

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[36] As pointed out by A. PAPADOPOULOU (2015), *Regional Protection Programmes*, cit., 15, the latter's activities included skills development, vocational training, infrastructure, jobs creation and market-based support for both refugees and the local communities.

[37] See the report available at https://www.rdpp-me.org/rdpp-reports.

[38] See Annex to Council Conclusions, *Taking action to better manage migratory flows*, 10.10.2014, 14141/14, 4.

[39] Communication, *A European Agenda on Migration*, cit., 5.

[40] Available online.

The "RDPP in North Africa" (RDPP NA) was launched on 15th April 2015 in eight targeted third countries: Algeria, Chad, Egypt, Libya, Mauritania, Morocco, Niger, and Tunisia. Its "protection" pillar has been funded through the Asylum, Migration and Integration Fund (AMIF) 2014-2020[41] to implement, to date, 57 projects in Algeria, Chad, Egypt, Libya, Mauritania, Morocco, Niger and Tunisia.[42] This pillar has currently entered Phase V, whose projects are expected to end on 31st December 2023. Italy leads the responsible Steering Committee (notably, the Italian Ministry of the Interior) and consists of representatives of the Commission, the European External Action Service (EEAS), the former European Asylum Support Office (EASO), several Member States[43] and Norway as an Associate State, in partnership with UNHCR and the International Organization for Migration (IOM). Main supported activities concerned assisted voluntary return and reintegration to the countries of origin; awareness-raising activities on the risks related to irregular migration and access to international protection; capacity-building initiatives in support of national governments, NGOs and civil society organisations with a specific focus on human rights standards, international protection and services for vulnerable migrants and refugees; child protection for children on the move; direct assistance for migrants and refugees, including distribution of food and non-food items, medical, legal and psychosocial assistance; infrastructure works for rehabilitation and equipment of key facilities; and registration, refugee *status* determination and durable solutions for asylum seekers and refugees.

As regards the "development" pillar of the RDPP NA, which began in 2016 in Morocco, Algeria, Tunisia, Libya, and Egypt, it has been managed by Commission's DG NEAR and financed through the European Neighbourhood Instrument (ENI) 2014-2020[44] and the EU Trust

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[41] Art. 20(2)(f), Regulation (EU) 516/2014, *establishing the Asylum, Migration and Integration Fund*, 16.4.2014, OJ L150, 20.5.2014, 168 ff. See E. CASAJUANA, R. WESTERBY (2022), *Follow the Money IV: The Use of AMIF and ISF-BV Funds outside the EU*, Brussels, 16, available online.

[42] http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/regional-development-protection-programme-north-africa.

[43] Austria, Belgium, the Czech Republic, Finland, France, Germany, Greece, Malta, the Netherlands, Portugal, Spain, and Sweden.

[44] Regulation (EU) 232/2014, *establishing a European Neighbourhood Instrument*, 11.3.2014, OJ L77, 15.3.2014, 27 ff. In the Joint Communication, *Review of the European Neighbourhood Policy*, 18.11.2015, JOIN/2015/50 fi-

Fund (EUTF) for Africa[45] to contribute to establishing migrant-friendly inclusive services, fostering social cohesion and employment opportunities at the community level, and enhancing advocacy, research, and knowledge-sharing. While Phase I was implemented by IOM from February 2016 to January 2020,[46] and Phase II by IOM and Save the Children from July 2017 and December 2018,[47] Phase III was entrusted in July 2019 to civil society organisations only for implementing projects expected to run in some cases until 2024.[48]

Finally, the "RDPP in the Horn of Africa" (RDPP HA) has worked from June 2015 until the end of 2020 (although some projects are still today in their implementation stage),[49] with the overall objective of filling in protection gaps and addressing the humanitarian-development nexus challenge.[50] The Steering Committee was led by the Netherlands,

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nal, 17, RDPP NA (as well as RDPP ME) has been recognised as crucial to "assist partner countries in developing their asylum and protection systems by supporting those displaced by conflicts […]".

[45] European and African partners launched the EUTF for Africa at the EU-Africa Valletta Summit of Migration in November 2015. Soon after, the Constitutive Agreement (available online) was signed by the Commission, 25 EU Member States, Norway, and Switzerland. As of 31 December 2021, total resources allocated to the EUTF for Africa amounted to around € 5 billion, including € 4.4 billion from the European Development Fund (EDF), the Development Cooperation Instrument (DCI), ENI, AMIF and other funding, and around € 623 million from the EU Member States and other donors (Norway, Switzerland, and UK).

[46] In 2015, the ENI financed the first action within the pillar, initially named "Community Resilience Initiative to support the Regional Development and Protection Programme in North Africa", later called "Phase I". It focused on formulating national needs assessments, training journalists, and providing technical support to local civil society organisations and advocacy efforts.

[47] The projects concerned complementary initiatives targeting sustainable livelihoods and access to services on a national level, based on the priorities identified in the needs assessments in the targeted countries.

[48] The overall objective of this three-year Phase III was to strengthen the resilience of those in need, and activities have built on the relevant parts of the needs assessment of Phase I.

[49] E. DAVIN, J. RUBIRA, P. DE MERCEY, D. WILLIAMS, H. LE BLAY, M. BONNET, R. CHRISTENSEN, E. OGOLA, S. KINATI, P. DAL BIANCO (2022), *EUTF Monitoring and Learning System HoA. S1 2022 Report (covering until 30 June 2022)*, available online.

[50] T.T. ABEBE (2021), *Forced Displacement Trends and Responses in the*

which coordinated the other EU Member States[51] and two Associate States[52] in partnership with UNHCR and IOM. The RDPP HA operated mainly in Ethiopia, Kenya, Sudan and Uganda, which still host many refugees from Eritrea, Somalia and South Sudan.[53] While the "protection" pillar was funded by AMIF 2014-2020,[54] the cost of the "development" one was charged to the EUTF for Africa, for a total of 58 projects[55] funded in the four RDPP's areas of capacity-building,[56] protection,[57] integrated services,[58] and socio-economic development.[59]

4. Assessing the effectiveness of RDPPs vis-à-vis RPPs

Data, reports and studies to assess the effectiveness of RDPPs compared to RPPs are few and not easily accessible. This is due to the nature of the RDPPs, which draw resources from different sources without a single central structure at the European level (their implementation being entrusted to one Member State per programme, as seen before). Moreover, the division between RDPPs' protection and development pillars does not make it easy to track such programmes compre-

Horn, Eastern and Great Lakes Region: Overview of the Decade, 25, available online.

[51] The Czech Republic, France, Greece, Italy, Luxembourg, Malta and the United Kingdom.

[52] Norway and Switzerland.

[53] Uganda alone hosted, at the end of 2021, the highest number of refugees in the region and the continent (1.5 million).

[54] E. CASAJUANA, R. WESTERBY (2022), *Follow the Money IV*, cit., 16.

[55] N. MAJIDI, S. BARRATT, R. FRISCHKORN, S. FRANSEN, A. KNOLL (2021), *Horn of Africa. Progressive Effects Evaluation of the Regional Development and Protection Programme (RDPP)*, available online.

[56] The aim was to strengthen the capacity of local and central authorities to develop and implement an integrated approach towards refugees, host communities and mixed migration.

[57] To strengthen comprehensive protection approach for refugees in different settings and their host communities, with specific emphasis on vulnerable groups.

[58] To improve social cohesion by promoting access to integrated services for both host communities and refugees.

[59] To improve livelihood and employment opportunities for refugees and host communities, with a specific emphasis on youth.

hensively. Finally, while positive from an incremental perspective, it is very difficult to carry out an analysis of changes directly attributable to RDPPs as the relevant projects are, in most cases, co-funded or at least operating in an environment characterised by the co-presence of other projects of different (financial) origin. [60]

Nonetheless, some observations can be made, starting from the shortcomings in RPPs, using some evaluation reports issued in the framework of the three RDPPs implemented so far.

First, it should be recalled that RPPs suffered from the 'original sin' of 'setting targets that were too broad to be reasonably achievable', mainly due to the limited available resources, which created a gap between planned objectives and their implementation [61] and had consequences as regards a flexible and non-systematic use of measures listed in the 2005 RPP Communication. [62] In relative terms, the situation has mostly stayed the same regarding the next two African RPPs, which benefited from more funding than the previous pilot one but had a broader geographical scope of application, notably in the Horn of Africa. This resulted not only in a quite predictable limited impact on the effectiveness of these programmes but also in the concentration of most resources on capacity-building activities alone [63] which has hurt other programme components, such as resettlement. [64]

The establishment of the RDPPs has led to some improvements in this, such as more resources than the old RPPs [65] and the inclusion of the development component, increasing the projects' overall efficiency.

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[60] As acknowledged by N. MAJIDI, S. BARRATT, R. FRISCHKORN, S. FRANSEN, A. KNOLL (2021), *Horn of Africa. Progressive Effects Evaluation*, cit., 3.

[61] GHK, *Evaluation of pilot Regional Protection Programmes*, cit., 11.

[62] A. PAPADOPOULOU (2015), *Regional Protection Programmes*, cit., 15-16.

[63] R. CORTINOVIS (2015), *The External Dimension of EU Asylum Policy*, cit., 11.

[64] A. PAPADOPOULOU (2015), *Regional Protection Programmes*, cit., 17. According to A. ROUSSELOT, L. AIOLFI, A. CHARPIN (2013), *Final Evaluation of the Thematic Programme "Cooperation with Third Countries in the Area of Migration and Asylum"*, 48, available online, the outcomes of the RPP in North Africa were affected by delays in the identification procedures, due in large part to the Arab Spring events, with the number of registered refugees far below potential ones.

[65] According to A. PAPADOPOULOU (2015), *Regional Protection Programmes*, cit., 16, "[i]n areas hosting protracted displacement, for example, the RPP scope of 2-5 million EUR was usually a small part of a bigger operation. Large scale projects, multiannual planning and coherence with other develop-

Regarding the RDPP ME, some evaluation reports have shown that Phase 1 (2014-2018) has been relevant, effective and at least partially efficient, that results have been achieved and that, despite the situation on the ground,[66] the programme has provided added value as a flexible and innovation-promoting tool,[67] and a practical response to protracted crises.[68] Such a result has been possible thanks to resources made available to the RDPP ME (around € 41.6 million), which have been spent for more than 90% (around € 38.1 million).[69] As for Phase 2 (2018-2022), while final reports are under preparation at the time of writing, some positive results have already been reported despite a very difficult socio-economic situation in the three targeted countries. Thanks to the increased overall budget compared to Phase 1 (€ 54.1 million), good results have been achieved, for instance, in employment growth and training, skills development and empowerment of local partners.[70]

As for RDPP NA, on the other hand, from August 2016 to December 2023 a total of € 63.7 million will be allocated to 57 protection pillar projects,[71] while data from the development pillar are more fragmented:[72] however, in the absence of a comprehensive qualitative eva-

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ment programmes and initiatives supporting the protection of vulnerable in hosting countries are needed in order to support solutions". More recently A. PAPADOPOULOU (2017), *EU External Cooperation and Global Responsibility Sharing: Towards an EU Agenda for Refugee Protection*, ECRE Policy Paper, 14, available online: "[t]he RPP have been severely underfunded in relation to the scope and objectives they were designed to meet".

[66] See the *Final Report July 2014 – September 2018*, 7, available online.

[67] See *Programme document*, *Regional Development and Protection Programme in the Middle East (RDPP II), October 2018 – December 2022*, updated 10.09.2021, 1, available online. Similarly, the *Final Report July 2014 – September 2018*, cit., 7.

[68] MINISTRY OF FOREIGN AFFAIRS OF DENMARK (2018), *Evaluation of the Regional Development and Protection Programme in Lebanon, Jordan and Iraq 2014-2017*, 67, available online.

[69] MINISTRY OF FOREIGN AFFAIRS OF DENMARK (2018), *Evaluation of the Regional Development and Protection Programme*, cit., 3.

[70] PARTICIP CONSORTIUM (2022), *EU Regional Trust Fund in Response to the Syrian Crisis. 10th Results Report. Progress update*, 61-63, available online.

[71] http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/regional-development-protection-programme-north-africa.

[72] Some figures can be found in EU Trust Fund for Africa reports, available at https://ec.europa.eu/trustfundforafrica/content/results-monitoring-and-evaluation

luation,[73] no conclusions can be drawn on the efficacy of the programme.

Finally, as far as the RDPP HA is concerned, complementarity and integration of internal and external funds have indeed worked well,[74] but a 2021 evaluation report[75] showed *inter alia* that a key concern voiced by stakeholders was the lack of sufficient resources to sustain the large-scale RDPP;[76] that the latter has had a positive income effect but a less clear effect on overall protection levels, also due to external factors (climate change, multiple regional crises, continued displacement, political developments);[77] notwithstanding this, "it is reasonable to assume that needs would have increased, livelihoods deteriorated, and protection levels dropped, in the absence of RDPP-funded interventions".[78]

So, although it is quite clear that in the absence of RDPPs the living conditions of both refugees and host communities would have been worse in relative terms, the key point is that even today the available resources are still far from adequate to address the problematic situation of protracted displacement of Syrians and Sub-Saharans refugees.

Another point made as early as the evaluation of pilot RPPs was "the insufficient coordination with other initiatives of the EU, the Member States and other actors involved". This was especially true regarding the lack of an integrated approach between RPP-funded protection projects and other development cooperation and humanitarian aid-oriented initiatives.[79] The reason can be traced back to RPPs' institutional framework, seen as too 'soft' and disconnected from field activities delegated

_en. See also E. CASTAGNONE, F. CERUTTI, C. MADRIDEJOS, C. RAVA (2022), *Monitoring and Learning System EUTF–North of Africa. 2022 Report Covering the period 2017–2022*, available online.

[73] Which, if existing, could not be found online.

[74] C. WOOLLARD, J. LIEBL, L. DAVIS, E. CASAJUANA (2022), *EU Migration and Asylum Funds for Third Countries*, study requested by the LIBE Committee, 57, available online.

[75] Which examined the effectiveness of selected projects in the different countries identified over the 2018-2020 three-year period.

[76] N. MAJIDI, S. BARRATT, R. FRISCHKORN, S. FRANSEN, A. KNOLL (2021), *Horn of Africa. Progressive Effects Evaluation*, cit., 61.

[77] *Ibidem*.

[78] *Ibidem*.

[79] GHK, *Evaluation of pilot Regional Protection Programmes*, cit., 10.

to UNHCR, and the limited involvement of national governments and local actors in designing and implementing actions on their territories. [80]

In this respect, the shift to RDPPs has led to improvements. First of all, where funding from the Trust Funds has been of some significance (as in the Horn of Africa), there has been a streamlining of development pillar resources and their complementarity with initiatives other than RDPPs but equally funded by such Funds. This was also possible through the strengthening of the overall governance: on the one hand, each RDPP has been assigned, as already mentioned, to a consortium led by a Member State with the task of coordinating the other participating actors; on the other hand, for each RDPP an Implementing Consortium has been set up at the central level including the Commission, [81] the donor Member States, UNHCR and IOM. Moreover, since 2010, RDPPs have been able to call on the operational cooperation of the EASO and now, the EU Agency for Asylum (EUAA), [82] when deemed appropriate.

As far as the involvement of national governments and local actors is concerned, the situation is more blurred. Generally speaking, each national and territorial context can be very different; however, the RDPPs' practice has shown that the greater involvement of national and local actors, the greater effectiveness of the projects undertaken. In the RDPP ME, for instance, it has been found a good balance between entrusting responsibilities to local partners and RDPP's organisational guidance and support; [83] however, when it comes to the RDPP HA, whenever government actors and local partners were not sufficiently involved, the project results were not optimal. [84]

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[80] M. GARLICK (2011), *EU "Regional Protection Programmes"*, cit., 385.

[81] According to C. WOOLLARD, J. LIEBL, L. DAVIS, E. CASAJUANA (2022), *EU Migration and Asylum Funds for Third Countries*, cit., 57-58, "[s]ince 2015, more coordination is taking place between all the relevant DGs on migration, including funding. Weekly meetings at Director level take place for all relevant services (DG INTPA, DG NEAR, DG ECHO, FPI, DG HOME) and cabinets".

[82] Art. 35(2), Regulation (EU) 2021/2303, *on the European Union Agency for Asylum*, 15.12.2021, OJ L468, 30.12.2021, 1 ff.

[83] L. BILDSØE LASSEN, A.-K. OLESEN YURTASLAN, M. SHQUIER (2022), *Localization of Aid in Jordan and Lebanon. A Longitudinal Qualitative Study*, 33, available online. Another positive effect has been remarked in terms of the improved capacity of implementing local organisations to consolidate best practices developed under RDPP projects and to use them to raise new funds (there, 31).

[84] N. MAJIDI, S. BARRATT, R. FRISCHKORN, S. FRANSEN, A. KNOLL (2021), *Horn of Africa. Progressive Effects Evaluation*, cit., 63-65.

Little has changed, by contrast, as regards 'the lack of a genuine regional scale of these programmes'. Just like the RPPs, also the RDPPs are tailored to the needs of the different targeted countries and, despite their name, still do not follow a truly regional approach. It is a matter of fact that projects are fine-tuned to the national needs, while transnational approaches are still uncommon [85] in both the RDPP ME (where a regional approach would be very challenging due to the significant differences between the three countries involved) [86] and the two African RDPPs (where differences are not only between countries but also between different areas of each country). [87]

5. Conclusions

In conclusion, let us try to answer the initial question: are RDPPs effective, or do they provide a too ambitious (and somewhat ambiguous) protection tool?

Looking at the positive aspects, there is no doubt that the shift from RPPs to RDPPs resulted in a net improvement in allocated resources and the scale and diversification of implemented projects, notably those aimed at supporting a socio-economically sustainable coexistence of refugees and the local population. After all, such a focus on RDPPs in the Middle East and Africa is consistent with an indisputable fact: in the absence of adequate resettlement quotas [88] and given the extreme difficulty of safe returns to the countries of origin, local integration seems to be the only durable solution feasible. [89] Therefore, the decision to increase the resources available for these programmes, strengthen the European-level coordination structures, and improve interplay with na-

[85] M. HENDOW (2019), *Bridging Refugee Protection and Development*, cit., 15.

[86] *Ibidem*. See also MINISTRY OF FOREIGN AFFAIRS OF DENMARK (2018), *Evaluation of the Regional Development and Protection Programme*, cit., 67.

[87] S. VEZZOLI, D. HILHORST, L. MEYER, J. RIJPMA (2022), *Refugee Protection in the Region: A Survey and Evaluation of Current Trends*, in *IM*, 2022, 3, 10.

[88] On *ad hoc* EU resettlement programmes and the difficulties of adopting a Union resettlement framework, see V. MORENO-LAX (2022), *The Informalisation of the External Dimension of EU Asylum Policy*, cit., 289 ff.

[89] Accordingly C. LE COZ, S. DAVIDOFF-GORE, T. SCHMIDT, S. FRATZKE, A. TANCO, M. BELEN ZANZUCHI, J. BOLTER (2021), *A Bridge To Firmer Ground: Learning from International Experiences to Support Pathways to Solutions in the Syrian Refugee Context*, Research report, 7, available online.

tional and local authorities and other actors in the targeted countries is to be welcomed.

However, one cannot deny the fact that available funds, although greater than in the past, are still insufficient for a credible resolution of protracted displacement situations. Indeed, it is clear that a few tens of millions per regional area cannot make a difference. While such programmes are only one of the EU's and the International Community's tools to deal with this issue, it is also true that RDPPs are the only real 'EU-branded' programme aimed at addressing the situations of protracted displacement; as a result, one would expect more from the EU, starting with an updated regulatory framework [90] consistent with the acknowledgement of the importance of the protection-development nexus. Hence, it seems that, like RPPs, also RDPPs are even today an over-ambitious instrument for their objectives vis-à-vis the available resources.

Another problem with RDPPs is their somewhat ambiguous nature. What is unconvincing is the persisting tiny regional scale: since RPPs and RDPPs fail from 2005 to develop a truly regional approach to their projects, one might conclude that 'regionality' does not lie in the adopted method but in a simpler geographical aggregation tailor-made to the needs of the EU and its Member States. Put otherwise, the risk is that targeted third countries are put together and programmes funded not only (and not so much) to strengthen national asylum capacities, provide durable solutions to refugees and better support the socio-economic development of host communities into a regional approach, but also (mainly?) to contribute to stopping migration flows towards Europe. This would unfortunately be consistent with the Hague Programme's acknowledgement of the need "to provide access to protection and durable solutions at the earliest possible stage" [91] and the fact that at least since the 2015 summer migration crisis, the nexus between refugee protection and migration control has become more and more visible. [92]

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[90] It is worth recalling that the only act dedicated to RPPs dates back to 2005.

[91] Para. 1.6.1.

[92] See further S. VEZZOLI, D. HILHORST, L. MEYER, J. RIJPMA (2022), *Refugee Protection in the Region*, cit., 7, which reminds us how, after the fall of Kabul in August 2021, the European States (and the USA) were quick to offer financial support to Afghanistan's neighbouring countries to host displaced persons from the Taliban regime.

In short, one is left with the idea that the EU and its Member States do not regard RDPPs as the centrepiece of a broad action for protection and development in the regions of origin of refugees, but only one of the tools to limit irregular entry, with the added risk of these programmes being side-lined in favour of other, more effective containment instruments, thereby undermining also their not-for-containment positive effects. In this respect, it does not seem promising that the Commission has not focused firmly on these programmes in recent years, since they are not explicitly mentioned in the 2020 New Pact on Migration and Asylum,[93] are only referred to in Recommendation 2020/1364[94] and it does not seem that area of action and the leading countries of future RDPPs have yet been established[95] despite the substantial increase in resources for the external dimension of European migration policy in the period 2021-2027.[96]

So, in the end, one might wonder if RDPPs can fulfil this secondary (or primary?) role of containing irregular arrivals. Even though the subject is too broad to be dealt with here, it seems that the same argument that is commonly used for development policy is being reproduced here on a small scale: the well-known and naïve idea is that, by increasing funds (and not even too much, in the case of RDPPs), the presence of refugees would not only be better perceived in the host countries, but the refugees themselves could learn to self-support and thus decide not to make the long and dangerous trip to Europe.[97]

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[93] Communication, *on a New Pact on Migration and Asylum*, 23.9.2020, COM(2020) 609 final.

[94] Recommendation (EU) 2020/1364, *on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways*, 23.9.2020, OJ L317, 1.10.2020, 13 ff. Similarly, RDPPs are only mentioned in the more recent Communication, *on the Report on Migration and Asylum (2022)*, 6.10.2022, COM(2022) 740 final, 25.

[95] In the recent Implementing Decision, *on the financing of components of the Thematic Facility under the Asylum, Migration and Integration Fund and adoption of the Work Programme for 2023, 2024 and 2025*, 23.11.2022, C(2022) 8340 final, it is stated that "[t]he Regional Development and Protection Programme (RDPP) – Protection Pillar will be implemented by Member States whose selection remains to be confirmed […]".

[96] I. GOLDNER LANG (2022), *Editorial. The New Pact on Migration and Asylum: A Strong External and A Weak Internal Dimension?*, in *EFAR*, 1, 1 ff.

[97] Accordingly S. VEZZOLI, D. HILHORST, L. MEYER, J. RIJPMA (2022), *Refugee Protection in the Region*, cit., 8 ff.

Well, without going too far, the mere existence of short-term containment initiatives – such as the so-called EU-Turkey declaration in the eastern Mediterranean, the agreements with the Libyan coastguard in the central Mediterranean, and the pushbacks "*en caliente*" at the Moroccan-Spanish borders as far as the western Mediterranean is concerned – is here to demonstrate the failure of such ideas. What is to be hoped, therefore, is that RDPPs keep their original function, albeit imperfect and ill-funded, as instruments for bridging humanitarian and development needs without being used (or not used, as the case may be) for other purposes.

Chapter 30

THE DETENTION OF MIGRANTS AT THE EU'S BORDERS: A SERIOUS VIOLATION OF HUMAN RIGHTS AND A THREAT TO THE RULE OF LAW

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ABSTRACT: *This chapter focuses on the serious violations of migrants' rights that occur during control and surveillance operations at the external borders of the EU, but also, and more importantly, in the transit areas of internal borders. This practice mainly affects the Balkan routes as the main gateways to the EU territory, in particular the Hungarian towns of Tompa and Röszke on the border with Serbia, with detention centres for migrants and barbed wire barriers to curb migration flows. Through a brief analysis of some of the judgments of the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU), this chapter will highlight the different approaches of the two Courts to transit zones and detention centres, as well as to the violations of migrants' human rights, showing that they pose a serious threat to the principle of the rule of law.*

1. Some introductory remarks on the migrant detention practices at EU borders

The detention of persons seeking protection is a common practice in asylum systems, even beyond the provisions of EU secondary legislation regulating the detention and restriction of the freedom of movement of third-country nationals, especially in the context of borders,[1] where the

[1] Detention is regulated by Directive 2013/32/EU of the European Parlia-

asylum procedures are less transparent than domestic procedures. In fact, in times of increased migratory pressure, the practices observed indicate that States of arrival fail to register migrants arriving in Europe in order to avoid the difficulties of managing reception. Their public authorities have even accompanied migrants to the border of another State, as the Court of Justice of the European Union (CJEU) ascertained in the *Jafari* case.[2] In addition, many migrants arriving in Greece or Italy want to reach other European countries, which do not hesitate to send them back to the countries of first arrival.[3] Furthermore, States'

ment and of the Council, *on common procedures for granting and withdrawing international protection*, 26.6.2013, OJ L180, 29.6.2013, 60 ff. (i.e., the Asylum Procedures Directive); Directive 2013/33/EU of the European Parliament and of the Council, *laying down standards for the reception of applicants for international protection*, 26.6.2013, OJ L180, 29.6.2013, 96 ff. (i.e., Reception Conditions Directive), and Regulation 604/2013/EU of the European Parliament and of the Council, *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*, 26.6.2013, OJ L180, 29.6.2013, 31 ff. (i.e., the Dublin Regulation). Detention may also be applied if the entry is refused under Regulation 2016/399/EU of the European Parliament and of the Council, *on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, 9.3.2016, OJ L77, 23.3.2016, 1 ff., or pending removal under Directive 2008/115/EC of the European Parliament and of the Council, *on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16.12.2008, OJ L348, 24.12.2008, 98 ff. (i.e., Return Directive). There are thus multiple legal regimes that apply to persons intercepted at a border crossing or who have applied for international protection at the border that may provide for detention. Moreover, the same person may be subject to different detention regimes as the procedure unfolds. On this point, see ECRE (2022), *Reception, Detention and Restriction of Movement at EU External Borders*, Heinrich-Böll-Stiftung European Union, available online; Š. DUŠKOVÁ (2017) *Migration Control and Detention of Migrants and Asylum Seekers – Motivations, Rationale and Challenges*, in *GroJIL*, 5(1), 23 ff. and M. DEN HEIJER (2022), *The Pitfalls of Border Procedures*, in *CML Rev.*, 59(3), 641 ff.

[2] ECJ, Grand Chamber, judgment 26.7.2017, *Khadija Jafari and Zainab Jafari*, case C-646/16. About the judgment, see, amongst others, N.K. ŠALAMON (2017) *CJEU Rulings on the Western Balkan Route: Exceptional Times Do Not Necessarily Call for Exceptional Measures*, in *EU Migration Law Blog*; D. THYM (2018), *Judicial Maintenance of the Sputtering Dublin System on Asylum Jurisdiction: Jafari, A.S., Mengesteab and Shiri*, in *CML Rev.*, 55(2), 549 ff.; V. MICHEL (2018) *De la délicate interprétation du Système Dublin*, in *European Papers*, 3(1), 419 ff.

[3] This is one of the "monstrosities" that the Dublin system entails, as em-

fear of the risk of 'absconding' from asylum or the Dublin procedure has also led to the establishment of facilities in remote locations where migrants are held in a kind of *fictio juris*, i.e., a legal fiction of non-entry, claiming that they have not formally entered the territory insofar as they have not been allowed to enter. As a result, migrants are detained or subjected to restrictions on their freedom of movement, even for long periods of time, with States justifying these measures on the grounds of organisation, speed of processing applications, or public order and security concerns.

On the contrary, EU legislation provides an exhaustive list of premises for which a person may be detained,[4] and establishes the principle that "a person should not be detained solely on the grounds that he/she is seeking international protection".[5] Formally, detention should be a measure of last resort, applied after an individual assessment of each case of the specific grounds on which detention can be considered lawful.[6] As a result, even if EU member States can detain asylum seekers

phasised in A. CIAMPI (2019), *Kafka's Trial and the EU Dublin Asylum System*, in D. CARPI SERTORI (ed.), *Monsters and Monstrosity. From the Canon to the Anti-Canon: Literary and Juridical Subversions*, Berlin-Boston, 221 ff. On the criticalities of the Dublin Regulation, see also G. MORGESE (2020), *La riforma del sistema Dublino: il problema della condivisione delle responsabilità*, in *Dir. pubbl.*, 1, 97 ff.; C. FAVILLI (2021), *La solidarietà flessibile e l'inflessibile centralità del sistema Dublino*, in *Dir. um. e dir. internaz.*, 1, 85 ff.; M.D. REQUENA DE TORRE (2022), *De refugiados a rechazados. El sistema de Dublín y el derecho a buscar asilo en la Unión Europea*, in *Revista derecho com. eur.*, 26(73), 1196 ff.

[4] Specifically, Art. 8(3) of the Reception Conditions Directive and Art. 15 of the Return Directive. See H.B. HUI, M.B. OSWORTH, (2020), *Human Rights Protections and Monitoring Immigration Detention at Europe's Borders*, in *EHRLR*, 6, 640 ff.; F. SPITALERI (2017), *Il rimpatrio e la detenzione dello straniero tra esercizio di prerogative statali e garanzie sovranazionali*, Torino; and R. PALLADINO (2018), *La detenzione dei migranti: regime europeo, competenze statali e diritti umani*, Napoli.

[5] Art. 26, Asylum Procedures Directive and Art. 15, Return Directive.

[6] Recital 15 of the Reception Conditions Directive is the starting point of emphasising the provisions of the Refugee Convention, the ECHR, and the EU Charter, "... Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both the manner and the purpose of such detention. Where an applicant is held in detention, he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority". Unlike Art. 5(1)(f) ECHR, EU asylum law requires that it be demonstrated that detention is necessary and proportionate to any of the purposes/grounds listed.

and returnees,[7] they must respect their fundamental rights and safeguards. As such, a total disconnect emerges between what EU law provides for and what takes place in practice. The lack of legal assistance and information, inadequate conditions and inhumane treatment, as well as the detention of vulnerable persons, remain key concerns.[8] Although some complaint mechanisms have been put in place,[9] they do not effectively prevent or sanction the violations of fundamental rights at the EU's borders, so much so that the Commission adopted the decision to register a European Citizens' Initiative on the matter.[10]

In light of the above, and starting from the different approaches taken by the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) in relation to the Tompa and Röszke transit and detention centres, this chapter will attempt to demonstrate that violations of migrants' rights pose a serious threat to the principle of the rule of (human rights) law as it relates to migration and border control practices. Finally, it will attempt to assess whether the pending reforms in the EU legal framework are adequate to mitigate these practices.

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[7] See, for example, ECJ, judgment 15.3.2017, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor and others*, case C-528/15, para. 40, where the Court noted: "… the detention of applicants, constituting a serious interference with those applicants' right to liberty, is subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness".

[8] According to UNHCR (2022), *Safety and Dignity for Refugee and Migrant Children: Recommendations for Alternatives to Detention and Appropriate Care Arrangements in Europe*, available online, child immigration detention takes place in at least 27 countries of the European region.

[9] See, for example, Art. 111 Regulation 2019/1896/EU of the European Parliament and of the Council, *on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624*, 13.11.2019, OJ L295, 14.11.2019, 1 ff.

[10] Commission Implementing Decision 2023/165/EU, *on the request for registration of the European citizens' initiative entitled 'Article 4: Stop torture and inhuman treatment at Europe's borders', pursuant to Regulation (EU) 2019/788 of the European Parliament and of the Council (notified under document C(2023) 39)*, 12.1.2023, OJ L23, 25.1.2023, 19 f.

2. Deprivation of liberty or restriction of freedom of movement in the transit zone at the Serbian-Hungarian border: the different approaches of the two European courts (*Ilias and Ahmed* v. *FMS and others*)

Given that the detention practices and restrictions on freedom of movement implemented by several member States in the border context, particularly at the external Serbian-Hungarian border, remain a highly opaque phenomenon characterised by the blurring of boundaries between reception and detention, the ECtHR and CJEU have attempted to provide clarity in a number of judgments. In particular, the two Courts have taken different approaches to the placement of applicants in transit zones and detention centres. Indeed, the ECtHR considers that the purpose of the detention of applicants under domestic law is to enable the Hungarian authorities to exercise their right to verify whether a migrant fulfils the conditions for entry into the territory (*Ilias and Ahmed v. Hungary*).[11] On the contrary, the CJEU equates it with an unjustified detention regime that lacks the appropriate safeguards provided for by the relevant EU legislation (*FMS and others*).[12]

[11] ECHR, judgment 14.3.2017, application no. 47287/15, *Ilias and Ahmed v. Hungary*. This case concerns two Bangladeshi nationals who transited through Greece, the former Yugoslav Republic of Macedonia and Serbia before reaching Hungary and the Röszke transit zone where they immediately applied for asylum and were held for 23 days. On 14 June 2017, the Hungarian Government requested that the case be referred to the Grand Chamber, which delivered a judgment on 21 November 2019, see ECHR, Grand Chamber, judgment 21.11.2019, application no. 47287/15, *Ilias and Ahmed v. Hungary*. Examining the applicability of Art. 5 on the applicant's confinement to the transit zone, the Grand Chamber dissented from the findings of the Chamber judgment in 2017. For comments on the judgment, see A. BOMBAY, H. PIETERJAN (2021), *The ECtHR's Ilias and Ahmed and the CJEU's FMS-Case: A Difficult Reconciliation?*, in *Sui Generis*, 255 ff.; F.L. GATTA (2020), *Diritti al confine e il confine dei diritti: la Corte EDU si esprime sulle politiche di controllo frontaliero dell'Ungheria (Parte II – Detenzione e Art. 5 CEDU)*, in *ADiM Blog, Osservatorio della Giurisprudenza*; S. ZIRULIA (2020), *Per Lussemburgo è "detenzione", per Strasburgo no: verso un duplice volto della libertà personale dello straniero nello spazio europeo?*, in *Sist. pen.*; V. STOYANOVA (2019), *The Grand Chamber Judgment in Ilias and Ahmed v Hungary: Immigration Detention and How the Ground beneath our Feet Continues to Erode*, in *Strasbourg Observers*.

[12] ECJ, Grand Chamber, judgment 14.5.2020, *FMS and others*, joined cases C-924/19 PPU and C-925/19 PPU. See for all, E. COLOMBO (2020), *Trattenimento nelle zone di transito e inammissibilità delle domande di asilo. La Corte di*

Specifically, the Grand Chamber of the ECtHR, overturning the findings of the Fourth Section,[13] held that in examining the space between restriction of movement and deprivation of liberty in the context of asylum, "its approach should be practical and realistic, having regard to the present-day conditions and challenges" (para. 213). In drawing such a distinction, the factors taken into account by the Court can be summarised as follows: i) the individual situation of applicants and their choices; ii) the applicable legal regime in the country concerned and its purpose; iii) the relevant duration, especially in light of the purpose and the procedural protection enjoyed by the applicants pending the events; and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants. However, the ECtHR noted that the applicants entered the transit zone of their own volition aiming to apply for asylum and not due to an immediate danger in Serbia. Furthermore, Hungary was entitled to take all measure to examine the applicants' claims before deciding to admit them (paras. 217-222). According to the Court's reasoning, a short waiting period to verify the right of entry cannot constitute a deprivation of liberty in the absence of other factors (para. 225). Noting that other migrants detained in the transit area had left Röszke to return to Serbia (paras. 235 and 237), and that this could have been materially achieved without the need for actions, such as boarding an aircraft, which would have required "external" cooperation from the Hungarian authorities, the Court concluded that:

> "[i]n practical terms ... the possibility for [the applicants] to leave the Röszke land border transit zone was not only theoretical but realistic".

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giustizia e le procedure di frontiera, in *Dir., Imm. e Cittad.*, 3, 212 ff., and more in general, M. ČEPO (2021), *Detention of Asylum Seekers Through the Practice of the Court of Justice of the European Union on the Example of the Republic of Hungary and the Perspectives of the New Pact on Migration and Asylum*, in *ECLIC*, 5, 120 ff.

[13] See B. GORNATI (2017), *"Paesi terzi sicuri", respingimenti a catena e detenzione arbitraria: il caso Ilias e Ahmed*, in *Dir. um. e dir. internaz.*, 532 ff.; P. KILIBARDA (2017), *The ECtHR's Ilias and Ahmed v. Hungary and Why It Matters*, in *EJIL: Talk!*; D. VENTURI (2017), *The ECtHR Ruling in Ilias and Ahmed: 'Safe Third Country' Concept Put to the Test*, in *European Database of Asylum Law*, available online; A.G. LANA (2020), *Migranti irregolari e Corte di Strasburgo: verso un affievolimento delle tutele? (artt. 5 e 8 CEDU)*, in A. DI STASI (ed.), *CEDU e ordinamento italiano. La giurisprudenza della Corte europea dei diritti dell'uomo e l'impatto nell'ordinamento interno (2016- 2020)*, II ed., Vicenza, 235 ff.

The Grand Chamber therefore held that Art. 5 was not applicable as inadmissible *ratione materiae*. Moreover, taking into account the material conditions in the area, the duration of the applicant's stay, and the opportunities for human contact with other asylum seekers, representatives of the United Nations High Commissioner for Refugees (UNHCR), NGOs, and a lawyer, the ECtHR considered that the situation complained of did not reach the minimum level of gravity necessary to constitute inhumane treatment within the meaning of Art. 3 of the Convention. Nevertheless, it recognised that the transit area, by virtue of its physical layout and the system of surveillance and control of entrances, was similar to some types of "light regime detention facilities" (para. 232).

On the other hand, the CJEU took a stricter line in its judgment in the urgent preliminary ruling procedure concerning an Afghan couple (*FMS* and *FNZ*) and an Iranian father and son (*SA* and *SA junior*), all detained in the same Röszke transit zone.[14] In interpreting the provisions of the Return Directive, the Asylum Procedures Directive, and the Reception Directive in relation to Hungarian legislation on the right to asylum, national borders, and the entry and residence of third-country nationals, the Court confirmed that the detention of asylum-seekers at the external border in the transit zone constitutes detention, clarifying that such detention must be ordered by a reasoned decision, with an assessment of its necessity and proportionality, subject to judicial review to ensure its legitimacy, and may not go beyond the limits of the border procedure as defined in the Asylum Procedures Directive. Furthermore, the CJEU considered that no national rule limits the duration of stay in the part of the transit area reserved for third-country nationals whose asylum application has been rejected.

The CJEU further noted that in both cases, the return decisions had been amended,[15] and as such, constituted a new decision, with the con-

[14] In particular, the case concerned the decisions taken by the Hungarian authorities rejecting their application for asylum as inadmissible, ordering their removal, together with a prohibition on entering and remaining on Hungarian territory for a period of one year.

[15] By the decisions of 3 and 6 June 2019, the Aliens Police Authority at first instance amended the return decision contained in the Asylum Authority's decision of 25 April 2019 as regards the country of destination, and ordered that FMS and FNZ be removed under escort to Afghanistan (para. 57). Similarly, by the decision of 17 April 2019, the Aliens Police Authority at first instance amended the return decision contained in the Asylum Authority's decision of 12 February 2019 as regards the country of destination and

sequence that the competent national authority should ensure compliance with all the procedural rules laid down in the Return Directive and respect for the principle of the rule of law. Specifically, the Court found, first, that the appeal against the decision was examined by the competent asylum authority, which reports to the Minister responsible for the police and is therefore part of the executive and not an independent and impartial body. Furthermore, the CJEU found that the relevant Hungarian legislation does not allow the national court to review the administrative decision on that appeal, since it only grants general power to review the legality of return decisions to the public prosecutor, who is the only person authorised to challenge such a decision before a court. Therefore, the CJEU found that it does not constitute a remedy that meets the requirements of EU law, and in particular, does not guarantee the principle of the separation of powers characterising the functioning of the rule of law (para. 136).

A brief comparison of the two judgments shows that, although the ECtHR declared its intention to adopt a practical and realistic approach, it ultimately did not assess whether Art. 5 ECHR had been respected on the merits of the case. Its approach gave great weight to the government's arguments concerning the alleged difficulties it was facing in coping with the massive influx of migrants, thus underlying the Hungarian State's right to prevent aliens from evading immigration restrictions.[16] However, the Court did not take into account that the applicants in this case had never evaded any immigration control measures, nor were they in conditions justifying restrictions on their freedom of movement. Furthermore, in overturning the Chamber's judgment, it totally ignored the numerous reports[17] confirming such arbitrary detention of migrants. Therefore, the CJEU's *FMS and FMZ* ruling completely contradicted the *Ilias and Ahmed* ruling, holding that transit zones are tantamount to detention camps.[18] The Court then confirmed its

ordered that SA and SA junior be removed under escort to the Islamic Republic of Iran (para. 90).

[16] See the critical considerations of J. RUIZ RAMON (2021), *The Strasbourg Reversal after the 'Refugee Crisis': ECtHR Deference to State Sovereignty in Asylum Detention Cases*, in *EU Migration Law Blog*.

[17] These are the UNWGAD, CPT, UNHRC, UN High Commissioner for Human Rights, UN Special Rapporteur on the Human Rights of Migrants, European Commission and Commissioner on Human Rights of the Council of Europe.

[18] See L. MARIN (2020), *La Corte di Giustizia riporta le 'zone di transito' un-*

findings, stating that Hungary had failed to fulfil its obligations under EU law (see Section 3). Thus, the ECtHR's case-by-case approach appears to be at odds with the CJEU's approach resulting from the application of EU law.

2.1. Some steps towards a "conciliatory" approach in *R.R. and others v. Hungary*

In some subsequent judgments,[19] the ECtHR has taken a more "conciliatory" approach to the CJEU's findings regarding stays in land border transit zones where applicants await the outcome of their asylum applications.[20] Indeed, in the *R.R. case*,[21] reiterating the aforementioned factors set out in *Ilias and Ahmed* that should be taken into account in determining the distinction between a restriction on freedom of movement and the deprivation of liberty in the context of the detention of

gheresi dentro il perimetro del diritto (europeo) e dei diritti (fondamentali), in *ADiM Blog*.

[19] Another more recent example, albeit related to the border with Croatia at the Tovarnik Centre, can be found in ECHR, judgment 18.11.2021, applications nos 15670/18 and 43115/18, *MH and others v. Croatia*. This case would seem to reconcile the approach of the two Courts not only because it declared that the conditions in the detention centres constituted a deprivation of liberty in violation of Art. 5(1), but also because it reaffirmed the extraterritorial jurisdiction of the Court in the application of Art. 2 and clarified the evidential criteria to be applied to the grounds for expulsions in compliance with Art. 4 of Protocol 4. According to J. DE CONINCK (2022), *MH and Others v. Croatia: Resolving the Jurisdictional and Evidentiary Black Hole for Expulsion Cases?*, in *Strasbourg Observers*. This judgment gave the ECtHR the opportunity to take a number of steps to improve legal certainty and the effectiveness of the protection of fundamental rights, thereby moving closer to the findings of the CJEU. See also H. HAKIKI; D. RODRIK (2021), *M.H. v. Croatia: Shedding Light on the Pushback Blind Spot*, in *VerfBlog*.

[20] Similarly, in the case *H.M. and others v. Hungary* (ECHR, judgment 2.6.2022, application no. 38967/17) concerning an Iraqi family's detention in the Tompa transit zone at the border between Hungary and Serbia after fleeing Iraq, the ECtHR unanimously held that there had been a violation of Art. 5(1) and (4) of the Convention because there had been no legal basis for the family's detention and they had had no opportunity to have their situation examined expeditiously by a court.

[21] ECHR, judgment 5.7.2021, application no. 36037/17, *R.R. and others v. Hungary*.

individuals in transit zones and reception centres, the ECtHR concluded that Art. 5 was applicable and had been violated by the detention of an Iranian-Afghan family, including three minors, in the Röszke transit zone between 19 April and 15 August 2017. In the Court's view, the absence of any domestic legal provision setting a maximum duration for the applicants' stay, the excessive duration of their stay, and the conditions in the transit zone, amounted to a *de facto* deprivation of liberty (para. 83). The Hungarian authorities had failed to issue any formal decision of legal relevance setting out the reasons for the detention, including an individual assessment, and the consideration of any alternative measures that would have been less coercive for the applicant family than detention. In addition, it held that the applicants had no means by which the lawfulness of their detention could have been promptly determined by a court, thereby violating Art. 5(4) ECHR.

Although the Court distinguished the facts of the case from those of *Ilias and Ahmed* by stressing the particular vulnerability of the applicants in the present case (repeat asylum seeker status, the children's young age, pregnancy, and their serious health condition), the ECtHR emphasised the obligations under the Reception Conditions Directive to take into account the specific situation of minors and pregnant women, and any special reception needs linked to their status throughout the asylum procedure. It found that the Hungarian authorities did not carry out an individual assessment of the applicants' special needs in accordance with EU legislation. It also found that the physical conditions of the containers in which the applicants were housed, the unsuitability of the facilities for children, the lack of professional psychological assistance, and the duration of their stay in the transit zone violated Art. 3.

It can therefore be said that the ECtHR adopted a reconciliatory approach, relying on EU law in its reasoning and making its requirements relevant to the assessment of compliance with the Convention. However, these seem to be small steps, as it is clear that the ECtHR does not consider that transit zones as such amount to detention: its view only changed according to the circumstances of the case, showing a State-centred approach and failing to recognise that asylum is "a necessity, not a choice".[22] On the contrary, in the *FMS* case, the CJEU adopted a broader concept stating that detention:

[22] See the very interesting and partly dissenting opinion of Judge Bianku, joined by Judge Vučinić, concerning the violation of Art. 5 ECHR.

> "within the meaning of Article 2(h) of Directive 2013/33, constitutes a coercive measure that deprives the applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter" (para. 223).

Furthermore, in the CJEU's view, the possibility of leaving the transit zone does not call into question the assessment of a situation of detention[23] (para. 228), even more so when this leads to the forfeiture of the right to asylum, as the same Court would later reiterate in cases where it found violations by Hungary.

3. The CJEU's findings on the Röszke and Tompa transit zones, and Hungarian legislation

In so doing, the CJEU pointed out that the Hungarian legislation does not comply with and infringes EU law on international protection.[24] First, the Court held that Hungary had set up a system for the systematic detention of applicants for international protection in the Röszke and Tompa transit zones, apart from the cases in which EU law authorises the detention of an applicant, without complying with the guarantees that EU law requires for such detention. The Court considered that, although an applicant for international protection may be detained in the immediate vicinity of the borders of a member State in order to determine or verify his or her identity or nationality, or those elements on which his or her application for international protection is based that

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[23] See the remarks of G. CORNELISSE (2022), *Criminalisation, Containment and Courts: A Call for Cross-Fertilisation Between the Social Sciences and Legal-Doctrinal Research into Immigration Detention in Europe*, in E. TSOURDI, P. DE BRUYCKER (eds.), *Research Handbook on EU Migration and Asylum Law*, Cheltenham-Northampton, 455 ff., in part. 467.

[24] ECJ, Grand Chamber, judgment 17.12.2020, *European Commission v. Hungary*, case C-808/18, paras. 144 and 163. For a comment, see S. PROGIN-THEUERKAUF (2021), *Defining the Boundaries of the Future Common European Asylum System with the Help of Hungary?*, in *European Papers*, 6(1), Insight of 29.3.2021, 7 ff.; C. ZAROGIANNI (2021), *CJEU's Judgment in the Case European Commission against Hungary (C-808/18, 17 December 2020): The Court Faces the Challenge of Taking a Leading Role in Interpreting the European Asylum Law*, available online. See also ECJ, Grand Chamber, judgment 16.11.2021, *European Commission v. Hungary*, case C-821/19.

could not be obtained without detention, this objective cannot justify the adoption of detention measures without the national authorities having previously determined, on a case-by-case basis, whether they are proportionate to the objectives pursued, and whether detention is used only as a last resort.[25]

Second, following the Commission's criticism, which was considered to be sufficiently documented and detailed, the CJEU found a consistent and generalised administrative practice on the part of the Hungarian authorities aimed at restricting access to the Röszke and Tompa transit zones in such a systematic and drastic manner that third-country nationals or stateless persons arriving from Serbia and seeking access to the international protection procedure in Hungary were in practice faced with the virtual impossibility of lodging an application for international protection. Furthermore, the Court held that the forced removal of an illegally staying third-country national beyond a border fence erected on the territory to a few metres from the Serbian-Hungarian border, that is to say, in a narrow strip of land devoid of any infrastructure, must be treated in the same way as removal from that territory, thus complying with the procedures and safeguards provided for in the Return Directive.

More specifically, the CJEU noted that the 2015 Hungarian Law on the management of mass immigration introduced the concept of a 'border procedure', thereby providing for the creation of transit zones within which asylum procedures should be conducted under the conditions of the Asylum Procedures Directive. Despite the arguments put forward by the Hungarian government before the CJEU[26] regarding the deroga-

[25] See the conditions referred to in paras. 44 and 46 ECJ, judgment 14.11.2017, *K. v. Staatssecretaris van Veiligheid en Justitie*, case C-18/16.

[26] In particular, Hungary doubts whether Art. 33 of Directive 2013/32 is capable of striking an appropriate balance between the overload of the asylum application processing system caused by unjustified applications and the legitimate interests of asylum seekers genuinely in need of international protection. According to the member State, the purpose of Art. 51(2)(f) of the Asylum Act is to prevent abuse by providing that, in accordance with the 'safe third country' ground of inadmissibility referred to in Art. 33(2)(c) of Directive 2013/32, the application of a person who has transited, possibly over a long period of time, through a State in which he or she has not been persecuted and is not in danger of being persecuted, is in principle inadmissible, even if that person has not applied for international protection in that State (ECJ, Grand Chamber, *European Commission v. Hungary*, cit., paras. 29 and 30).

tion provided for in Art. 72 TFEU, the CJEU affirmed that such a derogation cannot be interpreted as giving member States the power to depart from the provisions of EU law. They cannot therefore be determined unilaterally by each member State without any oversight from the EU institutions. It is therefore up to the member State wishing to make use of Art. 72 TFEU to demonstrate the need to make recourse to this derogation.

Due to a series of legislative proposals ostensibly aimed at combating illegal immigration by the government in 2018, the Hungarian asylum legislation was again subject to an infringement procedure by the Commission, particularly with regard to the criminalisation of activities in support of asylum and residence applications (i.e., the offence referred to in Art. 353/A), as well as the related para. 46/F of the Police Act, which applies to persons suspected of having committed the offence referred to in para. 353/A(1)(a) of the Criminal Code, which prohibits any person, even if he or she is not yet suspected of having infringed para. 353/A, from approaching Hungary's external borders.[27] By criminalising this assistance, the Court found that the provisions restrict the right to access and communicate with these applicants, expressly provided for in the Asylum Procedures Directive and the Reception Conditions Directive. Furthermore, the CJEU pointed out that they also limit the effectiveness of the right of asylum seekers to consult a legal adviser or other counsellor at their own expense, as well as the right to respond to the asylum seekers' requests, which derives indirectly from EU legislation. According to the Court, Art. 353/A(1)(a) of the Criminal Code is contrary to Art. 47 of the Charter of Fundamental Rights of the European Union (CFREU) and deprives migrants of the rights granted them under this Article (paras. 120-124). Thus, both CJEU judgments reveal a 'misalignment' of Hungarian legislation not only with EU legislation on international protection, but also and above all with the core elements of the rule of law (access to justice, transparency, and legality).

[27] The CJEU also ruled on the legality under EU law of the introduction of a new ground for non-admissibility of asylum claims (i.e., the new Admissibility Criterion), which had already been evaluated by the Court and found to be in breach of EU law.

4. Detention of migrants as a serious violation of human rights and a crisis of the rule of law: what prospects?

In conclusion, this brief investigation has shown that the detention/restriction of migrants' freedom of movement is a new method of border management, or rather a structural method, at the EU borders. In particular, although the EU has systematised detention by detailing the permissible grounds, procedural safeguards and conditions, including for vulnerable applicants, it has provided member States with an excuse to deprive newly arrived asylum seekers of their liberty, especially in transit zones and reception centres for identification and registration. In this context, the blurred boundaries between the reception of asylum seekers, restrictions on movement and deprivation of liberty in domestic and EU law have allowed States to circumvent the procedural guarantees necessary to protect their rights. Furthermore, the maintenance of law and order and the safeguarding of internal security within the meaning of Art. 72 TFEU has allowed the adoption of national legislation in contradiction with EU law.

In the face of legislation and case law reaffirming the need to avoid arbitrary detention at borders by ensuring that it is lawful, necessary, and proportionate, imposed in good faith after less intrusive alternatives have been explored, held for the shortest time possible, subject to review, and carried out under appropriate material conditions, there are increasing cases of detention outside the scope of any regulatory provisions and the control of any judicial authority. Throughout Europe, migrants are not detained on the basis of a detention order, constituting an arbitrary deprivation of liberty, nor are they guaranteed procedural rights, thus denying them judicial review of their detention, which remains the main instrument for the protection of human rights. In addition, accompanied minors are placed in immigration detention centres with their parents, while detention decisions concern only their parents.[28] Regardless of the terminology used by States, in practice they amount to *de facto* detention and give rise to serious and systematic vio-

[28] In ECHR, judgment 17.1.2023, application no. 26879/17, *Minasian and others v. the Republic of Moldova*, the ECtHR clearly condemned this practice. It found that the deprivation of liberty of three minors from Georgia lacked any legal basis because they were not mentioned in their mother's detention order, but only accompanied her in the detention centre (in violation of Art. 5(1) ECHR). Moreover, Art. 5(4) ECHR was violated because the children could not challenge their detention.

lations of fundamental rights, in particular Art. 4 CFREU, as recalled in the latest ICE initiative.[29]

Moreover, this investigation has highlighted that the approaches of the two Courts in the cases analysed, although divergent, tend to affirm the violations of migrants' rights contained in ECHR and other international sources on the right to asylum,[30] as well as in the relevant EU legislation aimed at implementing these rights. Interestingly, in the *R.R.* case, it appears that the procedural shortcomings identified by the ECtHR would not have occurred if the Procedures Directive had been properly complied with at the national level. As highlighted, this is another example of the complementarity between the Convention and EU law, as violations of EU law provisions corresponding to the Convention's guarantees can be indirectly identified and remedied in Strasbourg in an *ex-post* evaluation at the end of the domestic proceedings.[31] But this may not always be enough. Under the Procedures Directive, the right to effective remedy and to free legal assistance and representation only applies in appeal procedures (Art. 20 and Art. 46). Moreover, the denial of the right to asylum leads to further serious violations of fundamental human rights, first of all human dignity,[32] and the prohibition of inhumane and degrading treatment. While the principle of the rule of law is inherent in every provision of the ECHR, and is a fundamental value of the EU, it is "structurally" violated in the migration policies of several European States. Indeed, these practices give rise to serious concerns about the state of human rights, the humanitarian situation, and more generally, the rule of law. The network of civil society organisations, called Protecting Rights at Borders (PRAB), shows in its reports[33] that the consequences for the rule of law that affect specific

[29] See *supra*, note 10.

[30] Art. 16 and Art. 31 of the Geneva Convention.

[31] See the remarks of J. CALLEAWERT (2023), *The Right to an Effective Remedy in the Context of Asylum Proceedings: Judgment of the ECtHR in the Case of S.H. v. Malta*, available online.

[32] In the case of *H.M. and others v. Hungary* (application no. 38967/17), the ECtHR also found a violation of Art. 3 on account of the conditions to which the mother and children were subjected during their four-month stay in the transit zone. The Court also considered that the use of handcuffs and attaching the father to a leash when accompanying his wife to a hospital appointment was not justified.

[33] "The crisis at the EU's borders is not one of numbers. Instead, it is a crisis

groups in the short term (in this case migrants, asylum seekers, and refugees) could create deep fissures in the long term, and spread much more widely, as is already evident in a growing number of EU member States.

This situation undermines the legitimacy and the practical implementation of EU legislation. Nevertheless, the predominance of security issues over the other two components of freedom and justice[34] is also evident in the EU 2020 Pact on Migration and Asylum, which leaves a number of issues unresolved.[35] Among the various proposals, it provides for "pre-entry" screening to be carried out on the national territory, but be-

of human dignity and political will, created due to failure to implement existing legal frameworks and enforce judicial rulings. This pattern should not be seen in isolation. It is part of a wider Rule of Law crisis. It is high time to end the practice of turning a blind eye to human rights violations at EU borders, and to start to uphold, respect and enforce the rights of people at Europe's doorstep". See PRAB Report, *Beaten, Punished and Pushed Back*, January 2023, available online. Furthermore, the latest Report of May 2023 underlines that pushbacks continue to be used as a *de facto* border management tool at European borders, not only at the border between Hungary and Serbia. See PRAB Report, *What We Do in the Shadows*, May 2023, available online.

[34] See S. IGLESIAS SÁNCHEZ, M. GONZÁLEZ PASCUAL (eds.) (2021), *Fundamental Rights in the EU Area of Freedom, Security and Justice*, Cambridge; A. DI STASI, L.S. ROSSI (eds.) (2020), *Lo spazio di libertà sicurezza e giustizia. A vent'anni dal Consiglio Europeo di Tampere*, Napoli; M. FLETCHER, E. HERLIN-KARNELL, C. MATERA (eds.) (2019), *The European Union as an Area of Freedom, Security and Justice*, London; S. CARRERA, E. GUILD, A. EGGENSCHWILER (eds.) (2010), *The Area of Freedom, Security and Justice Ten Years on. Successes and Future Challenges under the Stockholm Programme*, Brussels; N. WALKER (2004), *Europe's Area of Freedom, Security, and Justice*, Oxford.

[35] In particular, with reference to the proposals on the implementation of the solidarity principle according to Art. 80 TFEU, see T. RUSSO (2021), *Quote di ricollocazione e meccanismi di solidarietà: le soluzioni troppo "flessibili" del Patto dell'Unione europea su migrazione e asilo*, in *FSJ*, 2, 281 ff.; T. RUSSO (2022), *The Migrant Crisis Along the Balkan Routes: Still a Lot to Do*, in *EU-WEB Legal Essays*, 1, 45 ff.; as well as the reference to the revision of the EU Return Pact. See R. PALLADINO (2023), *Il trattenimento ai fini dell'allontanamento: evoluzioni giurisprudenziali e normative a confronto*, in *I Post di AISDUE*, V, *Sezione "Atti convegni AISDUE"*, 6, 146 ff.; accordingly, overall, they seem to be converging towards a progressive institutionalisation and normalisation of measures depriving migrants of their personal liberty and towards a disruption of the substantive-procedural guarantees provided for by EU legislation. In any case, many open issues remain, as underlined in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.) (2022) *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli.

fore formal authorization to enter is granted, thus allowing a real "no entry" legal fiction. The purpose of this screening is to prepare for a further decision-making process that has three options: 1) the initiation of a formal procedure for international protection (asylum); 2) expulsion under the Schengen Borders Code; or 3) the return decision under the Return Directive. Even if the simplification of the procedures could lead to certain results in a short period of time, the overall success of the initiative would still depend on the cooperation of third States, particularly in the case of the last option. The proposed Regulation does not contain explicit provisions on restrictions on mobility: screening procedures will lead to severe restrictions on movement, restricting migrants' access to hotspots, or even requiring detention. The proposal does not avoid but raises the issue of hotspots and how to ensure adequate conditions and an acceptable level of legal protection, including access to justice. In short, there are doubts as to whether the proposed regime will really drastically improve the efficiency of border measures and bring about a real change in handling the migrant crisis and the rule of law.[36]

Finally, looking at the proposed Regulation amending the Schengen Borders Code of 2021, Art. 13, on the concept of border surveillance, the added para. 5 states:

> "In a situation of instrumentalisation of migrants, the Member State concerned shall intensify border surveillance as necessary in order to address the increased threat. In particular, the Member State shall enhance, as appropriate, the resources and technical means to prevent an unauthorised crossing of the border".[37]

If refugees are a threat (within the meaning of Art. 39 of the UN Charter?), then any means can be used to counter that threat.

A real improvement would require an enhanced role for the new EU Asylum Agency, with an autonomous decision-making process, albeit requiring judicial review under the responsibility of the Union or indi-

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[36] Proposal for a Regulation of the European Parliament and of the Council, *amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders*, 14.12.2021, COM/2021/891 final.

[37] M. GERBAUDO (2022), *The European Commission's Instrumentalization Strategy: Normalising Border Procedures and De Facto Detention*, in *European Papers*, 7(2), 615 ff.; F. PEERBOOM (2022), *Protecting Borders or Individual Rights? A Comparative Due Process Rights Analysis of EU and Member State Responses to 'Weaponised' Migration*, in *European Papers*, 7(2), Insight of 17.9.2022, 583 ff.

vidual member States, or the expansion of legal entry channels for economic migrants. Although the right to an effective remedy under Art. 47 of the EU Charter of Fundamental Rights, and access to justice in general, are not the solution to the management of border control, they are the very "essence" of the rule of law and of "a community based on the rule of law".

Part VI

BEYOND THE LEGAL PERSPECTIVE

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Chapter 31

THE STRATEGY OF EUROPEAN TRADE UNIONS FOR THE PROTECTION OF MIGRANT WORKERS

Adolfo Braga

ABSTRACT: *The European Trade Union Confederation (ETUC) represents the rights of all migrants and intends to support members' activities to organise all migrant workers and empower them in trade unions so that they can participate in collective bargaining. This contribution aims to analyse what forms of collaboration exist between all stakeholders in civil society for joint medium-and long-term strategies. Furthermore, it examines the Employer Sanctions Directive and the possible role of the European Labour Authority in ensuring efficient implementation of the Pact on Migration and Asylum to ensure the development of effective complaints.*

1. Introduction

The figure of the migrant encapsulates all the positive and negative, personal and social, economic and health characteristics of the ongoing globalisation process. Analysing the labour profile of immigrants allows us to immerse ourselves in a much broader context than the world of work, one concerned with the causes of inequality, and to reflect on the condition of labour structures and how these have drifted away from people's real needs.

On an international level, the immigrant population requires social organisations (including trade unions) to try to endeavour the reorganisation without a geographically broad and historically profound knowledge of the current migratory phenomenon; taking into account that migratory flows, by affecting the countries involved, pose aspects of more detailed debate within the European institutions, between States and, of course, within them, with considerable political repercussions.

It is above all the countries most exposed to the arrival of migrants in the Mediterranean area (Italy certainly, but also Greece) which are calling for concrete intervention on the part of the European institutions so that the rescue and reception of these people, as well as the procedures tied to their arrival (whether related to their *status* as "irregulars" or, perhaps, asylum seekers) are not considered as an issue that affects only those specific countries, but rather the whole of Europe, seen as a *unum* and not as the sum of separate entities.

It is precisely for these reasons that the study of migration processes requires a multidisciplinary approach, starting from a sociological point of view, by studying above all the causes that determine them and the rules called migration policies, which instead attempt to regulate them in terms of their dimensions. A migration phenomenon which should be analysed in its global dimensions, taking care to describe the number, composition and general distribution of migrants in the world.

Another disciplinary approach is the historical one, which is able to describe the development and current situation of immigration in the world and, above all, Europe's attitude towards migratory phenomena. After a long phase in which these issues were not part of the European Community's policies, followed by a subsequent period – essentially after the Treaty of Amsterdam in 1997 and the Tampere Council in 1999 – during which the first migration policies were developed,[1] the institutions tried to give more appropriate answers, including by virtue of the new framework outlined by the Treaty of Lisbon – which came into effect on 1 December 2009 – in which competences in the field of migration are gathered under Title V of the treaty on the functioning of the European Union (TFEU), entitled "Area of freedom, security and justice", a label that in itself seeks to allow the fundamental and irrepressible rights of those who arrive in a given place and those who have lived there for a long time and have good reason to expect that their personal security – and that of the social groups to which they belong – will not

[1] L. TEODORESCU (ed.) (2013), *L'Unione europea verso una politica comune di immigrazione*, Università degli Studi di Rome Tre – Centro di eccellenza Altiero Spinelli per l'Europa dei popoli e la pace nel mondo, Roma, 2-5; F. SCUTO (ed.) (2012), *I diritti fondamentali della persona quale limite del contrasto dell'immigrazione irregolare*, Milano, 71-85 and 90-97; E. BENEDETTI (ed.) (2010), *Il diritto di asilo e la protezione dei rifugiati nell'ordinamento comunitario dopo l'entrata in vigore del Trattato di Lisbona*, Padova, 101 ff.

be jeopardised,[2] to coexist and achieve a balance, albeit amidst many inevitable difficulties.

Undoubtedly, migration is a phenomenon as old as humanity, so much so that it can be said that humans are a migratory species;[3] it is therefore a universal phenomenon, capable of extending beyond historical and geographical boundaries, crossing all, or almost all, fields of human knowledge. However, its very universality makes it a phenomenon that is both easy and difficult to define. Easy if we refer to the action that the act of migrating entails: i.e. a movement from one place to another place; difficult if we refer to migration as a social phenomenon and therefore subject to the countless interpretations that history can give us of it.

The attempt to bridge the definitional gap between the simple action of migration, conceived regardless of who, when and where, and the migration phenomenon, perceived according to the historical reality in which it takes place, shows that classificatory artefacts are created through which we decide how many and which members of the human race can be defined as such, how many and which can officially exist, and how many and which can have their dignity as human beings respected.

Migration policy initiatives often come up against a stark divergence between the widely demonstrated economic benefits of migration and the equally widespread public perception of its negative impact.[4]

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[2] F. SCUTO (ed.) (2012), *I diritti fondamentali*, cit., 85-90; B. NASCIMBENE (2011), *Lo spazio di libertà, sicurezza e giustizia a due anni dall'entrata in vigore del Trattato di Lisbona*, in *Dir. Imm. e Cittad.*, 4; A. ADINOLFI (2010), *Riconoscimento dello status di rifugiato e della protezione sussidiaria: verso un sistema comune europeo?*, in E. TRIGGIANI (ed.), *Europa e Mediterraneo. Le regole per la costruzione di una società integrata*, XIV Convegno SIDI, Bari, 18-19 giugno 2009, Napoli; L. CALAFÀ (2011), *Stranieri tra politiche e diritti dopo Lisbona – Extra European Citizen between Immigration Policies and Rights after Lisbon Treaty: the Season of Oxymorons?*, in *Lav. e dir.*; M. GESTRI (2010), *Immigrazione e asilo nel diritto dell'Unione europea*, in G. CORDINI, V. GASPARINI CASARI (eds.), *Il diritto dell'immigrazione*, vol. I (*Profili di Diritto italiano, Comunitario e Internazionale*), Modena, 59 ff.; C. FAVILLI (2010), *Il Trattato di Lisbona e la politica dell'Unione europea in materia di visti, asilo e immigrazione*, in *Dir. Imm. e Cittad.*, 2.

[3] M. AMBROSINI (ed.) (2005), *Sociologia delle migrazioni*, Bologna.

[4] A. BRAGA (2021), *Le Migrazioni forzate per la ricerca di un lavoro: le iniziative dell'ILO per il reclutamento equo e il nuovo patto ue su migrazione e asilo*,

Migration-related issues have involved the European Trade Union Confederation (henceforth ETUC), which took them up with the Declaration adopted at the extraordinary Executive Committee meeting on 9 February 2021. A Declaration, therefore, by the ETUC on the new Pact on Migration and Asylum (European Commission, 23 September 2020).

According to the ETUC, the Pact did not provide a "fresh start", but continues to perpetuate the previous security-oriented approach with strong focus on border control, deterrence, detention and deportations; leaving very little room for or postponing proposals in the area of regular migration. While acknowledging that "migration has been a constant feature of human history" and affirming the commitment to adopt a more "humane" approach to migration, this is not fully reflected in the proposals.

Ultimately, the ETUC regretted that the European Commission was unable to show political leadership through this Pact. It could have built a binding and common approach to asylum and migration that would have ensured that all member states respected international human rights laws.

2. A historical and sociological approach to the migratory phenomenon

The focus on the changes made by States to migration policies, on the basis of the different eras which have passed, contributes to defining the figure of the migrant (in its variants: regular, irregular, clandestine, and so on)[5] influencing the way he or she is perceived within the host society. It is, however, possible to divide the migration processes into four main epochs.

The liberal phase and the Great Emigration marked a historical period between 1840 and the First World War, in which economic liberalism favoured and demanded labour mobility. Europe was the point of departure: land of emigration; the United States, Australia and the Americas in general were the points of arrival: lands of immigration. Immigration was not only considered indispensable and therefore also free but was even encouraged by special recruitment campaigns.

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in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.), *Migrazioni Internazionali. Questioni giuridiche aperte*, Napoli, 10.

[5] L. ZANFRINI (ed.) (2007), *Sociologia delle immigrazioni*, Bari, 115.

The period between the First and Second World Wars is characterised as a very important moment for the analysis of migration flows seen through the filter of migration policies. There was in fact a substantial decrease in migration, both due to the ongoing war events and the major economic depression of 1929. From now on, immigration would no longer be free, but subject to constraints, to compliance with annual quotas allocated to each country of origin and to a selection based on the professional qualifications possessed by candidates.[6] In addition to a change in classification criteria for immigrants, there was also a tightening of society's perception of the foreigner, who was seen as the cause of worsening wage and working conditions and was destined to become the victim of racist movements.

The Fordist or neo-liberal phase highlights a historical moment between the end of the Second World War (1945) and the economic recession of 1970 and is substantially characterised by the transformation of Europe from a land of emigration to a land of immigration. The demands of post-war reconstruction and Fordist and neo-liberal economic development (based respectively on big business and the need not to be slowed down by the shortage of labour), which were ill-suited to the political regulations of the immigration phenomenon, made the old continent the main point of attraction for migratory flows. The figure of the "guest worker", as the Germans called migrants, came into being precisely to justify his or her presence in accordance with the host country's need for cheap labour. Migration was therefore seen as a temporary phenomenon. In fact, the migration policy agreements of the time stipulated that the duration of the residence permit was tied exclusively to the duration of the migrant's work experience. The post-industrial phase refers directly to the recession of the world economy, linked to the oil crisis of the 1970s. In this phase, the migration phenomenon abruptly stopped being seen as an economic issue and began to be interpreted, studied, and perceived above all as a political problem. Worker migrants were transformed into unwanted presences and vivisected into the various figures we refer to today: illegal, regular, irregular, asylum seeker, refugee, etc.

Currently, in the age of globalisation, a new phase of the migration phenomenon is opening up: no longer attributable solely to economic processes, nor to exclusively political ones. A phenomenon, therefore, that is much more complex and difficult to manage and closely linked

[6] *Ivi*, 56.

to the globalisation process, which is caught between two forces. A vertical, political one, which, frightened by the threat it poses to the idea of the nation-State, stiffens up to protect itself and ill-adapts to the changes taking place. A horizontal, socio-historical one, reflected in an enormous kaleidoscope of colours, languages, ideas, religions and which, by virtue of its dynamism and fluidity, breaks down the concept of borders and separation between States and differences, affirming instead one of reciprocity.[7] Thinking about migration today means reflecting on and confronting the historically and culturally rooted conception of State thinking, which should be the starting point for any reflection on migration. This is because the social, economic, cultural, ethical and political categories we refer to when thinking about migration and, more generally, the entire social and political world, are certainly and objectively national categories.[8] State thinking is based on the concept of ethnic homogeneity defined in terms of "border, citizenship, anchorage to a specific territory and language".[9] Ethnic homogeneity draws a boundary line, geographically and administratively established, socially and politically constructed, radically separating "nationals" from "non-nationals".[10] Defining migrants according to the vision of State thinking, i.e., from the point of view of the Nation seen as a natural and non-historical object, leads us to think of migrants only as either originating from, or emigrating from, or immigrants, distancing us from what they actually are – as we all are – human beings. This conviction has led and continues to lead to a completely distorted approach, encounter, with the migrant. An encounter that turns out to be a clash and that resolves itself, at best, in indifference, in opportunism. The explicit discourse on immigration, and in particular the scientific discourse, has made a habit of pairing immigrants up according to the different institutions with which they necessarily have to deal because of their immigration: immigrants and work, immigrants and housing, etc.[11]

In order to overcome the limits of such an outlook, to ensure that the emigration-immigration phenomenon resolves its paradox: immigra-

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[7] A. SAYAD (ed.) (2002), *La doppia assenza. Dalle illusioni dell'emigrato alle sofferenze dell'immigrato*, Milano, 367-368.

[8] *Ibidem*.

[9] L. ZANFRINI (ed.) (2007), *Sociologia delle immigrazioni*, cit., 7.

[10] A. SAYAD (ed.) (2002), *La doppia assenza*, cit., 368.

[11] *Ivi*, 164.

tion ends with a presence, emigration results in an absence. Presence is regulated, controlled, managed, while absence is masked, filled, denied; [12] a new approach to the phenomenon and its actors is necessary because it is unrealistic to expect all contemporaries to immediately change their habits of expression. We must become aware of the fact that our own discourses are not inoffensive, and that they contribute to perpetuating prejudices which have proved perverse and deadly throughout history. "For it is our gaze that often imprisons others within their narrow affiliations, and it is our gaze that liberates them". [13]

3. Migratory phenomenon and migratory policies

The study of the causes of migratory processes undoubtedly presents itself in an articulated form because it requires an understanding of why a person emigrates, why a person becomes an immigrant in a specific foreign land rather than in another, and why only some people decide to embark on the migratory path while others, apparently in the same conditions, desist from doing so; ultimately, the pursuit of an analysis which helps seek explanations in several spheres of human knowledge.

The migration of individuals certainly starts with the importance of relational networks, from identity in relation to one's past life, the search for those who belong to the same group or nationality and to those who have gone ahead. Destinations are often the same as those of friends who offer themselves as guarantors of travel expenses and hosts until a job is found to pay back the cost of the ticket. [14]

Studying migration still means coming in contact with networks of migrants, because migration is not an individual pursuit, but rather one of networks, i.e. actual migration units were (and are) neither individuals nor families, but groups of people linked by knowledge, kinship and work experience. [15]

The problem is thus not recognising the phenomenon, but rather assessing its scope and significance; highlighting the theoretical implica-

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[12] *Ibidem*.

[13] A. MAALOUF (ed.) (2005), *L'identità*, Milano, 28.

[14] W.I. THOMAS (ed.) (1997), *Gli immigrati e l'America. Tra il vecchio mondo e il nuovo*, Roma, 99.

[15] C. TILLY (1990), *Transplanted networks*, in V. YANS-MCLAUGHLIN (ed.), *Immigration reconsidered: history, sociology and politics*, New York, 79-95.

tions of adopting a migrant network approach that makes explicit how social networks also structure and influence individual behaviour in the recipient society. In fact, we define migratory networks as "sets of interpersonal ties that link migrants, former migrants and non-migrants in origin and destination areas, through the bonds of kinship, friendship and shared community";[16] they provide a reference for elaborating explanations of migration that can build a bridge between "macro", or structuralist, theories and "micro", or individualist theories. While the former emphasises the major structural phenomena (from the expulsive factors of poverty, oppression and overpopulation to the attractive ones determined by the demand for labour) which provoke population movements, the latter are based on the assumption of rational, self-interest-oriented choices on the part of individuals. The analysis of network ties makes it possible to understand why, among the many people subject to the same structural constraints, only a few undertake the experience of international migration, why they head for certain destinations, not necessarily the most favourable from an economic or regulatory point of view, and how they try to fit into the new society. The focus on networks is thus a way of analysing migration as a long-term social process, endowed with its own intrinsic dynamics.[17]

Network theories conceive migration as embedded in social networks which cross space and time, arise, grow, and finally decline. In these approaches, individual decisions are embedded within social groups, which in turn interpose and mediate between macro-determined social and economic conditions and actual subjective migration behaviour. The previous migration experience of individuals or their relatives, the links established between the places of origin and destination, the existence of support devices, the functioning of family chains and information flows, appear to be at least as important as economic calculations in explaining arrivals and departures. The very routes and destinations of refugees and asylum seekers, which at first glance would appear to depend essentially on expulsion factors and the search for refuge in the first safe country available, are in fact strongly influenced by social ties.[18]

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[16] D.S. MASSEY (1988), *Economic development and international migration in comparative perspective*, in *Pop. and Develop. Rev.*, 14, 396.

[17] S. CASTLES (2004), *The factors that make and unmake migration policies*, in *IM*, 8(3), 852-884.

[18] K. KOSER (1997), *Social networks and the asylum cycle: the case of Iranians in the Netherlands*, in *IM*, 31(3).

The study of networks actually makes it possible to qualify migration phenomena as social phenomena, not simply governed by the laws of supply and demand, demographic variables or political relations. This means, among other things, claiming the relevance and heuristic value of analyses conducted with the conceptual and methodological apparatus of sociological disciplines. For this reason, the emphasis on migratory networks in migration studies is mostly found in sociological (and anthropological) approaches, whereas economists, demographers, geographers, and political scientists generally prefer to take different interpretative paths. In this aspect, one of the points on which network-based explanations have been most insistent is the self-propelled nature of migration processes: thanks to networks, they can continue even when the reasons (e.g. the explicit recruitment of labour) which initially triggered them have ceased. Networks already in place not only encourage new inflows of immigrants, but also develop an increasingly dense web of contacts between the two poles of migration, allowing migration processes to take on an autonomous consistency.[19] Important feedback effects of migration also exist in the contexts of origin, again through networks of social relations: remittances, temporary and commuting migrations, periodic or definitive returns affect the societies of origin in various ways, influencing – albeit in a controversial way – local development processes, cultural changes, and the very expectations and behaviour of non-migrants.

Networks, in this respect, re-elaborate, extend and connect the concept of the "migratory chain", which appeared as early as the 1960s to explain the trajectories of southern European emigrants, to the more general strand of the study of social networks.[20] Whereas the "migratory chain" mainly explains the "pull" mechanisms that attracted new people to destinations where their relatives had already established bridgeheads, the concept of network encompasses a broader range of social phenomena, which refer to the processes of integration into the labour market, of residential settlement, of building ties of sociability and mutual support, of cultural revision, in the sense of maintaining, rediscovering, redefining, or, as others argue, "reinventing" the "ethnic" identity in host societies.

Theoretical interest also derives from the view of migratory networks

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[19] A. PORTES (ed.) (1995), *The economic sociology of immigration*, New York.

[20] C. PRICE (ed.) (1963), *Southern European in Australia*, Melbourne; E. REYNERI (ed.) (1979), *La catena migratoria*, Bologna.

as elements of agency, i.e. of the autonomous initiative and attention-seeking of migrants, who through network ties can actively promote new migration processes, help to determine ways of social inclusion, develop forms of social mobility (e.g. through entrepreneurship) and "minority" collective identities. At the same time, the migrant embedded in a network is not an isolated individual, floating in a social void, with no other points of reference than his or her own rational interest. The reference to networks thus makes it possible to seek an intermediate theoretical path between the opposing stumbling blocks of hyper-socialised and hypo-socialised conceptions of migration, in which actors are respectively considered passive subjects, conditioned by overlying structural forces, or individuals acting on the basis of subjective desires and preferences. In Castles' synthesis, the concept of "migrant agency" means that "migrants are not isolated individuals responding to market stimuli and bureaucratic rules, but rather social beings, who seek to achieve better outcomes for themselves, their families and their communities by actively shaping migration processes". [21]

Massey recognised and distinguished two main theories of migration: *theories on the initiation of migration; theories on the perpetuation of migration*. Currently, it is believed that migration processes occur through constant mechanisms over time, represented by so-called:

- push factors;
- pull factors.

Push factors refer to all those conditions present in the land of emigration that lead to its abandonment such as poverty, lack of work, conflicts, persecution of minorities and environmental disasters; while pull factors refer to all those present in the land of immigration such as cultural expectations, economic possibilities, demand for labour and family reunification.

This model includes both a more general level of application, looking at the phenomenon in its social complexity – defined as macro-social or structural – and a more specific level, concerning the individual, defined as micro-social or individual.

Through the macro level of analysis, it is possible to trace both the underlying structural causes and the direction of international migration flows. The structural interpretation of migrations places them in the context of exchanges and relationships of various kinds (economic, po-

[21] S. CASTLES (ed.) (2004), *The factors*, cit., 860.

litical, cultural, linguistic) that link countries and geographic areas.[22] Macro-sociological theories, however, have the great limitation of making migrants: "passive subjects, at the mercy of overarching forces that move them like pawns on the chessboard of geopolitics and economic interests, deprived of any real capacity for choice, orientation, definition of their own goals and life projects.

Micro-social theories, on the other hand, place the individual and his or her family unit at the centre of the migratory choice, made according to the specific economic, cultural, political and social context. While these processes would appear to occur constantly over time, their characteristics (economic, political, cultural, social, environmental, etc.) tend to change according to the historical period in which they take place.

As the characteristics of the pull and push factors, and thus also the macro- and micro-social contexts to which they apply, change, so will those of the migration processes taken into consideration. For example, during industrial development at the turn of the 19th and 20th century, pull factors prevailed above all; vice versa, push factors currently prevail.

The most obvious limitation of current theories is that they explain the origin of migration processes by considering either only the macro or only the micro analysis of one of the many characteristics considered, thus forming a partial and fragmented interpretation of the phenomenon. Instead, by considering these theories, not alternative to one another, but as complementary to each other, an accurate understanding of contemporary migration flows can be obtained.

The study of the pull push factors, acting at macro and micro levels, makes it possible to identify within which social and personal contexts, respectively, a migration process is most likely to occur. This theory, on the other hand, is unable to answer why, given the same macro and micro-social conditions, some people decide to leave and others do not; why it is that when the aetiological factors disappear or change, the migratory phenomenon remains in any case constant over time.

In order to seek answers to these questions, we must place ourselves at a level in-between the macro and micro structures of migration processes. This level of analysis, defined meso or relational, directly connects the society of emigration and immigration with the individual, first emigrant then immigrant, thus establishing a reciprocity between the two systems. This implies that if the social structure influences the

[22] S. GERACI (2000), *Migrazioni*, in S. GERACI (ed.), *Approcci transculturali per la promozione della salute. Argomenti di medicina delle migrazioni*, Roma, 27.

choices of each individual, he or she will also generate social change through his or her own choices.

This triggers a constantly moving mechanism that makes migrations and migrants promoters of economic, cultural and social change.

The main theories on the perpetuation of migration are represented by:

- the network theory;
- the institutionalist theory.

The network theory considers migration processes as "an effect of the action of networks of interpersonal relations between immigrants and potential migrants".[23]

Migratory networks are defined by Massey as "sets of interpersonal ties that link migrants, former migrants and non-migrants in origin and destination areas, through the bonds of kinship, friendship and shared community".[24]

The capacity that networks have to fuel ongoing migration is essentially due to their adaptive function. This characteristic refers above all to the capacity that social networks have to facilitate adaptation to the host society, thereby reducing both the costs and risks involved in migration. Through material and emotional support and a reduction in randomness, networks make the migratory experience ever more independent of the structural or individual factors that generated it.

Another contribution to the perpetuation of migration is the emergence of institutions, both legal and illegal, that make it possible and facilitate the migrant's integration into the social context of arrival. Institutions are understood as all those social relations, legally or non-legally recognised, that, by acquiring legitimacy established over time, are capable of conditioning the behaviour of individuals, offering them opportunities that would otherwise be non-existent and at the same time constraining their freedom of action.

The institutionalist theory refers to all those social structures that form and fit on the boundary between the number of admissions permitted by law and that of would-be migrants. The institutions, which are thus formed, are divided into:

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[23] M. AMBROSINI (ed.) (2005), *Sociologia delle migrazioni*, cit., 42.

[24] D.S. MASSEY (ed.) (1988), *Economic development*, cit., 43.

- illegal organisations: for a huge profit, these may make possible clandestine border crossings, the provision of forged documents or the placement of labour in the informal economy;
- solidarity and humanitarian organisations: these are non-profit institutions which operate in host countries and are sometimes supported by them. Pursuing respect for human rights, they seek to ensure: health and social assistance, legal advice as well as activities to promote the rights of migrants within the political choices of host governments. The sum of all these actions would seem to strengthen the ability of networks and other institutions to act in the construction of movements;
- trade union organisations which represent the rights of all migrants, including asylum seekers, refugees and undocumented migrants.

4. The position of the European Trade Union Confederation

The ETUC has called on all member states to respect their obligations under the 1951 UN Geneva Convention and the 1967 protocol to provide legal protection to asylum seekers and not to return asylum seekers or refugees to a country where they face serious threats to their life or freedom. Furthermore, it has called for compliance with the Convention on the protection of the rights of all migrant workers and their family members; as well as compliance with ILO Convention 143 on migrant workers and ILO Convention 97 on migration for employment, as well as the global Compact for safe, orderly and regular migration.

The ETUC's position on the new European Pact on migration and asylum dated 23 September 2020 is one of disapproval as it allows member states to violate these international conventions by sponsoring deportations as an alternative to accepting their human rights responsibility to allow people to seek asylum in their countries.

In its new Pact on migration and asylum (COM(2020) 609), the European Commission also announced the possibility of considering how to strengthen the effectiveness of sanctions against employers (2009/52/EC) and the need for further action. This directive prohibits the employment of undocumented migrants to combat irregular migration. Nevertheless, the ETUC continues to be critical of this directive as it is seen as a tool to control immigration and not to improve conditions for irregular migrant workers, as well as of the lack of regular labour migration routes to Europe. It also sets minimum standards for sanctions and

measures to be applied against employers as well as measures to strengthen the protection of migrants' rights.

On 29 September 2021, the Commission published its long-awaited report on the implementation of the employer sanctions directive (ESD). The ETUC has stated its opinion [25] on the practical implementation of the directive, and on the very limited implementation of the provisions to ensure back payments, grievance relief and residence permits for undocumented workers. At the same time, on 24 June 2021, the European Union Agency for fundamental rights published a report on the implementation of the directive and found serious deficiencies in both full and meaningful transposition and implementation into national law and practice.

The main challenges facing the ETUC as regards the implementation of the directive are many. In particular, the practical implementation of regulatory measures, together with the protection of the rights of undocumented migrant workers. Another challenge is the effective sanctioning of exploitative employers – sanctions are too easy to avoid and not at all dissuasive compared to the tax benefits of undeclared work and exploitation. The ETUC member organisations have emphasised the very limited application of the provisions to guarantee arrears (Art. 6), the facilitation of complaints (Art. 13) and access to residence permits. Emphasis was also placed on the issue of proper access to information on rights and procedures and the role of trade unions in this regard.

As stipulated in Arts. 6(2) and 13(1), Member States shall ensure the existence of effective mechanisms and procedures through which irregular migrant workers can file complaints against their employers; apply for credit; and eventually enforce a judgment for any outstanding wages, even when they are no longer in the country. It also foresees the possibility for competent authorities to initiate procedures for the recovery of unpaid wages without the introduction of a credit.

The ETUC calls for effective complaint mechanisms to be made available to all workers, regardless of status. [26] Firewalls between labour inspectorates and immigration authorities must ensure that undocu-

[25] The ETUC provided written contributions to the informal consultation submitted by DG Home Affairs and participated in the social partners' hearing organised on 13 July 2021 by DG Employment and DG Home Affairs at the request of the ETUC.

[26] See ETUC resolution on fair mobility and migration, 23.3.2021, available online.

mented migrant workers do not run the risk of detention or deportation due to interactions with labour inspectors, during labour inspections or when pursuing a legal solution.[27]

However, in practice, the implementation of the directive has not created meaningful possibilities for undocumented migrants to claim outstanding wages or to file claims against employers. Without protection systems or access to residence permits to conclude legal proceedings, undocumented workers risk retaliation by employers, loss of income, and detention and deportation.

In some cases, the undocumented worker can file a complaint with the labour inspectorate and present a case to the labour court, but he/she has to cover all costs to claim his/her rights through the court. Moreover, the process is lengthy, and migrants may have left the country, have been deported or decide not to continue claiming their rights due to the high costs of the proceedings.

In addition, undocumented workers face significant challenges in gathering the necessary evidence to prove the existence of the employment relationship, the hours actually worked, etc. In general, the burden of proof is too high and is particularly difficult in the case of multiple contractors and subcontractors.

The application of employment rights cannot be linked to the existence of a physical employment contract.

The provision on the presumption for an employment relationship of at least three months in the absence of proof is very important. However, this presumption is not interpreted in all countries as three months of full-time employment (e.g. in Germany) - working time must still be proved, which may undermine the effect of this provision.

Art. 13(2) states that third parties, who have a legitimate interest in ensuring compliance with this directive, may engage on behalf or in support of an undocumented worker in any administrative or civil proceedings. However, associations and trade unions have been prevented from accompanying the victim to court (e.g. in Italy), with the consequence that the undocumented worker is much more reluctant to report the employer for fear of reprisals.

On a more general level, the ETUC condemns member states that

[27] See PICUM (2020), *A worker is a worker: how to ensure that undocumented migrant workers can access justice*. PICUM guidelines for the development of an effective complaints mechanism in cases of labour exploitation or abuse.

seek to foment hatred and xenophobia towards asylum seekers, refugees and migrants in general, and also condemns those who implement policies that deny their rights. These positions have led to discrimination, particularly against those from black and minority ethnic backgrounds, further reinforcing structural racism.

For the ETUC, the hope was that the new Pact would promote universal human rights and prevent the suffering and exploitation of all migrants, asylum seekers, refugees and other vulnerable groups in all countries and the rise of xenophobia and racism throughout the European Union.

The European trade union confederation considers that the European Commission has been unable to show political leadership through this Pact. Indeed, it could well have built a binding and common approach to asylum and migration that would have ensured that all member states respected international human rights law.

The Pact should have created a common EU rights-based policy for member States to take responsibility for asylum seekers and meet the needs of migrants. On the contrary, it gave in to anti-immigrant political movements and member States that wished to treat migration and asylum as a purely national issue in order to continue to restrict the access of those seeking international protection in their countries and to reject the fundamental rights of migrants.

A further criticism of the Pact by the ETUC is that it does not remedy the main shortcoming of the current Dublin regulation, which allows member States to deny responsibility for protection to asylum seekers who have entered the EU in another country. While at the same time paying lip service to those member States at the EU's borders that have to take disproportionate responsibility for the reception and care of newcomers.

Denying the rights of international protection seekers, and more generally of migrant workers, only benefits employers who use asylum seekers and refugees, as well as undocumented and other precarious workers as cheap labour, which in turn creates and establishes division among workers, and lowers the conditions and pay for all workers.

The ETUC is concerned that with the *pre-screening* and revision of *border procedures* proposed in the pact there may be more people systematically detained at "crisis points" in the EU and Turkey and in transit countries such as Libya and Niger; places where basic human rights are not respected. The lack of human and material resources in the asylum processing services and reception centres, not least in the

EU border states, also means that the two fast-track procedures will not be respected or will prevent the international obligation to process asylum applications and return decisions on an individual and fair basis.

The ETUC condemns the fact that the Pact attempts to strengthen the *European fortress* with a massive reinforcement of FRONTEX, the European border protection and coastguard agency, and the creation of the figure of an EU general coordinator for repatriation. These measures will prevent asylum seekers from reaching EU countries to seek asylum, force people to travel along even more dangerous routes and rely on trafficking to seek protection. The measures will further legitimise the repatriation of asylum seekers to countries where they have been persecuted.

The ETUC fears that the Pact will increase the invasive collection of biometric data of asylum seekers and migrants, including fingerprints, through the EURODAC database, with greater risk of victimisation and persecution.

The Pact threatens to prevent civil society from conducting search and rescue operations, suggesting that the Commission should work with member States to ensure that private vessels do not jeopardise migration management. This is contrary to international maritime law and the long-standing maritime tradition that every ship's captain has a duty to rescue people in distress at sea.

There are no new proposals on regular migration. The ETUC regrets that labour migration has been placed in the context of the EU's need to "attract talent and skills". However, the fact that the need is recognised to better protect migrant workers from exploitation is a positive aspect.

The ETUC is concerned about the proposal to create an EU talent pool for skilled workers from third countries wishing to enter the EU, which would serve as an EU platform for international recruitment. Among other reasons, the brain drain cannot be considered good cooperation with the countries of origin.

The ETUC is concerned about the EU's lack of attention towards the Global Compact (GCM), which is not even mentioned in the text of the Pact. The GCM is the first attempt to address the effective management of migration from a multilateral perspective. The ETUC sees the Global Compact as a useful framework to explore international migration governance mechanisms involving countries of origin, transit and destination and emphasises respect for human rights and decent employment.

The proposals do not offer targeted measures to fully reflect the gender dimension of migration and the vulnerable position of unaccompanied minors and children with their families.

The ETUC calls for a universal human rights approach, whereby:

- all member States fulfil their obligations under international human and labour rights conventions;
- there is a significant increase in safe and regular channels for asylum seekers through a common European asylum system based on sufficiently staffed and trained public services dealing with asylum, not least in the EU border member States;
- there is a real revision of the Dublin rules – the EU should be recognised as one territory, according to international law, in order to protect asylum seekers;
- the member States make a binding commitment for the fair distribution of asylum seekers;
- all member States support assistance to persons in distress at sea and fully respect international law in this regard. The Commission must start infringement procedures against member States that do not comply with their international legal obligations to provide support and assistance to persons in distress at sea. Member States must ensure that search and rescue services (public or private) have sufficient means and resources at their disposal to ensure the assistance and safety of all persons in distress, as well as the protection of rescuers; persons with an insecure or irregular status are regularised;
- asylum seekers are granted the right to work in all member States. It must be ensured – with the involvement of employers and trade unions – that all asylum seekers, refugees and migrant workers receive decent treatment at work. This is essential to build solidarity among workers and ensure equal treatment and equal opportunities for all workers. The ETUC has shown that equal access to work and the ability to claim rights at work is fundamental to achieving full recognition of universal human rights, including the right to citizenship;
- a clear commitment must be given by member States to ensure that the fundamental human rights of asylum seekers and migrants are realised and protected at all times, including access to safe housing, information (in the language they can understand), health and social services, and justice;
- full transparency, democratic control and monitoring is required by

the EU's Frontex agency to prevent violations of fundamental rights and illegal rejections;
- cooperation is forthcoming to combat the structural causes of forced migration between governments and social partners in the EU and in third countries, in particular in the Mediterranean, in the countries of the Near-East and in sub-Saharan regions;
- regular labour migration routes must be developed to enter the European Union;
- cooperation (political and economic) must be strengthened with the countries of origin in order to strengthen domestic economies, provide assistance in education and (vocational) training, state administration, etc.

The ETUC has implemented actions calling on MEPs to uphold these principles and promote an approach to asylum and migration based on human rights, solidarity and access to public services, such as asylum administrations, healthcare, decent housing, education, among others.

The ETUC is committed to supporting members' activities to organise all migrant workers - including asylum seekers, refugees and undocumented persons – and empower them in trade unions so that they can participate in collective bargaining, thereby ensuring that all workers, regardless of their immigration status or nationality, are treated equally and have their universal human rights respected.

The ETUC will work with key stakeholders from civil society on joint medium – and long-term strategies.

In the field of labour migration, the ETUC will closely follow the development of so-called "*talent partnerships*" in the neighbouring countries of the European Union, the Western Balkans and Africa and contribute to the public consultation on the future of EU policy on legal migration, which must be based on union rights and ethical recruitment.

The ETUC will follow the evaluation of the employer sanctions directive and the possible role of the European labour authority in ensuring its effective implementation, as outlined in the Pact, to ensure that it focuses on developing effective complaints mechanisms.

The ETUC will follow the new integration and inclusion action plan for 2021-2024 and continue to support labour rights, collective bargaining, labour market integration and access to social protection for migrants and refugees. The Commission recognises in the Pact the key role played by trade unions in the integration of migrants into the labour market, following the renewal of the European Partnership for integration.

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Chapter 32

MIGRATION FLOWS, INTEGRATION AND AGENDA 2030: A QUANTITATIVE ANALYSIS

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ABSTRACT: *This paper starts from the need to fill some gaps in quantitative terms on the effects of immigration in the destination countries, focusing on the Italian situation. The lack of empirical evidence on the migration phenomenon, the interventions often lacking wide-ranging profiles, generally linked with emergency situations, the income effects of migration for less developed countries which encourage the increase in flows, are crucial factors to be taken into consideration so that they can be included in a more general framework of relationship between migratory flows and sustainable development. Moreover, migration policies have often remained on the sidelines of the debate on sustainability, generally confined to the problems of development cooperation. Using the UN 2030 Agenda as a guideline, our goal is to address the association between immigration and sustainable development of the destination areas from a quantitative point of view, merging data on immigrants with some aspects relating to health, environment, safety and inclusion.*

1. Introduction

In line with target 10.7 of the new 2030 Agenda for sustainable development, Italy considers the impact of migration to be of fundamental importance for the development of society, expressing the hope for an orderly, safe, responsible, and regular mobility of people. There are several potential reasons behind the choice to migrate: the traditional liter-

ature finds that the most common motives are relative deprivation, climate shocks, social conflicts, and income differential across regions [1] Umblijis also argued that migration could be considered an auto-selection process in which the less risk-averse migrate. [2] We therefore have a first distinction: while migrants choose to move, refugees are forced migrants, leaving their homes for necessity. [3]

The economic literature has often focused its attention on the immigration impact on economics and, above all, on the labour market, especially on wage levels, employment rates, and savings [4] Although there is no doubt that immigrants contribute significantly to aggregate output [5] nevertheless, there is an ongoing debate on the role of immigrants especially at economic and social level: public perception is that they are a fiscal burden for Europe, abusing generous welfare states or taking jobs away from native workers. [6] However, it may be worthwhile to consider that the empirical evidence is mixed: on the one hand, in the United States, for instance, immigrants are said to receive welfare benefits higher than those provided to natives; [7] on the other hand, the immigration effect on public finances in the host state is not negative. [8]

Most empirical studies demonstrate that domestic and foreign workers are complementary, and only very little evidence shows that immi-

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[1] W. CLARK, A.V. WILLIAM, D.S. WITHERS (2007), *Family migration and mobility sequences in the United States: Spatial mobility in the context of the life course*, in *Demo. Research*, S6(20), 591-622; W. NAUDE (2010), *The Determinants of Migration from Sub-Saharan African Countries*, in *JAE*, 19(3), 330-356; M. BEINE, P. BOURGEON, J.C. BRICONGNE (2013), *Aggregate Fluctuations and International Migration*, Technical report.

[2] J. UMBLIJS (2012), *The effect of networks and risk attitudes on the dynamics of migration*, in *Int. Migr. Inst. Work. Paper*.

[3] S. SCHMEIDL (1997), *Exploring the causes of forced migration: A pooled time series analysis, 1971-1990*, in *SSQ*, 284-308

[4] G. OTTAVIANO, G. PERI (2011), *Rethinking the effects of immigration on wages*, in *JEEA*, 10(1), 152-197.

[5] G.J. BORJAS (2019), *Immigration and Economic Growth*, in *NBE Working Paper*.

[6] A. ALESINA, A. MIANO, S. STANTCHEVA (2018), *Immigration and redistribution*, in *WP Harv. Uni.*, Cambridge.

[7] G.J. BORJAS, L. HILTON (1996), *Immigration and the welfare state: Immigrant participation in means-tested entitlement programs*, in *QJE*, 111 (2), 575-604.

[8] I. PRESTON (2014), *The effect of immigration on public finances*, in *Eco. Jour.*, 124 (580).

gration affects the labour market negatively.[9] As Steinhardt states,[10] classifying workers according to their work experience and education level does not result in negative effects on the wages of natives, while emigration does. Considering work sectors, immigrants are particularly employed in basic occupations like cleaning or retail trade activities; in point of fact, migrants specialize in manual and low-skill and low-paid jobs, whereas natives prefer high-skill intensive occupations or different ability levels for communication and language.[11]

Recent studies have also focused attention on innovation, which is a key factor for the economic growth of a country and have found a positive correlation between innovation and migration, thanks to the increase of intelligence, creativity, risk propensity, and entrepreneurship.[12]

Further considerations must also be made with regard to education: foreign human capital is often undervalued,[13] although not in all countries, immigrants show high levels of education: Italy, for example, does not attract highly-educated immigrants, but it can count on low-educated workers from developing countries who raise capital intensity in small manufacturing firms.[14]

Immigrants can cause an increase in education expenditure, e. g. through language courses.[15] As Speciale revealed (2012),[16] an increase

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[9] See, among others, D. CARD (2001), *Immigrant inflows, native outflows, and the local labour market impacts of higher immigration*, in *JLE*, 19(1), 22-64; F. D'AMURI, G. PERI (2011), *Immigration, jobs and employment protection: evidence from europe*, in *NBER Working Papers* 17139; G. OTTAVIANO, G. PERI (2011), *Rethinking the effects of immigration on wages*, in *JEEA*, 10(1), 152-197.

[10] M.F. STEINHARDT (2011), *The wage impact of immigration in Germany–new evidence for skill groups and occupations*, in *B.E. Jour. EAP*, 11(1), 31.

[11] G. PERI, C. SPARBER (2009), *Task specialization, immigration, and wages*, in *Am. Eco. JAE*, 1(3), 135-169.

[12] C. OZGEN, P. NIJKAMP, J. POOT (2013), *The impact of cultural diversity on firm innovation: Evidence from Dutch micro-data*, in *IZA Jour. Migr.*, 2, 18.

[13] R.M. FRIEDBERG (2000), *You Can't Take It with You? Immigrant Assimilation and the Portability of Human Capital*, in *JLE*, 18(2), 221-251.

[14] A. ACCETTURO, M. BUGAMELLI, A. LAMORGESE (2012), *Welcome to the machine: firms' reaction to low-skilled immigration*, Topics for debate (in *Economic Working Paper*), no. 846, Bank of Italy.

[15] G. BETTIN, A. SACCHI (2020), *Health spending in Italy: the impact of immigrants*, in *Eur. J. Pol. Eco.*, 65, December.

[16] B. SPECIALE (2012), *Does immigration affect public education expenditures? A quasi experimental evidence*, in *JPE*, 96(9), 773-783.

in foreign population led to a decrease in public education expenditure between 1987-1999. Actually, some studies confirmed that the presence of migrants in certain European regions brings about fewer social transfers. [17]

At the end of this brief review, we must not forget that the causes of migrations are not only connected to (i) searching of better economic and social opportunities but are also related (ii) to conflicts and repressive conditions of individual freedoms and (iii) to climate change and drought. In fact, this phenomenon has resulted in numbers reaching over 232 million migrants worldwide, of which approximately 60 million people have been forced to migrate due to war or persecution. With the increase of these flows, problems related to the life of the person have arisen, such as: the protection of immigrants' rights, the protection of fragile persons (such as women and minors) from the various types of discrimination, and their integration into the societies of arrival. [18]

With regard to Italy, the presence – and above all, the contribution – of foreign workers, both EU and non-EU, is now a constant feature of the national labour market. [19] This situation, according to forecasts – provided by the United Nations and ISTAT (National Institute of Statistics) – on the future of immigration affecting the Apennine Peninsula, would seem to lead, within thirty years, to a replacement of the workforce of Italian workers. However, it should be noted, that due to the events that have occurred in recent times – from the Arab Spring to the crises that have affected North Africa, to Asian investments in the African continent, up to the so-called "Sicurezza bis" decree – the aforementioned forecasts may not be fulfilled; also the post-pandemic might bring economic and social contingencies that may overturn the usual interpretative paradigms. The future scenario, therefore, outlines multiple development possibilities; among these, the replacement of the Italian workforce by immigrants, in order to avoid the "economic collapse", which may lead to a reduction in terms of demographic balance accompanied by losses of

[17] A. RAZIN, E. SADKA, P. SWAGEL (2002), *Tax burden and migration: a political economy theory and evidence*, in *JPE*, 85(2), 167-190.

[18] Italian Agency for Development and Cooperation, available online.

[19] The incidence of foreign workers on the Italian labour market is highlighted, in particular, by the Annual Report. "Foreigners in the labour market in Italy", edited by the General Directorate of Immigration and Integration Policies of the Ministry of Labour and Social Policies. The report in question, in drawing on sources of a different nature, illustrates in a broad and timely manner multiple aspects of the integration between migrants and the labour market.

GDP (Gross Domestic Product) in the Italian economic system, and serious repercussions on the social security system, mainly due to the country's old age index and the retirement age index. Obviously, to ensure that these flows occur safely and support Italy's demographic and economic system, policies should be implemented aimed at protecting the rights of immigrants and their economic and social integration.

2. Migration flows trends in recent years in Italy

In Italy, most of the regular migration flows come from Eastern Europe. However, regarding the "landing" phenomenon, we may observe that most migration flows come along the African route. There are several driving forces behind migration to Italy; it is true that most of the migratory phenomena is driven by economic factors and is, therefore, a voluntary migration; however, we are also witnessing the so-called phenomenon of "forced migrants", who move for humanitarian reasons across the Mediterranean Sea. This new "landing" trend of migration has also resulted in the increase in applications from asylum seekers and has occupied space in the media scene in recent years, even though the migration numbers have not been as high as those of the years which preceded the economic crisis of 2008. Until a few years ago, only a fraction of "landed" migrants asked for asylum in Italy,[20] then the European Union imposed the "hotspots"[21] on the member states, and with this procedure, border countries tightened border controls and the numbers of asylum applications grew, reaching 123,482 in 2016. Landing percentages rose from 37% in 2014 to 56% in 2015 and 68% in 2016.[22]

The last wave of migration began in 2011 with the emergence of crises in North Africa and the Middle East – accompanied by the death of the Libyan leader, Muhammar Gaddafi, and the subsequent disappear-

[20] Consider that in 2014, for example, out of 170,000 migrants, less than 70,000 requested international protection from our government.

[21] These are already existing centers equipped to identify migrants, which will be expanded. The facilities will allow migrants to be held in detention for a limited period of time. In the hotspots, the Italian police will be helped by some officials of the European agencies Europol, Eurojust, Frontex and Esso: the agents will be used to identify migrants who want to apply for asylum, documents available online.

[22] Department for Civil Liberties, Ministry of home affairs, data and statistics are available online.

ance of his "governance" – which questioned the system of control of the external borders of the European Union. The movement of people involved the whole European continent with the massive reopening of the Mediterranean and Balkan routes. The following years, from 2008 to 2013, were more unstable. 2011 recorded the first consistent wave of illegal landings, with 63,000 people, and the next one began in 2013 with 43,000. Both years were characterized by the latest crisis events (in North Africa and in the nearby Middle East). From 2014 to 2017, a new phase of migratory flows opened, and Italy recorded over 600,000 migrants (170,000 in 2014, 153,000 in 2015, 181,000 in 2016 and 120,000 in 2017). The flows have taken on considerable dimensions and have partially changed their nature: the majority of migrants belonged to the category of forced migrants. Faced with these changes, national and international legislation (in particular, the Dublin regulations, the European asylum system) appeared weak and unable to absorb the new forces. Recent arrivals in southern European countries have put the European asylum system in question, bringing out all its fragilities. One of the other issues in the context of migration concerns the aforementioned "Sicurezza bis" decree, that penalized the permanence of immigrant workers within the country. For instance, those fleeing a natural disaster and, in the meantime, finding a stable and regular job in Italy were not able to convert their so-called "special" residence permit into a work residence permit after the humanitarian permit expired. The year 2017 was also the year that recorded a drop in the number of landings. In fact, in 2018, just 23,370 people landed. This trend also continued in 2019, with a further decrease and just 11,439 people landed. The most significant change following the "Sicurezza bis" Decree[23] concerns the reconfiguration of the SPRAR[24] system (Protection system for asy-

[23] This was Legislative Decree no. 53 dated 14 June 2019, containing Urgent provisions on public order and safety (Official Gazette no. 138 dated 14 June 2019), known as the Security Decree bis, approved by the Council of Ministers on 11 June 2019 following the proposal of the President Giuseppe Conte and the Minister of the Interior Matteo Salvini.

[24] The Protection System for Asylum Seekers and Refugees (SPRAR) is made up of the network of local authorities which, within the limits of available resources, have access to the National Fund for asylum policies and services for the implementation of integrated reception projects. At territorial level, local authorities, with the precious support of the third sector realities, guarantee interventions of "integrated reception" which go beyond the mere distribution

lum seekers and refugees). Until the introduction of the new provisions, the number of municipalities involved in the system was growing exponentially and a functioning and effective system was established in many Italian areas. The "Security Decree bis" did not eliminate the SPRAR, but it completely reduced its function.

As for 2020, we can observe more significant changes. Despite the forecasts, the difficulties in managing the Covid-19 pandemic and the worldwide economic hardships, 2020 showed an increase in landings compared to the previous two years. In 2020, over 34,154 illegal immigrants landed on the Italian coasts, of which the following nationalities stood out in terms of numbers: Tunisia (12,731 units); Bangladesh (4,132 units); Ivory Coast (1,807 units); Algeria (1,379 units); Pakistan (1,358 units); Egypt (1,206 units); Sudan (1,099 units); Morocco (996 units); Afghanistan (950 units); Somalia (876 units) and other nationalities (with 6,778 units).

Over the last ten years, migration flows towards the EU have remained substantially stable, with just about 1-1.2 million units coming from non-EU countries. In 2021 the greatest increase in these flows was recorded in Germany, while the data regarding Italy remained substantially stable, occupying the fifth position in terms of the total EU population.

In Italy, the last migratory wave, which began in 2011 and exploded in the years 2014/2017 and was mainly caused by the emergence of the crisis in North Africa and the crisis in the Middle East (accompanied by the death of Gaddafi and the subsequent disappearance of his "governance" from Libya), also changed the nature and routes of immigration; in recent years the curve of the landings has begun to rise again despite the sharp drop between 2017 and 2019, the various Security Decrees which have been implemented, and the Covid-19 pandemic afterwards, again reaching figures of over 100 thousand units in 2022.

3. Immigrant population – integration and labour market

To stay in line with the new 2030 Agenda for Sustainable Development, we have attempted to quantitatively analyse some issues related to the

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of food and accommodation, also providing complementary information, accompaniment, assistance and orientation measures, through the construction of individual socio-economic integration paths, information on the SPRAR System is available online. Eurostat Database, flow trend of the populations of the countries taken into consideration (graph 1) born abroad, available online.

integration, education and employment of immigrants – especially issues related to the weakest categories, including women and the most disadvantaged units of this phenomenon – in order to better analyse their inclusion in Italian society.

The latest data indicate progress by the Romanian, Albanian, Nigerian and Pakistani communities in running businesses in Italy. 7500 municipalities out of 8,000 have companies led by foreign entrepreneurs. With almost 650 thousand companies (10.7% of the total) at the end of March 2022, foreign entrepreneurship is confirmed as a structural component of the Italian entrepreneurial fabric. Foreign entrepreneurship is present in 94% of Italian municipalities, and it continues to notch up consistent growth rates even in such a difficult phase caused by the Covid-19 pandemic emergency. Businesses run by people of foreign origin represent an increasingly consolidated reality in Italy. They are generally launched as small and unstructured and are the result of the expression of the individual's abilities and the opportunities offered by the market in our country. Based on the forecasts, the substantial flows of immigrants arriving in Italy will continue to fuel this dynamic and, therefore, the further diffusion of the foreign entrepreneurial structure, which represents a growth factor for the entire national economy. However, these businesses ought to be helped to strengthen themselves in order to provide them with continuity and the possibility of full integration into the Italian productive and social structure. The business community with foreign owners in Italy continues to grow even despite the Covid-19 pandemic; however, its expansion has slowed down. In the first half of 2020, the balance between new businesses and those that ceased their activity stood at 6,119 units, bringing the stock of businesses with foreign owners to a figure of 621,367 units, with a 1% increase in the latter compared to December 31 of the previous year. The most widespread entrepreneurial form among foreigners in Italy remains sole proprietorship (with 475,000 units equal to 76.5% of the total, a share much higher than the Italian average, which has dropped in recent decades to about 52% of the total). On the other hand, companies belonging to foreigners which have adopted the form of "joint company" stand at around 96,964 units, which represents 15.6% of the total.[25]

The framework of foreign entrepreneurship in Italy is made up of

[25] La Repubblica, economy and finance section, publication of 28 August 2020 of the processing of data collected from the "UNIONCAMERE" and "InfoCamere" reports on foreign industry in Italy, available online.

approximately 486 thousand (75% of the total) individual micro-enterprises, spread across almost the entire country. To closely explore the characteristics of the phenomenon of the origin of entrepreneurs, Unioncamere and InfoCamere analysed the data from the Business Register relating to the establishments of these businesses at the municipal level and the type of business managed by the various communities. The latest data collected by Unioncamere over the last two years show a greater growth of sole proprietorships managed by people born in Romania (+ 4,674 units) and Albania (+ 4,581), nationalities in which the concentration of activities is particularly high in the construction industry (respectively 30% and 36% of all businesses in the two communities). Another element to note is the growth of the business communities of Nigerian (+ 2,630) and Pakistani (+ 2,397) immigrants while, in percentage terms, the most marked accelerations come from the activities of citizens from Kosovo (+ 26%), Afghans and citizens from the Ivory Coast (both increased by 24%). In general, in recent years the performance of foreign companies (difference between companies that were launched and those that ceased to exist) has always had a positive balance even if in recent years this difference has decreased.

From this data regarding the vitality of companies with foreign owners in Italy, we can extrapolate other important elements regarding their work activities. An interesting element is represented by the presence of women in running businesses – 23.8% of the total – equal to 136,312 units. From this number, we can subtract the entrepreneurship index (total number of businesses divided by the female immigrant population) equal to about 5.22% of the female immigrant population and clearly lower than the index run by male immigrants (20.34% of residents and equal to 494,845 units). In the last 10 years, however, women-run businesses have grown at a faster rate than those run by men reaching 27.3% of the total foreign-run businesses at the end of 2021, i.e. a total of 205,951 business units, equivalent to a 42.7% increase. Another fact to consider regarding foreign companies is that, in most cases (more than 80% of the total), they are made up of micro-enterprises or individually run businesses.

An interesting fact also regards the link between the market sector of the company and the owner's nationality of origin: we can observe that there is a territorial division between the companies and the nationalities of origin. In fact, citizens from the Indian subcontinent (India, Bangladesh and Pakistan), others from African countries (Senegal and

Nigeria) and China, generally operate on the retail trade market; Moroccan citizens mostly operate in the itinerant sales market; those from North African countries (Egypt and Tunis) and Eastern European countries (Romania and Albania) usually operate in the construction sector. [26]

4. The labour integration of foreign women and the fragility achieved with the Covid-19 pandemic

Women account for more than half the immigrants currently residing in Italy totaling over 2.6 million (51.9% of the total). In fact, these female citizens originate from 198 different areas of the world. The highest number of female migrants to Italy come from Romania, Albania and Morocco. In 2020, the imposition of the Covid-19 pandemic pinpointed a number of disadvantages that led to foreign women losing their jobs more easily than men or native citizens. The statistical dossier on immigration reveals a decrease in employment of 456 thousand people, of which 159 thousand (6.4% of the total) concern female migrants (109 thousand units). Their employment rate fell by 4.9%, more than double than that of foreign men (– 2.2%) and 8 times higher than that of native women (– 0.6%, in line with native men). In fact, the pandemic helped to explain the high vulnerability of immigrant female employment with the clear channelling into poorly protected jobs exposed to precariousness, restrictions and the risk of contagion. More than half of them work in just three professions: domestic workers, caregivers and office and commercial cleaners. It is precisely the people employed in family assistance – domestic cleaners, carers, babysitters and domestic workers – and social-health workers who have had greater exposure to the contagion from Covid-19, in fact, 8 out of 10 were data referring to women. Out of an approximate total of 456,000 jobs lost from 2019 to 2020, a quarter of them are attributed to foreign women. These phenomena of fragility and exposure to contagion, also due to the reform of the redundancy block – therefore to the lack of any possibility of being able to take advantage of social assistance such as "Naspi" (New Social Insurance for Employment) – has in many cases also prompted many foreign women to return to their countries of origin. [27]

The employment situation of foreign women is very complex. On

[26] Unioncamere-Movimprese, Press release 2022/06/20, available online.

[27] IDOS (2021), *Dossier statistico sull'immigrazione*, Roma.

the one hand, they are much more exposed to the risk of unemployment than Italian women, constituting 16% of the total number of unemployed women, while representing 8.5% of the female population residing in Italy. Despite foreign women have a higher unemployment rate (15.2%) compared to foreign men (11.4%), what really makes the difference is the gap in the inactivity rate among people residing in Italy, with women migrants in first place with 47.20% of inactivity; 2% more than Italian women and 28.3% more than foreign men. [28]

Despite the unemployment rate being high, foreign women are found to be much more educated than foreign men, even if overall foreigners have a lower education rate than native residents in Italy. In this research work, we calculated a rate (amount of declarants divided by the total number of the population taken into consideration) for all educational levels of resident immigrants. Female emigrants declared that they had acquired: a university degree and a post-graduate degree for a total of 11.4%, higher than foreign men (6%); a "diploma" for a total of 30.8%, against 25.5% of men; the middle school certificate 36.9% against 39% and elementary school certificate/no qualification 8.2% of them against 9% of men.

5. The "NEET" phenomenon among young foreigners residing in Italy

The set of unemployed and inactive people who are not enrolled in studies or training and are aged between 15 and 35 make up the so-called group of "NEET" (not in education, employment or training), which appears to be a condition of alienation from the world of work which often brings very severe long-term effects. These are usually

[28] These data indicate the percentage of unemployed and inactive people out of the total number of residents of working age, both men and women. According to the ILO definition, an unemployed person is defined by Eurostat as someone aged 15 to 74, not employed during the reference week (according to the definition of employment), currently available for work (paid employment or self-employment) before the end of the 2 weeks following the reference week, actively seeking work, i.e. has either carried out activities in the four-week period ending with the reference week. Inactive people are those who are not part of the labour force, meaning he or she is neither employed nor unemployed. The set of people outside the labour force can include pre-schoolchildren, schoolchildren, students, pensioners and housewives or -men, for example, provided that they are not working at all and not available nor looking for work.

young people at the end of their studies with no interest in working activities, even though they are fit for work; they are unemployed and do not even look for opportunities to sharpen their training.

In addition to these characteristics, there are also a number of factors that usually influence the possibility of becoming part of the NEETs category in Italy: education (those with a low level of education are more prone to becoming NEET), gender (women are more exposed), citizenship (immigrants have a higher risk of ending up in the category), residence (those who live in small municipalities or small urban centres – where the chance of finding work is scarce and the possibilities of increasing one's educational background are few – are exposed to increased possibility of ending up not working and not studying), disability (which increases the difficulty of accessing the world of work).

Another factor which has affected the growth of this phenomenon in recent years is certainly the Covid-19 pandemic, which put an abrupt stop to young people looking for a job. Equally high in this period, in fact, was also the share of young people who left the education and formation system prematurely and after having attained, at most, lower secondary school or lower middle school qualification. In the second quarter of 2020, in Italy, 13.5% of young people aged between 18 and 24 interrupted their studies early. Similarly, children who had only one parent employed in qualified professions abandoned their studies in 2.5% of cases compared to 24% of children of parents employed in unqualified professions, where the wages are much lower. Furthermore, among males and foreigners, the percentage of those who abandon their studies is 15.4% and 36.5% respectively, and consequently higher if compared with that of girls (11.5%) and of young Italian natives (11.3%). According to the report provided by ActionAid and the CGIL (Italian General Confederation of Labour), in 2020, Italy was found to be the country of the European Union with the highest number of young people aged between 25 and 34 who do not work (and do not look for work), do not study and do not follow a training course. In these statistics, women have the highest prevalence with 1.7 million units, with a higher incidence in the South than in the North of the country, also noting overall worrying territorial, gender and citizenship inequalities. The worrying data was provided by ActionAid and the CGIL in the Report regarding territorial, gender and citizenship inequalities – "NEET between inequality and gaps. In search of new policies" – together with a series of recommendations intended for the new government and Parliament to direct national and territorial policies for young people through the "Youth Guarantee"

intervention program. 56% of the total NEET concerns women and the female presence has remained unchanged over the years, and all this demonstrates that it is much more difficult for the female gender to get out of this condition. Gender inequalities are also visible in the role of NEETs in the family. In fact, about 26% of this category lives outside the family unit of origin and among these, a large gender difference exists; 23.5% NEET mothers and 3% fathers. The highest percentage of the NEET young women is found among the inactive (27% of the total population in this category), who are not looking for and are not available for work. The prevailing reason for inactivity among NEETs is linked to the gender disparity in care loads which keeps women from taking action to find a job or forces them to leave the Italian labour market. The native Italian NEETs are for the most part inactive, – i.e. people who have been discouraged by other difficulties, have stopped looking for work – and reach a share of 66% of the total in this category, and 20% of these, even if they are not actively searching the job, are prepared to work. The greater trend towards inactivity is mainly reflected in people with a high school diploma (32% of the total) or a minor qualification (16%). Further inequality data concerning the NEET categories affect the issue of citizenship and immigrants in Italy. Among NEET immigrants, there is a tendency for those who have a low-level education to belong to this category; in fact, 48.4% of them have only attained a middle school certificate.[29]

According to the report entitled "Second European union minorities and discrimination survey" provided by the "European Union Agency for Fundamental Rights (FRA)", within the countries of the European Union, young foreigners are the most exposed to this condition. This is specifically due to factors linked to their culture of origin and that of the host country. A prejudice deeply rooted in the cultures of origin (widespread in Italy and which sees the woman as being responsible for the household and childcare) makes their employment difficult. In general, young foreigners are 70% more likely to become a NEET than their native peers.[30]

6. Poverty risk rate of the immigrant population

Regarding the issues addressed, another factor should be noted which determines the statistics and also an important part as regards the trend

[29] ISTAT, Istat database available online.

[30] Second European union minorities and discrimination survey, available online on EU-MIDIS II.

of life of foreigners in Italy, namely, the risk of poverty and social exclusion. In addition to the rate report on the risk of poverty and social exclusion, using EU-SILC data, we calculated the difference between the increase of native and immigrant units of this phenomenon. From this point of view, we can safely say that Italy is in line with other European countries investigated as regards foreigners being more at risk of poverty and social exclusion than natives. These data refer to citizens between 18 and 64 years of age. The countries reported are the top 10 in the European Union for the highest number of immigrants at risk of poverty and social exclusion among foreigners, measured by the degree of monetary poverty, large scale of material deprivation and low work intensity (see Table 1).

Table 1. People at risk of poverty and social exclusion among natives and immigrants in the major European Union countries

Country	2015			2021		
	Immigrants	Native	I/N [31]	Immigrants	Native	I/N
Belgium	50.6%	21.6%	2.69	39.1%	18.8%	2.08
Germany	30.4%	20.0%	1.52	39.3%	21.0%	1.87
Greece	65.3%	32.4%	2.01	51.0%	28.3%	1.80
Spain	54.9%	28.7%	1.91	56.4%	27.0%	2.09
France	34.9%	18.4%	1.90	41.0%	19.2%	2.13
Italy	47.5%	28.4%	1.67	44.7%	25.2%	1.77
Netherlands	33.4%	16.4%	2.04	35.9%	16.6%	2.16
Austria	35.8%	16.9%	2.12	39.1%	17.3%	2.26
Portugal	34.8%	26.4%	1.32	27.0%	22.4%	1.20
Sweden	40.8%	18.2%	2.24	39.7%	17.2%	2.31

Source: Elaboration on Eurostat – EU-SILC dataset

[31] Processing performed on data collected by the Eurostat platform, EU-SILC ratio given by the percentage amount of the immigrant unit at risk and social exclusion divided by the amount of the native unit at risk and social exclusion, data available online.

The difference between foreigners (44.7%) and Italians (25.2%) as regards this phenomenon is 19.5 percentage points. The difference calculated Italy is higher than Portugal (22.4% risk of poverty and social exclusion of natives) which has a difference of 4.6 percentage points with foreign citizens, Germany (21% risk of poverty and social exclusion of natives) 18,3% gap with the foreign population, the Netherlands (16.6% risk of poverty and social exclusion of natives) 19.3% difference with the foreign population and lower than Belgium (18.8% of the total unit), Greece (28.3% of total units), Spain (27% of total units), France (19.2% of total units), Austria (17.3% of total units) and Sweden (17.2%) with respectively gaps of 20.3%, 22.7%, 29.4%, 21.8%, 21.8% and 22.5%, scaled by countries in the order mentioned in the current paragraph.

7. Conclusions

The management of migratory flows is assuming greater importance, especially in countries such as Italy, where the aging population risks seriously compromising income capacities, closely linked to the amount of people able to actively participate in the production cycle.

Of course the problem of managing migratory flows does not end with the ability to govern entries and exits from the country, but above all with the possibility of providing those arriving in the new country with a chance to study, work, and reach levels of income and welfare similar to those of the native population; the real problem is essentially that of integrating foreigners into the life of the host country.

In a previous work[32] we have already verified that there is still a strong gap between the native and immigrant populations, with the latter able to obtain less stable employment, working a generally lower number of days, and consequently having lower income levels; moreover, educational qualification seems to offer less protection capacity for immigrants both with respect to the possibility of finding a job and to wage level.

The data presented here seem to confirm the discrimination between natives and non-natives, with a lower participation in the labour market

[32] A. CICCARELLI, A. DE DOMINICIS, M. DI DOMIZIO, E. FABRIZI, E. TOTA (2022), *Immigrazione, impatto socio economico e mercato del lavoro*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.), *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli.

and a greater risk of entering the area of poverty, with dynamics that appear to be shared in the major European countries; moreover, the structural gap seems to have increased during the pandemic period.

Furthermore, it should not be forgotten that the line of reasoning was based on aggregate data and that, presumably, the dynamics at area level could hide even greater differences, above all in a country like ours where different regions show large differences in income levels and participation in the labour market.

For proper management of the migratory phenomenon, it becomes crucial to monitor the foreign population throughout the process of integration with the native population, whose habits they must not only imitate but above all share levels of education, participation in society, income, etc.

The drastic loss in fertility rate, if not adequately supported, risks compromising the country's future growth; especially in the short term, a policy of family support in order to increase the fertility rate does not appear to be enough to significantly reverse the constant aging of the population. It therefore appears necessary to no longer look at the migratory phenomenon with fear and detachment, but rather as an opportunity to be seized in order to rebalance the demographic structure of the population and help us enlarge the employment base. Only in this way will it be possible to ensure the sustainability of the economic and social system as well as that of public finances, with evident positive impact on overall income levels, on the pension system and more generally on the welfare state.

Chapter 33

THE ROLE OF LINGUISTIC AND CULTURAL MEDIATORS IN MIGRANT RECEPTION: SOME PRACTICAL INSIGHTS

Francesca Vaccarelli

ABSTRACT: *This paper aims at outlining the pivotal role played by linguistic and cultural mediators as facilitators of the relationship and communication between migrants just received, the sociocultural context and the services they will exploit, such as healthcare services, social services, working services and educational services. Mediators acts on different levels, that is illustrative and informative (reception and guidance of migrants), linguistic and communicative (translation of verbal and non-verbal messages), cultural and intercultural (facilitating communication) and psychological-relational (analysis of implicit and explicit needs, prevention and management of conflicts) (Luatti 2011). Some practical insights will be offered to better implement good practices in improving linguistic and cultural mediation programmes for migrants in Europe.*

1. Introductory notes

Mixed migration movements [1] bring together people from different regions, who speak different languages, usually lesser-used languages, and who belong to different cultures and may have different needs – they can be refugees or belong to a group of international migrants. The first

[1] According to the *IOM Glossary on Migration* (2019), mixed migration movements are movements, usually irregular, of large number of people that are on the journey together, that use same routes and means of transport, but that have varying needs and profiles, which include refugees, asylum seekers, trafficked persons, unaccompanied and separated children (UASC) and migrants in an irregular situation.

step in assisting them is providing them with tools for expressing their thoughts, needs, fears, concerns, feelings, etc. and making all of them understandable to the host community. [2]

Concerning that point, an issue that has received relatively little attention so far has been interpreting – broadly speaking, including also mediation – for asylum seekers and refugees. Although there are a few seminal works on the subject, it is clear that the influx of migrants and refugees into Europe in recent years claim a more focused approach to the role of interpreting in the processes and procedures associated with the migration crisis. Beginning in 2015 large waves of migrants arrived in Europe, with around 4.7 million of them entering European Union countries. Thus, from the beginning of 2014 to the end of 2015 the number of asylum applications to Europe more than doubled from around 40,000 to 100,000. Citizens who had been victimized or were fleeing their conflict-torn lands, or families looking for a place where they could earn a living, often risked their lives to reach Europe. This still ongoing trend has become known as the "European migrant crisis" or, perhaps more accurately, the "European refugee crisis." The sheer number of people affected by this crisis and the gravity of their situation is impossible to ignore.

Therefore, in the wake of such a massive influx of migrants, the need for linguistic and cultural mediation has increased sharply both in the receiving Countries and in the territories that migrants and asylum seekers cross to reach their destinations. [3] These needs, however, have often not been adequately met. This failure may be attributed to lack of experience, inflexible social and institutional structures, and infrastructures that make it difficult for receiving States to respond to communication exigencies. At the same time, these more or less responsive reactions are often rooted in a lack of political will to appropriately fund initiatives that aim to bridge cultural and linguistic gaps. Nonetheless, recession and austerity have forced EU Member States not being able to fully implement and integrate these policies. [4]

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[2] M. MARJANOVIĆ, A. HARBUTLI (2021), *Standards on Cultural Mediation in Protection*, Crisis Response and Policy Centre, Belgrade.

[3] M. SCHUSTER, L. BAIXAULI-OLMOS (2018), *A Question of Communication: The Role of Public Service Interpreting in the Migrant Crisis – Introduction*, in *The European Legacy*, 23(7-8), 733-737.

[4] A survey on these aspects has been carried out by TIME (Train Intercultural Mediators for a Multicultural Europe) project partnership in 2015 and

Integration policies, which are considered one of the major pillars in migrant policies in Europe, have proved to be very important to national and local community life both for natives and migrants. They facilitate the establishment of good communication and mutual understanding between different cultures, promote awareness and sensitize all parties involved on otherness issues, promote access to public services and enhance services provided. To that end the role of linguistic and cultural mediation has been regarded as catalytic. It is important nevertheless that linguistic and cultural mediation be exercised by trained and experienced professionals who obtain all necessary knowledge, skills and competencies to promote and not to hinder its scope.

2. Interpretation and mediation

Before we proceed to our investigation on the need for linguistic and cultural mediation in migrant settings, it is worth considering the relation between interpretation and mediation and to clarify the distinction. The aim of interpretation is to convey the meanings of what is said during an interpersonal interaction as accurately as possible. Linguistic and cultural mediation is a much wider and a more enriched means of communicating messages from sender to receiver and vice versa. It may be regarded as a bridging of cultures, meanings, silent languages, terms, collocations. In this light, one can say that interpretation and linguistic and cultural mediation are two facets of interpersonal communication necessary for the success of the latter, despite the different approach each one follows. It seems the same distinction that is between the term 'linguistic mediation', referred mainly to activities related to translation and linguistic interpretation, and 'cultural or intercultural mediation', referred to a type of activity that deals

2016. Such a partnership brings together universities, VET centres, organizations active in migrant integration and public authorities from seven countries – Austria, Belgium, Germany, Greece, Italy, Poland, Portugal. The aim of the project is to explore practices of training and employing intercultural mediators throughout the EU. It promotes the exchange of good practices in the field of intercultural mediation by proposing model training programmes for both intercultural mediators and their trainers. TIME also analyses existing structures in the partner countries and proposes recommendations for the validation of training for intercultural mediators. This project has been funded with support from the European Commission.

with mediating between different cultures with a focus on socio-anthropological aspects. [5]

In pragmatical terms, at many interpretation events, such as conferences, seminars, meetings, etc., participants belong to the same speech community. This means that even though they might come from different countries and speak different languages they all share knowledge of the subject of a conversation. For example, at a conference of neurologists everyone shares the same scientific background. The only gap separating them is the language gap. The interpreter helps create proper communication among them by making sure that all sides have understood what the other side has said. The interpreter transfers linguistic content properly by adjusting for idiomatic expressions, local references, manners of speech, etc. When the interpretation event is taking place outside such formal settings as conferences, seminars and meetings, and moves in informal settings of daily life such as hospitals, police stations, social welfare centres, etc. then not everyone taking part in the interaction is from the same speech community. Additionally, there are various kinds of human responses influenced by culture involved in the interaction and this creates a huge difference in communication. In this case the culture gap becomes wider than the gap presented by words. The interpreter must make more adjustments in order to ensure that everyone has understood everyone else. If the interpreter is to ensure proper communication in such settings, they will be operating more than interpretation. They will naturally begin to perform linguistic and cultural mediation. This will broaden their role in the interaction making them an equal participant in the communication instead of being a passive and invisible medium. [6]

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[5] V. TONIOLI (2016), *Una figura da ri-definire. Il mediatore linguistico e culturale*, in C.A. MELERO RODRÍGUEZ (ed.), *Le lingue in Italia, le lingue in Europa: dove siamo, dove andiamo*, Venezia, 165-176.

[6] It is worthy of remark the crucial, yet often underestimated role that interpreters play in asylum interviews. An asylum applicant who does not speak the language of the country of asylum will be reliant on an interpreter to present their claim accurately. Similarly, if the interviewer is to assess the applicant's claim effectively and fairly, they have to rely on the interpreter to facilitate communication.

Therefore, the interpreter has a very critical role in the communications. The asylum seeker's matter must be interpreted into another language comprehensively and accurately, so that the authority can reach a fair decision in the matter of a person seeking international protection. The interpreter is in a

Therefore, interpretation differs from linguistic and cultural mediation mainly in so far as the former focuses mostly on the language structure and not on the inner meanings of a message. Furthermore, interpretation is a registered profession with all legal rights, consequently a professional interpreter needs to follow certain standards and a code of conduct including among others the verbatim conveyance of involved parties' wording without adding or omitting anything or without expressing one's own opinion, agreement, disagreement or stance and without substituting any of the involved parties. On the other hand, linguistic and cultural mediation emphasizes matters of culture and language and focuses on the complex and at the same time interdisciplinary character of communication; that is to say, it combines elements from psychology, sociology, science of communication, political science, etc. Moreover, a linguistic and cultural mediator has built up specific skills and competencies such as recognizing the body language, having basic knowledge of legal and procedural issues, having highly developed empathy and awareness, confidentiality and neutrality and so on. Furthermore, in contrast to interpretation, linguistic and cultural mediation is not a registered profession; thus, the role of linguistic and cultural mediators is not clearly defined and acknowledged. Therefore, the practice does not follow a standardized code of conduct, and it is not exercised within a certain legal framework.

Linguistic and cultural mediation often refers to the intercultural aspect of communication and mindfulness in different cultures, related mainly to migration and multiethnic and intercultural societies. It includes capacity-building, as it is designed to recreate intermediate structures among individuals, communities and the State.

This is the reason why linguistic and cultural mediation is considered as the most proper, low cost and win-win approach to ensure migrants integration in the host society. Linguistic and cultural mediators have to

key position, communicating messages in situations which have a bearing on the rest of the asylum seeker's life. The interpreter's task is to faithfully and accurately interpret the message from one language to another. The interpreter must not give advice, express their opinions to the parties or voice their views on the matter being interpreted. The interpreter's role is solely that of a messenger who has to ensure fairness, accuracy and confidentiality. On this topic, see, for example, FINNISH IMMIGRATION SERVICE and EUROPEAN REFUGEE FUND (2010), *Interpretation in the Asylum Process. Guide for interpreters*, available online; UNHCR Austria (2017), *Handbook for Interpreters in Asylum Procedures*, available online.

integrate this crucial point to act as a bridge between institutions and migrants. Their role and status are a key issue in building the local intercultural management policy. Comparing European experiences on the matter is fruitful to better understand the difficulties and national specificities in order to suggest a relevant local policy in migration and integration. Linguistic and cultural mediators remind of the legal framework of immigration and integration in order for migrants to find their place to live and work in the host societies. The third person at the heart of the mediation is a key element – no mediation would be possible without this third person. A mediator "enables individuals and even more so social or cultural groups not to live in isolation, withdrawn, un-recognised by the rest of the population, ignored, despised or rejected in meaninglessness and violence".[7]

According to Vještica and Sjekloća,[8] linguistic and cultural mediation is a form of three-way joint communication that mediators facilitate by interpreting speech and cultural content between two or more culturally different individuals or groups in order to promote mutual understanding. In an IOM – Migration Health Division publication about health mediation models,[9] linguistic and cultural mediation is referred to as "all activities that aim to reduce the negative consequences of language barriers, sociocultural differences, and tensions between ethnic groups".

Definition of the role and duties of linguistic and cultural mediators is the first step towards understanding the frameworks and good practices of linguistic and cultural mediation in European Union Member States. The following are the main tasks for integrating migrants with different capacities in European countries, based on two reports:[10]

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[7] M. WIEWORKA *et al.* (eds.) (2002), *Mediation: a European comparison*, editions de la DIV, Saint Denis.

[8] S.A. VJEŠTICA, V. SJEKLOĆA (2020), *Protection through Cultural Mediation: Handbook*, Crisis Response and Policy Centre, Belgrade.

[9] INTERNATIONAL ORGANIZATION FOR MIGRATION (2017), *Health mediation models in the EU: Examples of good practices*, available online.

[10] ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (2017), *Local and central government co-ordination on the process of migrant integration: good practices from selected OSCE participating States*. Policy study, available online; H. VERREPT (2019), *What are the roles of intercultural mediators in health care and what is the evidence on their contributions and effectiveness in improving accessibility and quality of care for refugees and migrants in the WHO European Region?* (Health Evidence Network Synthesis

– interpreting;
– bridging intercultural gaps (cultural brokerage);
– establishing and maintaining a rational, friendly atmosphere for negotiation;
– building trust between parties (by resolving misunderstandings);
– preventing conflict and supporting resolution;
– acting as a "reality check" by showing parties each other's perspectives; and
– advocacy, if necessary (in certain situations, a mediator might have to ensure the quality of services and ensure protection of migrants' rights.).

3. Need for linguistic and cultural mediation

As we highlighted in the sections above, as a response to the increase in migration trends due to armed conflicts, persecution, climate change and poverty, a lot of new services were developed at state and local level, provided by either government or NGOs and international organizations. Given that communication is the first step in expressing needs and feelings, one of the essential services that have been developed is linguistic and cultural mediation.

Facilitation of communication is important in addressing both immediate and non-immediate needs, since persons on the move, getting in contact with communities that do not share their languages, culture, religion, and experiences, have difficulties in understanding each other. Vulnerable situations in which refugees and migrants find themselves can further put them at risk of violence, trafficking, exploitation, extortion, forcibly participating in crimes, etc. Linguistic and cultural mediators help bridge the gaps caused by the encounter (even clash) of two or more very different cultures and linguistic and cultural mediation can be used as a tool for the protection of refugees and migrants, as it is provided in an approachable manner and applies different tools and techniques that help in promoting mutual understanding and acceptance of others. [11]

Following the needs of refugees, migrants and asylum seekers, linguistic and cultural mediators can operate in different fields, i.e., set-

Report 64), World Health Organization Regional Office for Europe, Copenhagen.

[11] M. MARJANOVIĆ, A. HARBUTLI (2021), *op. cit.*

tings, in accordance with their roles and responsibilities set by the organizations, agencies or institutions that engage them.

Linguistic and cultural mediators' work starts with providing linguistic and cultural mediation on the field at places where migrants and refugees gather, hotspots, reception centres, etc. Besides interpreting, linguistic and cultural mediators are involved in the identification of new arrivals and vulnerable persons, providing information on risks of irregular movement and existing services, and taking part in NFIs' (Non-Food Items) distribution. Afterward, linguistic and cultural mediators assist in the registration of these persons at accommodation centres and provide cultural mediation there. Further activities depend on the individual needs of beneficiaries, so linguistic and cultural mediators perform their work in other settings, such as healthcare and mental health settings, inclusion and integration, educational and social welfare settings, etc.,[12] as we will discuss in the following section.

While working in all of these settings, linguistic and cultural mediators should follow standard principles that apply to linguistic and cultural mediation: do no harm, confidentiality, responsibility, accuracy, ethics, safety, equality, and treat others with respect and dignity. These principles are not limited to linguistic and cultural mediation but are followed by other actors working in the humanitarian field.

Lorenzo Luatti, in his 2011 volume,[13] focuses on the benefits that linguistic and cultural mediators can offer to migrants, stating that mediation makes it possible for migrants to access *appropriate* services, supporting operators in the change and taking charge phase. It offers spaces for listening, attention to communication, the possibility of choice, recognition and conscious interaction, promoting the participation and inclusion of the subjects involved (both individuals, migrant families, and foreign communities) through a process of *empowerment*, enhancement of subjective resources, of reactivation of the communication skills of the parties, of gradual autonomy of the decision (to those who otherwise would not be able to be heard), in a new vision of citizenship and social cohesion suitable for current pluralism. Luatti also emphasizes the fact that linguistic and cultural mediators' task is not on-

[12] M. Marjanović, I. Idris, A. Harbutli, V. Sjekloća, R. Matuško (2023), *Student's Handbook on Cultural Mediation*, Crisis Response and Policy Centre, Belgrade.

[13] L. Luatti (ed.) (2011), *Mediatori atleti dell'incontro. Luoghi, Modi e nodi della mediazione interculturale*, Gussago.

ly making communication possible between people who speak different languages, but also mediating between two different cultures. A mediator must therefore be able to master verbal and non-verbal language, which includes the use of space, gestures and facial expressions. These vary according to culture, gender relationships, age groups and conventions of politeness. Linguistic and cultural mediators must therefore be professionals of languages and cultures.

4. Linguistic and cultural mediators' roles and responsibilities

The most important role of linguistic and cultural mediator is, of course, to facilitate communication between two or more persons, and the most important role of linguistic and cultural mediators as protection actors, besides facilitating communication, is to facilitate asylum seekers, refugees and migrants in accessing services and rights. But linguistic and cultural mediators' roles differ from setting to setting and from context to context in which they operate. There are two main contexts that significantly impact the role of linguistic and cultural mediators: transit and integration contexts. [14]

Transit context, especially in situations of large mixed movements, involves the mobilization of a lot of organizations, institutions and agencies in order to respond to the needs of refugees and migrants. Most of the settings where linguistic and cultural mediators would be performing cultural mediation are open gathering spaces, refugee centres, healthcare services, mental health facilities, social welfare, and inclusion activities. Some of these settings would require additional assistance to the beneficiaries in the form of protecting their rights on sight.

Integration context usually starts when persons decide to stay in one place and integrate into the community of that place. Sometimes, integrating into a particular community might be challenging and linguistic and cultural mediators could facilitate this process for beneficiaries.

With respect to these contexts, there are three additional activities besides facilitating communication, that linguistic and cultural mediators perform independently on the field: facilitation of identification of vulnerable persons and groups (usually conducted at places where refugees and migrants are gathering or residing, and usually, newly arrived persons are the ones who are being identified), facilitation of access to

[14] S.A. VJEŠTICA, V. SJEKLOĆA (2020), *op. cit.*

services (responding to urgent needs, such as accommodation, medical, legal, social and psychological needs, NFIs, so they can assist them in obtaining them or refer them to relevant institutions, agencies, organizations) and facilitation of access to rights (in that case, linguistic and cultural mediators take on the role of protection actors.).

A fundamental aspect for an effective mediation is having gained skills and competencies. Since linguistic and cultural mediators will be performing cultural mediation in highly sensitive settings, and they will be involved in the protection of refugees, asylum seekers and migrants, it is necessary that they have adequate skills and competencies, as well as that they have completed relevant trainings. [15]

Skillset needed for linguistic and cultural mediators can be divided into four distinct groups: language skills, translation and interpretation skills, interpersonal skills and cultural competencies.

Language skills are of essential importance. Linguistic and cultural mediators should be fluent in at least two languages, of which one is their native language. They can be fluent in one dialect of a language, but it would be preferable if they also understand and speak the standard language and are able to recognize dialects of that language.

As to translation and interpretation skills, although the term translation is used as an umbrella term for all kinds of translation and interpreting modes, the main distinction between them is that translation deals with written and interpreting with verbal or signed communication. Hence, skills and trainings required for successful translation and for successful interpreting differ greatly. Basic translation and interpre-

[15] Luatti, in a paper delivered on the occasion of the Conference "La mediazione interculturale. Strumento per le politiche di inclusione e di contrasto alle disuguaglianze" (Ravenna 26.11.2020), retraces the main stages of intercultural mediation in Italy, which have come through four phases, sometimes temporally intertwined and overlapping: experimentation and creativity (end of the 1980s-beginning of the 1990s), development of the training level (end of the 1990s-beginning of the 2000s), diffusion and isolation (mid-2000s), autonomous action towards the establishment of a professional category (2004/2005). To these four phases we can add two subsequent ones (from 2005 to the present): the phase of pluralisation and dispersion of the mediators' working fields and institutional action aimed at the recognition of the professional figure, and the phase of progressive and substantial retreat of mediation (in the institutional agenda, in the debate, in the fields of intervention, in the resources), following the poor implementation of integration policies in Italy and in Europe, only partially mitigated by the already mentioned "European refugee crisis" affecting the second decade of the 2000s.

tation skills that linguistic and cultural mediators should acquire are preparation for translation and interpretation assignments, terminology research, translation and interpretation techniques, such as note-taking, memory development techniques.

As far as interpersonal skills are concerned, they include empathy, that is the ability to participate in another person's experience by means of imagination and the ability to connect to persons emotionally, active listening, that is the ability to listen and understand people and it comprises observing, using non-verbal communication, facial expressions, linguistic nuances and silence; good communication skills, i.e., the ability to convey the message in as few words as possible, the ability to speak in a concise and clear manner, adjusting pitch and tone, interpreting and using body language, gestures, facial expressions and eye contact, and being aware of appropriate social distance during conversation and the amount of permissible physical contact.

Cultural competence represents a set of skills, knowledge, attitudes, behaviours and abilities to interact and communicate effectively with persons of different cultures, ethnic origin, religion, socioeconomic background, etc..[16]

It has to be considered that linguistic and cultural mediators in migrant settings may face risks when mediating for migrants of the same country as the relationship of trust can be broken by a perception that linguistic and cultural mediators are traitors as are a go in-between with national institutions,[17] therefore it is essential to build trust and adopt neutrality in such contexts.

5. Different settings involving linguistic and cultural mediation

Linguistic and cultural mediators are usually engaged in different settings by NGOs or agencies operating in fields that provide services to refugees and migrants. The main migrant settings where linguistic and cultural mediators operate are the following:

– accommodation centres;
– hotspots;

[16] N. ŽEGARAC *et al.* (2016), *Pojmovnik Kulturno Kompetentne Prakse*. Novi Sad, Pokrajinski zavod za socijalnu zaštitu.

[17] D. FILMER, F.M. FEDERICI (2018), *Mediating Migration Crises: Sicily and the Languages of Despair*, in *Eur. J. Lang. Policy*, 10(2), 229-253.

– healthcare settings;
– mental health settings;
– social welfare centres;
– education institutes;
– inclusion and integration settings;
– remote settings.

The most usual setting in which linguistic and cultural mediators operate are accommodation centres, that is places where a large number of asylum seekers, refugees and migrants reside, such as asylum centres, reception centres, specialized facilities for children, safe houses, one stop centres, etc. These centres and institutions are almost always managed by government institutions or agencies, rarely by non-governmental organizations. In these environments, linguistic and cultural mediators usually mediate between refugees and migrants and other actors representing governmental or non-governmental sectors, on some occasions even between different groups of refugees and migrants themselves. Governmental actors that are present in such setting are specialized agencies that provide accommodation and hospitality and multiple other services, members of the police force, centres for social welfare, healthcare providers, etc., while non-governmental actors usually include representatives of humanitarian and protection agencies (e.g., organizations providing legal aid, cultural mediation and interpretation, psychosocial support, etc.) and international organizations within their mandate as well. Besides mediating, linguistic and cultural mediators are also trained to do certain tasks independently but in close collaboration with other service providers. These involve providing information, identification of vulnerable persons, referral of persons to competent institutions and organizations, reporting to competent authorities, providing escort to various institutions, conducting cultural orientation sessions for beneficiaries, facilitating negotiation and support conflict management, providing psychological first aid, etc.

Linguistic and cultural mediation is increasingly needed in places where refugees and migrants gather (hotspots). With the growth of the population in mixed movement, the need has arisen to establish places where access to basic human needs, information and connections would be available. Some of these hotspots, while persons are on the move, has even become temporary unofficial accommodation places, mostly in remote areas near the official country borders sites. Since a large number of refugees, migrants and asylum seekers come through already es-

tablished routes, many of which are operated by smugglers, in some cases it is difficult to reach out to people in these places, as they tend to be misinformed, distrustful and sceptical of any assistance offered by anyone who does not speak their language. Therefore, linguistic and cultural mediators, as professionals who speak their language and have knowledge of their culture, can help in building trust, which is the first step to further communication. Many persons on the move sleep rough, which means seeking shelter in abandoned buildings, parking lots, parks, set up tents in woods or sleeping in open air. Being in harsh conditions, such as lack of water and food supplies and bad weather increases the chances of migrants, refugees and asylum seekers being exposed to many forms of abuse, exploitation and violence, especially the vulnerable and undocumented ones among them. Also, poor hygiene and lack of proper water quality put them at risk of infectious and other diseases. Additionally, since staying outside of designated accommodation could violate local laws and policies, they could face the risk of detention, imprisonment or other legal consequences. In this setting, linguistic and cultural mediators often work independently and provide information about the risks of irregular movement and staying undocumented, inform about available accommodation and asylum procedures in the country, work on identifying vulnerable categories and further referral to relevant organizations and institutions.

Linguistic and cultural mediation in healthcare setting is also known as medical interpreting and healthcare interpreting and is usually distinguished from other modes of interpreting because it requires an additional set of skills and specific knowledge. Standard elements that characterize linguistic and cultural mediation in a healthcare setting are escort, facilitation of communication, facilitation of access to rights and psychosocial support. Facilitation of communication and facilitation of access to rights are interconnected elements, since they aim to the same goal. Linguistic and cultural mediators often serve as facilitators in this case too, especially in situations when the balance of power relations is disturbed, which is most often the result of a communication barrier. These communication barriers include not being familiar with the language, culture and health system of the host country, health illiteracy and low level of education, feelings of shame caused by various reasons.

Special attention has been paid to interpreting and cultural mediating in mental health setting due to multiple factors. These factors include exposure of asylum seekers, refugees and migrants to extreme violence, threats to life, torture, war-related distress, brutality and subsequent psy-

chological trauma, and also the experience of losses, such as losses of family and social networks, valued social roles, etc. Linguistic and cultural mediators performing mediation between psychologists, psychotherapists and psychiatrists will be participating in highly intense and emotionally charged conversations, interviews, counselling sessions or therapies. Therefore, the standard requirements for linguistic and cultural mediators working in this setting is to have necessary competencies, such as language proficiency, knowledge of specialized vocabulary, culture-specific knowledge, to have a set of interpersonal skills, more importantly empathy and emotional resilience, as they need to be able to listen and reproduce highly stressful and emotional stories. What differs linguistic and cultural mediation in mental health setting from linguistic and cultural mediation in healthcare setting is the need for the long-term involvement of linguistic and cultural mediators, in order to ensure confidentiality, build trust and ease the therapeutic process for beneficiaries. Nonetheless, it has to be said that the shared experience between linguistic and cultural mediators and those whom they assist makes their work emotionally challenging and the risks for them of burnout are extremely high. Linguistic and cultural mediators may adopt personal coping strategies, but well-integrated psychological support and supervision are necessary to fully protect them, particularly those exposed to extremely sensitive issues around mental health, violence or torture.

Linguistic and cultural mediation in social welfare centres involves social workers, temporary and legal guardians, various outreach workers, case managers of social welfare centres, etc. Since this is a very sensitive setting, involving vulnerable persons, such as children, LGBTI+ persons, or GBV – gender-based violence – survivors, who might additionally be at risk, it is very important to follow established standards for providing cultural mediation in this background, to have adequate levels of language, interpretation, cross-cultural and professional competencies.

Linguistic and cultural mediation in education institutions, such as primary and secondary schools, plays an important role in developing links, promoting effective relationships between people from different cultures and in facilitating the social inclusion of refugees and migrants. [18] If children reside in asylum centres, reception centres or facili-

[18] See M. CATARCI (2016), *Intercultural Mediation as a Strategy to Facilitate Relations between the School and Immigrant Families*, in *REIFP*, vol. 19, no. 1,

ties for unaccompanied or separated children, linguistic and cultural mediators could provide cultural mediation for these centres' facilitators in assisting children to understand school material.

The aim of linguistic and cultural mediation in inclusion and integration settings – i.e., refugee hubs, integration centres, reception centres, asylum centres, places embracing a large number of people – is to "develop links and promote effective relationships between people from different cultures", [19] which leads to easier and faster inclusion and integration into host communities. One of the greatest obstacles for successful inclusion and integration is language barrier. Acquiring the language of the host community or language the host community can understand (lingua franca) might be a very difficult endeavour and a long process for some people, especially older persons. Another obstacle for inclusion and integration are cultural differences that seem hard to surmount. Linguistic and cultural mediators can significantly help in overcoming this obstacle by providing information, additional explanation, promoting cultural acceptance and bridging the cultural gap between communities. Special attention should be paid to recognizing value systems that violate human rights and laws and regulations of the host country. Another aspect of inclusion and integration where linguistic and cultural mediators' assistance can be useful is helping asylum seekers, refugees and migrants obtain housing, while also providing feedback to service deliverers to help make their facilities and programmes more accessible. Together with finding housing, linguistic and cultural mediators also support refugees and migrants integrate into the labour market by providing them with useful information with regard to CVs, job applications, and interviews.

Linguistic and cultural mediation can be also provided remotely and well-known and developed remote ways include over-the-phone interpreting (OPI) and video remote interpreting (VRI). However, communication needs exceed these two platforms and digital communication technologies nowadays offer a wide range of ways of online communication, such as social media sites and apps, online games, multimedia, text-based communication (such as instant messaging and chatrooms), online learning platforms, etc. The need for remote cultural mediation has increased with the emergence of epidemics and pandemics caused

127-140; K. ASSENZA (2017), *La Mediazione Culturale in Ambito Scolastico: Una Strategia per l'inclusione*, in *IJT*, 25(1), 31-43.

[19] M. CATARCI (2016), *op. cit.*

by infectious disease outbreaks, such as Covid-19, Ebola, etc., since they impose limitations on movement and face-to-face contact. In order to ensure quality service, it is important that linguistic and cultural mediators are computer-literate and to be provided with adequate equipment, including stable internet connection.

Besides these settings where the role of linguistic and cultural mediators is defined, there are some other settings and activities where linguistic and cultural mediators might be engaged, because professional interpreters are not available or because there are no interpreters for a specific language, which is often the case with languages of limited diffusion (LLD). Such settings are usually police stations and courts and activities include police questioning, asylum hearings, court hearings, etc. Another activity that sometimes might be asked to linguistic and cultural mediators, either in these settings or during the reception of beneficiaries, is to assess the country of origin according to the language analysis – the so-called LADO, Language Analysis for the Determination of Origin.[20]

6. Some concluding remarks

The studies carried out for this contribution give rise to some final considerations for improving linguistic and cultural mediation services for migrants and refugees in the EU.

As we have highlighted in previous sections, a linguistic and cultural mediator is someone who facilitates communication between one person or a group of people and a service provider or an institution, including cultural elements both verbal and non-verbal, act as a bridge between cultures, convey information as accurately as possible, while being faithful to the source, and can give support to both parties regarding cultural attitudes, beliefs and behaviours. They operate as a community liaison giving shape to a three-way joint communication.

Research conducted confirmed the central role of linguistic and cultural mediation services in facilitating social cohesion between migrants and their countries of destination in various settings, to achieve a smooth integration of immigrants into the host societies. The definition

[20] P.L. PATRICK (2012), *Language Analysis for Determination of Origin: Objective Evdence for Refugee Status Determination*, in P.M. TIERSMA, L.M. SOLAN (eds.), *OHLL*, New York, 533-546.

of the necessary qualifications and the status of linguistic and cultural mediators at European level would contribute to the official identification of this professional figure and enhance integration processes. Promoting minimum professional standards for assessing the profile and competence of linguistic and cultural mediators, providing for ethical standards, mainstreaming gender into linguistic and cultural mediation to ensure that the practices are sensitive to gender dynamics and responsive to gender-based needs, regularly monitoring linguistic and cultural mediation processes to ensure quality assurance and harmonization of standards across the EU, providing support to improve the performance of linguistic and cultural mediators, including mentorship programmes and peer-to-peer schemes, are some general recommendations for strengthening linguistic and cultural mediation services for integration. Robust, structured training for linguistic and cultural mediators, qualification of mediators, possibly enshrined in legislation, gender mainstreaming in intercultural policies and practices and awareness-raising about various forms of discrimination are the main areas to be fostered.[21] Such recommendations can be used in similar contexts, where the changing demographic character of migrant flows requires a novel approach to the needs in the host countries. European societies could benefit from the exchange and transfer of good practices, structures and systems in linguistic and cultural mediation for migrants, as many Member States have a similar need to facilitate cohesion with migrants but above all that migrant integration is a European issue and not just one of national scope.

[21] M. ERDILMEN (2021), *Frameworks and Good Practices of Intercultural Mediation for Migrant Integration in Europe*, IOM UN Migration, available online.

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Chapter 34

IRREGULAR MIGRANTS IN MOROCCAN LAW. AN ANALYSIS OF ARABIC TEXTS

Paola Viviani

ABSTRACT: *Regular and irregular migrations to and from Morocco are discussed in Law n° 02-3. Some researchers and members of transnational organizations who have thoroughly discussed this are very critical for several reasons. Among them, Abdelkrim Belguendouz, in 2009, but not only then, underlined that Moroccan Parliament simply corrected the French edition that is at the origins of the Arabic text. In this paper the latter will be examined. In particular, Part II, where the legislator has foreseen the penal provisions to be imposed upon irregular migrants, migrant smugglers and other kinds of offenders supporting illegal migration.*

1. Defining the scopes of the research

This paper intends to discuss the legislation concerning the irregular migration currently in force in Morocco. As a case study, Part II of the fundamental legal document al-Qànùn[1] raqam 02-03 *al-muta'alliq bi-dukhùl wa iqàmat al-ajànib bi 'l-Mamlaka al-Maghribiyya wa bi 'l-hijra ghayr al-mashrù'a/*Loi n° 02-03 *relative à l'entrée et au séjour des étrangers au Royaume du Maroc, à l'émigration et l'immigration irrégulières*[2] will be taken into consideration. In order to carry out the analysis, this law's history will be traced first; subsequently, the scrutiny of the specific articles under observation will follow, and will be mainly based on their Arabic text.[3] This does not mean, however, that it is not appropriate or,

[1] Transliteration of Arab script is provided in a over-simplified form.

[2] *Dahir n° 1-03-196 du 16 ramadan 1424 (11 novembre 2003)*, in *al-Jarìda al-Rasmiyya*, 5160, 3817 ff.; in French, in *Bulletin Officiel*, 5162, 1295 ff.

[3] Here the term 'text' is used as in S. ŠARČEVIĆ (1997; 2000), *New Approach*

better, necessary, also to compare the Arabic text with the French edition, and this for at least two reasons.

First of all, the great majority of the legal acts emanated in the country,[4] notoriously have both an Arabic and a French version. Although French has not been either *the* or *an* official language in Morocco since 1956 and the extensive policy of arabisation has been continuing, this European language still holds a high status to the extent that French versions of Arabic texts are also published, and as such they become authoritative and therefore legal documents.[5] We have seen this, for instance, in the case of Law n° 02-03 in one of the six editions of the *Bulletin Officiel.*[6] However, sources reveal that when choosing the language to be used for the initial draft of a legal file, the legislators' preference depends on varying circumstances; they may conceive and compile it in either Arabic or French alternatively and it will be subsequently *translated* into the other idiom. Seemingly, there is no generally fixed rational reason behind this work method. Broadly speaking, when a legal document promulgated in Morocco is being approached some questions immediately arise. The main ones are: 1) in which language was this text originally written or at least drafted?; 2) would it be possible to know or infer what led to this decision?; 3) was it a target-oriented choice? Or, again, a language- and culture-oriented choice? For instance, if Arabic took precedence over French, did it happen on the ground of its status as the now 'oldest' official language in Morocco;[7] or, on the contrary, was French preferred because of its high reputation in the field of administration and bureaucracy? This practice is a heritage of the country's colonial past as well as, and perhaps more importantly, a useful tool for official international communication. In fact,

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to Legal Translation, The Hague-London-Boston, 20-21: "Legally binding instruments, including authoritative translations, are also referred to as authentic texts. A text becomes authentic only by reason of its adoption or other mode of authentication […]. Equally authentic texts of the same instrument existing in two or more languages are sometimes referred to in legal discourse as parallel texts […]".

[4] A. NAIMI (2015), *Traduction officielle des textes juridiques : le Maroc à la peine*, in *La vie éco*, 05.10, available online. See also R. ALUFFI (2012), *La lingua dei diritti arabi*, *CDCT working paper 10-2012*, Comparative and Transnational Law, 3, 1 ff., available online.

[5] Available online.

[6] Nonetheless, cf. R. ALUFFI (2012), *La lingua dei diritti arabi*, cit.

[7] Cf. the 2011 Moroccan Constitution, Art. 5.

we have to consider that for historical reasons the nowadays *lingua franca*, the 'neutral' English, has not been widespread in Morocco until recently.[8] Moreover, legislative texts may have been inspired by former regulations in force in other countries which were not written in Arabic.[9] They may even represent an irrefutably 'faithful' translation-transposition-adaptation of a legal text adopted elsewhere: this clearly emerges from the analysis of Law n° 02-03, from which much food for thought can be drawn. Not only was it written down in French and then rendered in Arabic because it was profoundly influenced by a previous text adopted in France, but it was harshly criticised for being in some points no more than a mere copy of the above-mentioned document, as I will explain. This aspect is exactly the other reason why it may be very useful or unavoidable to compare the Arabic text with the French one of Law n° 02-03.

2. From a literary-oriented to a language- and culture-oriented analysis of migration related to Moroccan situation

Within the framework of the research project on *International Migrations, State, Sovereignty, and Human Rights: Open Legal Issues* that has eventually led to the release of this volume, a paper[10] was produced in 2022. This was an attempt to provide insight on the way how the tremendously relevant topic of Moroccan migration to Europe, and specifically to Spain, between the 1990s and the very beginning of the 2000s,

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[8] A. ZOUHIR (2013), *Language* Situation *and Conflict in Morocco*, in O. OLA ORIE, K.W. SANDERS (eds.), *Proceedings of the 43rd Annual Conference on African Linguistics*, 271 ff.; K. ZIAMARI, J.J. DE RUITER (2015; open edition, 2016), *Les langues au Maroc : réalités, changements et évolutions linguistiques*, in B. DUPRET, Z. RHANI, A. BOUTALEB, J.-N. FERRIÉ (éds.), *Le Maroc au présent. D'une époque à l'autre, une société en mutation*, Casablanca, 441 ff., available online; H. KHIRA (2022), *Diversité linguistique au Maroc: Réalité, attitudes et représentations*, in *Ziglôbitha, Rev. ALLC*, 5, 17 ff., available online; H. R'BOUL (2022), *The spread of English in Morocco: Examining university students' language ontologies*, in *English Today*, 38, 72 ff., available online.

[9] See, for instance, for all, C. SAGGIOMO, P. VIVIANI (under publication), *La Charte Nationale de l'Environnement et du Développement Durable du Maroc: une analyse comparée des versions arabe et française*.

[10] P. VIVIANI (2022), *La migrazione dal Marocco alla Spagna: echi letterari*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.), *Migrazioni internazionali: questioni giuridiche aperte*, Napoli, 181 ff.

has been dealt with in national literature, namely in those works produced by Moroccans in the many languages used by them, both at home and in their adopted homes all over the world. On such grounds, and despite the mainly literary approach followed, the analysis that was then undertaken could not prescind from considering social, economic and legal features in both Europe and Morocco, which have clearly proved to be fundamental in moulding the history of migration flows from Morocco to Europe over the decades. After all, the scrutiny of these elements turned out to be a major task in order to acquire awareness of the motives lying behind the migratory phenomenon, specific of the Alawite Kingdom – and not only in the years considered –, as well as of the reasons why migrants' experience took on the multiple forms it did. Such forms have been registered and described in a good number of literary works that let dramatic or tragic traits emerge, on material, psychological and moral levels.

This paper paved the way to deepen the study of Moroccan migration flows from various standpoints and helped to arouse many questions. Among them: how did the Moroccan government face the migration issues especially after King Muhammad VI's ascent to the throne, whose reforms have often been lambasted by observers, despite the fact that his reign had been favourably welcomed at its beginning? It's worth repeating that Law n° 02-03 was criticised and attacked too for various reasons. For instance, the fact that it is, in some passages, in analysts' opinion, a mere copy of a former French *Ordonnance*. However, what may have this implied linguistically, culturally, socially and politically speaking? Besides, would it be possible to investigate and understand the role played by the *Secrétariat Général du Gouvernement* (General Secretariat of the Government, SGG henceforth) [11] in this specific case study? How did SSG work in this circumstance, given its fundamental multiple functions and its special tasks? Among them, and by means of its "division de l'interprétariat général", "la traduction officielle des projets de textes législatifs et réglementaires émanant des administrations publiques. Elle peut, également, assurer tous autres travaux de traduction qui lui sont adressés par le dites administrations"? [12] Moreover, in a recent document, the procedure to be adopted by SSG

[11] For more information, cf. Décret n. 2-83-365 du 7 joumada I 1405, 29 janvier 1985, *relatif à l'organisation du secrétariat général du gouvernement*, Art. 13, available online.

[12] *Ibidem*.

along the path of a legal text's conception, drawing up and revision before publication in the *Bulletin Officiel* are clearly provided. As far as translation is concerned, this document reads that: "c'est le SGG qui assure la traduction des textes en langue française ou arabe selon la langue dans laquelle est rédigé le projet et, si le projet lui parvient rédigé dans les deux langues, il assure la vérification de la conformité des deux versions. Cette étape de traduction ou de vérification de la conformité est très importante car c'est à ce moment qu'apparaissent parfois les imperfections du projet et qu'il est possible de les rattraper". [13]

Varieties of Arabic and Tamazight as well as French, Spanish and other languages have been and are being normally used by Moroccans within their country borders, thus perfectly shedding light on the Alawite Kingdom's composite essence and socio-political and cultural pluralistic situation. Some of the mentioned languages are not Moroccans' mother tongues, as is the case of the MSA, Modern Standard Arabic. The latter and French are the most utilised languages for both oral and written communication in specific fields. There is no room here to thoroughly delve into the major issue of plurilingualism and multilingualism in Morocco, but it's important to at least offer some glimpses into the situation of Arabic and French in the country, mostly because of their primacy in the legal field. It's exactly here that their relevance fully emerges from both a linguistical and cultural perspective, since they effectively influence every individual's daily experience by means of the message that the legislators want to divulge through them. Actually, these two languages and, what is more, their legal codes continuously confront one another, and this implies that also the cultures expressed by such codes are in constant mutual dialogue, since "le droit est par essence une science sociale où la coutume, comme ensemble de mœurs et de modes d'organisation sociale, constitue une source. Chaque terme juridique se caractérise par sa haute technicité dont le trait culturel est omnipresent". [14] In addition, it is in the legal sector that the forces at work in Moroccan society play an exceedingly essential role – as occurs in every nation, actually. In fact, languages may also have the ef-

[13] *Procedure d'elaboration des projets de textes legislatifs et reglementaires au Maroc.* Présenté par Bensalem Belkourati Conseiller juridique des administrations au Secrétariat Général du Gouvernement, available online.

[14] H. BENTALEB (2017), *Aspects de la variation linguistique au Maroc. Terminologie juridique entre l'arabe et le français : quels écarts culturels ? cas de La Moudawana*, in *2L*, 1.1, 46.

fect of triggering relevant consequences both on individuals and communities, due to personal and collective background and to the conflicts existing between the different groups living in a same societal context. As history teaches, legal texts do often ignite protests, and that can happen not only because of the norms contained therein, but also based on the way they are written: so, can the chosen linguistic code also ignite protests? In this context and on the ground of what has been stated so far, this is an absolutely rhetorical question.

Moroccan society is traditionally pluralistic, *pluriel*,[15] given its members' multifarious and overlapping ethnical, geographical, historical and cultural background. This is a fact that, needless to say, cannot be underestimated or overlooked by any means when dealing with the various and diverse communities living side by side in this fascinating country, where borders or limits are very often blurring and consequently difficult to grasp sometimes. Morocco has been underlining its own pluralism more and more over the recent decades, which has implied putting in place ever growing *inclusiveness*, an element characterising the Monarchy's policy of general reform in multiple sectors. Obviously, one of the most interesting and critical facets of Moroccan society is its linguistic situation, in which the already mentioned concept and practice of inclusiveness has been playing a more and more decisive role since 2011, when the new Constitution was enacted. In fact, despite all the critics and perplexities that this Constitution faced and would face also later,[16] it is always worth highlighting how much it proved to be revolutionary in that particular historical juncture. As far as the linguistic and cultural issues are concerned, thanks to this Constitution and precisely to Art. 5, where it was stated that although Arabic remained *the* country's official language, Tamazight was *a* official language and that it would undergo a process so as to achieve a political and juridical recognition of complete equivalence with Arabic, reconciliation policies tried to renew the dialogue between the centre and periphery (in this case, Amazigh community) on a new ground. This way, Morocco moved a

[15] This term recalls the famous book *Maghreb pluriel* (1983) by outstanding Moroccan man of letter Abdelkébir Khatibi ('Abd al-Kabìr al-Khatìbì, 1938-2009).

[16] P. VIVIANI (under publication), *Literature as a Mirror. The Search for Peace and Pacification in Moroccan Society as Depicted in Banāt al-ṣubbār (2018) by Karīmah Aḥdād*, in F. FISHIONE, A. MONACO (eds.), *Be Like Adam's Son – Theorising, Writing and Practising Peace in the Arab Region*, Sheffield.

step forward along the path that would lead, in a hopefully near future, to a thorough equality not only between the two idioms, but also between their cultures and their respective communities' members. Contemporaneously, legislators devoted the said Art. 5 to other linguistic and cultural realities that were and are an integral part of Moroccan society, thus paving the way to a new vision and mission in this area as well. For instance, if on one hand we read that "the State works for preservation of Hassani", on the other hand, "it sees to the coherence of linguistic policy and national culture and to the learning and mastery of the foreign languages of greatest use in the world, as tools of communication, of integration and of interaction (by which) society (may) know, and to be open to different cultures and to contemporary civilizations".[17] Although no specific foreign language is cited, you can easily assume that there is a hint to English, and even more to both Spanish and French, whose relevance in certain geographical areas in the country is undoubted.

As far as the legal sector is concerned, then, French is notoriously widespread. Arabic is the idiom of Islam and of culture, even though it is not, as has already been said, Moroccans' mother tongue; on the other hand, French is still considered *the* language of bureaucracy in Morocco and it has been defined as "elitaire" and "utilitaire".[18] It certainly is a seemingly unavoidable tool for interaction and intercommunication in specific societal environments and institutions both nationally and internationally. Both (legal) Arabic and (legal) French have been charged with a fundamental task, i.e. to express post-colonial Morocco's legal system, which is very far from being univocal. On the contrary, this legal system is considered to be a dual one which is expressed in two different languages, each of them being characterised by its own culture and therefore its own culturemes that powerfully come into light in every single legal text. Researchers saw in the Moroccan legal system a special kind of bijuralism within a bilingual context where "le droit français conflue avec le droit musulman (bijuridisme) et le français cohabite avec

[17] Quotations from the English translation by W.S. Hein & Co. Inc., available online.

[18] L. MESSAOUIDI (2013), *Contexte sociolinguistique du Maroc*, in P. BLANCHET, L. MESSAOUIDI (sous la direction de), *Langue française et plurilinguisme dans la formation universitaire et l'insertion professionnelle des diplômés marocains en sciences et technologies*, préparation éditoriale assurée par V. DELAGE, Rennes, 28, available online.

l'arabe (bilinguisme). Ainsi, le dualisme juridique – ou bijuridisme – et le bilinguisme ont provoqué une nécessité incontestable de traduction du langage juridique français vers l'arabe dans le but de préserver et garantir la diffusion des normes juridiques *erga omnes* dans les deux langues".[19] Besides, if the *Mudawwana* is seen as the text where specific Arabo-Islamic tradition is most evident,[20] you cannot deny that also other meaningful legal texts offer relevant culturemes in both the language and the iconography used.[21] So, on this point, what could be said regarding Law n° 02-03? Would it be likely to detect culture-specific items therein too?

3. Law n° 02-03: a history

Migration policies adopted in Morocco during King Muhammad VI's reign have their fulcrum in the legal text used here as a case study, Law n° 02-03, which can be considered as a turning point in the country's context. Indeed, it is a clear break with a past characterised in this field by the presence of different shattered laws regarding migration all of them promulgated during the colonial era. This legislative document is therefore of utmost importance, because it represents the first text within Moroccan legal system to deal with in – and out-migration flows contemporaneously and to have had "l'avantage d'unifier et de "décoloniser" migration law.[22] It's worth remembering that many observers have always claimed that several matters concerning migrants' conditions were not taken into account in this text appropriately, which caused an accusation of violation of human rights and led jurists and activists to give vent to vehement general disapproval. Over the decades, however,

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[19] KH. EL KRIRH (2020), *L'enseignement-apprentissage du français juridique en contexte francophone: approche contextuelle et interculturelle*, in *Revista de lenguas para fines específicos*, 26.2, 10, available online. See also, i.e., M. RYANI (2020), *La traduction juridique au Maroc*, in *Maghrib al-qànùn*, 17 septembre, 12.4, available online.

[20] H. BENTALEB (2017), *Aspects de la variation linguistique au Maroc*, cit.

[21] C. SAGGIOMO, P. VIVIANI (under publication), *La Charte Nationale de l'Environnement et du Développement Durable du Maroc*, cit.

[22] KH. ELMADMAD (2009/01), *Les Migrants et leur droit au Maroc*, in *Les Migrants et leur droits au Maghreb*, Avec une référence spéciale à la Convention sur la protection des droits de tous les travailleurs migrantssous la direction de Khadija Elmadmad, San Domenico di Fiesole (FI), 111, available online.

its norms have triggered a number of further reforms. These elements have been the object of a number of studies and will not be discussed here.[23] Nonetheless, it is important to recall, although very briefly, this law's history and the motivations lying behind its conception. Suffice it to remind here, then, that it was mainly originated by a sort of reaction to terroristic acts. For instance, outstanding Moroccan researcher on migration issues Abdelkrim Belguendouz, who has been analysing extensively this law and the circumstances that led to its adoption, wrote: "La question principale est la suivante: comment la politique européenne a-t-elle été conduite pour aboutir à la dérive sécuritaire et comment la politique menée par un Etat-tiers comme le Maroc en est-elle arrivée à partager cette démarche et à tendre à adopter avec l'UE, dans le domaine migratoire, un partenariat d'essence sécuritaire"?[24] He concluded that this text represents a consequence of what can be labelled as the security drift ("dérive sécuritaire") pursued by the UE after the attack to the Twin Towers in New York on September 11st 2001.[25] It is comprised within a unique plan against terrorism and, specularly, against irregular migration, often considered as a way of facilitating the movement of potentially dangerous people.[26] Besides, it is also manda-

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[23] A. BELGUENDOUZ (2009/07), *Le Maroc et la migration irrégulière: Une analyse sociopolitique*, San Domenico di Fiesole (FI), available online. Among others, see also G.M. PICCINELLI (2022), *Il ruolo del Marocco nella cooperazione euro-africana ed euro-mediterranea in materia migratoria*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.), *Migrazioni internazionali*, cit., 141 ff.

[24] A. BELGUENDOUZ (2005), *Expansion et sous-traitance des logiques d'enfermement de l'Union européenne: l'exemple du Maroc*, in *Culture et Conflits*, 57, 155 ff. (page not specified in the open edition file), available online.

[25] *Ibidem*.

[26] However, Belguendouz remarked in June 2003, when the bill was being discussed: "La problématique migratoire ne peut se ramener à l'émigration irrégulière et à l'immigration clandestine, alors que l'essentiel de la loi et de sa philosophie, se place sous le signe de la criminalisation de la migration et de sa pénalisation, y compris pour les immigrés et les émigrés eux mêmes, et pas uniquement contre les organisateurs de la traite, les rabatteurs, les passeurs et les mafias avec tous leurs complices. […] En résumé, nous constatons que les objections que suscite le projet de loi 02-03 sont de très loin supérieures à l'acquis de ce texte. Plus que d'amendements partiels à introduire au niveau du parlement, ce projet a besoin d'être totalement refondu dans un autre état d'esprit". Cf. A. BELGUENDOUZ (2003), *Le Maroc vaste zone d'attente?*, in *Plein droit*, 57, 39 ff.

tory to remember the EU actions adopted in order to stop or at least contain growing migrations flows from North Africa and Sub-Saharian Africa, and especially from Morocco, a country not only of out-migration for its own nationals, but also of in-migration as well as of transit and out-migration for so many people coming from other areas in the Continent, and particularly from the very Sub-Saharian region. Morocco was then, in that period, in a very difficult position before its UE partner, which expected the country to manage irregular in- and out-migrations. As can be read in various studies carried out on this issue, like those by Belguendouz or the report released by GADEM (*Groupe antiraciste d'accompagnement et de défense des étrangers et migrants*) in 2009, in Morocco, on the wake of the attacks in Casablanca, Law n° 02-03 concerning migrations and Law n° 03-03 regarding terrorism[27] were conceived, discussed and adopted,[28] which gives clear testimony of the fact that migration policies started to be strongly intertwined with those of counter-terrorism. The truth to say, and again on the basis of the detailed analysis carried out by Belguendouz, Law n° 02-03's draft, which had already been presented on 5 February 2003, was discussed in Parliament after May 16th, but only too quickly and thus not thoroughly. This means that the five suicide bombings that took place in Casablanca on May 16th accelerated the whole process of its adoption.[29] These five terroristic episodes of course deeply affected public opinion, thus spurring legislators and policymakers to come up with strategies aimed at confronting possible future attacks from Islamic terrorism and from the

[27] "Contrairement à une idée largement répandue même au sein des milieux spécialisés, il n'existe pas de loi antiterroriste en droit marocain. Les dispositions de la loi n° 03-03 promulguée par dahir le 28 mai 2003 ont été versées pour partie dans le Code pénal et pour partie dans le Code de procédure pénale. Pour entrer en vigueur, il fallait que le contenu de cette loi soit intégralement coulé dans ces deux codes. Et c'est désormais à l'un et/ou à l'autre code qu'il convient de faire référence lorsqu'il est question d'une ou de plusieurs dispositions de lutte contre le terrorisme. Par commodité, on parlera de dispositif juridique de lutte contre le terrorisme". Cf. M. AMZAZI (2013), *Essai sur le système pénal marocaine*, Ch. II. *La menace terroriste*, Rabat, fn. 205.

[28] N. KHROUZ, A. OUARDI, H. RACHIDI (2009), *Maroc. Le cadre juridique relatif à la condition des étrangers au regard de l'interprétation du juge judiciaire et de l'application du pouvoir exécutif*, Rabat, 12 ff., available online.

[29] "The choice of targets suggested that the terrorists wanted to destroy symbols of Morocco's religious tolerance and modernity". A. BOTHA (2008), *Terrorism in the Maghreb. The Transnationalisation of Domestic Terrorism*, ISS Monograph Series, 144, 91.

envisaged perils originated from growing irregular migration flows. In fact, in Belguendouz's reconstruction of the events, two main features emerge that are of great relevance, also in an exquisitely linguistic and cultural appraisal of Law n° 02-03. These characteristics – which, I dare say, are deeply entwined between one another – are perfectly epitomised in the following passage, based on Belguendouz's gauge: "Cette loi, à laquelle on a beaucoup reproché d'être, en partie, un "copier-coller" de l'ordonnance de 1945 française telle que modifiée par les lois Sarkozy de 2003, ne semble pas avoir été discutée et créée en fonction de la réalité marocaine mais semble plutôt répondre à une 'urgente' nécessité de montrer que le Maroc se dotait d'instruments de 'lutte contre l'immigration'".[30] Again, Belguendouz wrote elsewhere, thus reinforcing his harsh criticism expressed in the quotation provided immediately before, that this law is not but "un clonage sécuritaire et [...] un 'copier-coller' littéral de l'Ordonnance modifiée du 2 novembre 1945 en France dans sa version révisée la plus répressive [...]".[31] In a further study he added that "les parlementaires marocains dans les deux chambres – toutes tendances confondues – n'ont pas utilisé leurs attributions pour enrichir le texte gouvernemental par des amendements substantiels. Les seuls changements introduits, ont été liés essentiellement à la forme, en raison d'une traduction défectueuse du français vers l'arabe du projet préparé par l'administration".[32] The most important sentence, in the context of this essay, is the one regarding the state of the translation from French into Arabic as supposedly written up by SGG, given its pivotal and very delicate tasks. Likewise one can assume that perhaps the defects of the Arab edition were caused by the rashness of the process leading to the adoption of the law, which was indeed adopted on June 26th. Effectively, the French law that served as a source of inspiration for Moroccan legislators and policymakers, *Loi n° 2003-1119 du 26 novembre 2003 relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité: les dispositions con-*

[30] *Ivi*, 19, drawing from A. BELGUENDOUZ (2003), *Le Maroc non africain gendarme de l'Europe? Alerte au projet de loi n°02-03 relative à l'entrée et au séjour des étrangers au Maroc, à l'émigration et l'immigration irrégulières,* Salé. See also N.D. NDIAYE (2018), *L'implication des pays tiers dans la lutte de l'Union européenne contre l'immigration irrégulière*, in *Et. Intern.*, 49, 317 ff.

[31] A. BELGUENDOUZ (2005), *Expansion et sous-traitance des logiques d'enfermement de l'Union européenne*, cit.

[32] A. BELGUENDOUZ (2009), *Le Maroc et la migration irrégulière*, cit., 20.

cernant les maires,[33] had been debated in the Council of Ministers on April 30th and adopted on October 28th, then promulgated on November 26th, namely 15 days after Law n° 02-03 had been promulgated in Morocco. Therefore, the latter normative document underwent a shorter and swifter procedure than the law that was at its origins. Is this fact meaningful? Is this a further evidence of the Moroccan Government's will or even need to unequivocally assert itself as a bulwark defending the UE space against migration flows coming from Africa and from the very Morocco? Besides, it is likely to suggest that the two texts ran on almost parallel tracks, and so the overall, let's say, 'cultural' frameworks within which both laws can be inserted. Researchers who have been studying these laws comparatively have all come to the same conclusion: Law n° 02-03 imposes more severe penal provisions than the French law does, and this can well corroborate the fact that it was conceived to serve a main goal: "Permettre au Maroc d'assumer pleinement ses engagements envers ses principaux partenaires, notamment en matière de lutte commune contre la migration clandestine dans sa double composante nationale et étrangère".[34] That being the case, what is it likely to say about those articles that specifically concern irregular migration, that is those where the legislator has foreseen the penal provisions to be imposed upon migrants and the people who help them? May they reveal significant facets in a broadly cultural field? Or, on the contrary, are they devoid of culture-specific references? Besides, may the absence of these latter be considered per se as a significant element?

4. Law n° 02-03: some language remarks on Part II

When reading the official Arabic text of Law n° 02-03, one can clearly find key features of legal Arabic at a lexical, syntactical and textual level.[35] The 'combination' of these elements is expected to lead to an appropriate document in both form and content, that is consistent and cohesive, and serves relevant socio-political functions – broadly speaking, cultural functions. This means, for instance, that those in charge of drafting the document to be discussed within the body responsible for it may have resorted, among other elements, to "religious, culture-

[33] Available online.

[34] A. BELGUENDOUZ (2009), *Le Maroc et la migration irrégulière*, cit., 20.

[35] H. EL-FARAHATY (2015), *Arabic-English-Arabic Legal Translation*, Abingdon-New York, 31 ff.

specific and system-based terms",[36] which is indeed one of the main characteristics in legal Arabic. Actually, in Law n° 02-03 there are roots and consequently lexemes traditionally linked to the religious field that also belong to other semantic fields that are central in the discourse on migration and the security drift, the 'dérive sécuritaire' followed by Morocco in the wake of the UE policies regarding in-migration flows. Besides, the way how they are handled here, or, better, either their presence or their absence, is a feature that seems to be particularly significant.

Law n° 02-03 comprises 58 articles. It includes three parts, the first of them consisting of chapters and sections. Within Part I there is a chapter devoted to penal provisions for foreigners who commit offence, while Part II is specifically devoted to those penal provisions applicable in case of irregular in- and out-migration and to all kinds of designated offenders, both migrants and those who in various ways favour irregular migration flows:

I) Titre Premier.[37] De l'entrée et au séjour des étrangers au royaume du Maroc // al-Qism al-awwal. Dukhùl al-ajànib ilà al-Mamlaka al-Maghribiyya wa iqàmatuhum bi-hà (القسم الأول: دخول الأجانب إلى المملكة المغربية وإقامتهم بها) = Part I: The entry and residency of strangers in the Moroccan Kingdom;

Chapitre VII [*sic*]. Dispositions pénales // al-Bàb al-thàmin: Ahkàm zajariyya (الباب الثامن: أحكام زجرية) // Chapter VII [*sic*]. Penal Provisions, 42 to 49;

II) Titre II. Dispositions Pénales Relatives à L'émigration et L'immigration Irrégulières // al-Qism al-thànì. Ahkàm zajariyya tata'allaq bi 'l-hijra ghayr al-mashru'a (القسم الثاني: أحكام زجرية تتعلق بالهجرة غير المشروعة) // Part II. Penal Provisions relating to illegal migration (50 to 56).

From a swift comparative perusal of the mentioned 1945 Ordonnance, as modified by Loi n° 2003-1119 du 26 Novembre 2003 adopted during Nicolas Sarkozy's mandate as French Prime Minister, and of the Moroccan Law n° 02-03, it is likely to notice their similarity, as pinpointed by observers. In the text released in France, however, Arts. 19-21 regulate penal provisions without differentiating between, one might say, those regarding 'migrants *tout court*', on the one hand, and those

[36] Law n° 02-03, *passim.*

[37] Here the French edition is cited before the Arabic one on the basis of its chronological precedence.

relating to illegal migrants, on the other hand, as it happens in the Moroccan law, instead. What is very interesting is the way all offenders (both 'kinds' of migrants and those who favour them) and their first and foremost offence in general (that depends on the situations: lawless – or would-be lawless – entry to, stay in and exit from Moroccan territory, as I will briefly explain later on) are being defined and described. In particular, neither in the French text nor in the Arabic one terms like migration or others sharing its same root are explicitly mentioned, except in the law's title, the preamble of the Dahir n° 1-03-196 that promulgated it, Art. 4, the title of Part II and those of two abolished Dahirs quoted in Art. 58, where we read the lemma *hijra*.

In Part I, for instance, offenders are almost always referred to as foreigner(s); sometimes as (any) person. Art. 1 clarifies that foreigners are to be intended in this text as those people 1) who are not Moroccan nationals; 2) whose nationality is unknown; 3) whose nationality is difficult (or impossible) to identify. They belong to various categories of people: those who may have entered Morocco legally and then have not fulfilled the tasks required by this very law, or people whose status was not judged as legal by authorities the moment they reached the country. On the contrary, irregular migrants are not only those people "whose emigration has been entirely unlawful starting from their entry into the national territory, and whose identification is consequently difficult to establish",[38] because they either avoided border posts or submitted false documents or evaded the necessary formalities, but also those Moroccan nationals and those non-nationals who (try to) cross the country's borders unlawfully. For instance, in Art. 50 we find:

every person who illegally leaves Moroccan territory	كل شخص غادر التراب المغربيبصفة سرية

every person who stealthily enters Moroccan territory or leaves it	كل شخص تسلل إلى التراب المغربي أو غادره

In few passages within the part devoted to unlawful migration, the designated offenders here, that is irregular migrants, are also referred to

[38] R. Filali Meknassi (2019), *Moroccan migration law in storm*, in *RDCTSS*, 4, 141.

as foreigners. In Art. 52 this occurs so as to distinguish these offenders from offenders who are Moroccan nationals: أشخاص مغاربة كانوا أو أجانب = be they Moroccan people (nationals) or foreigners. Otherwise, illegal migrants simply are الأشخاص = the people/those who. Likewise, in Art. 56, the term أجانب = foreigners is to be found, which seems to create some perplexity in the interpretation of the whole document. Indeed, if apparently there is a will of giving way to a strong divide between foreigners (Part I) and irregular migrants (Part II), nonetheless there is a sort of blurring line between the status of those migrants whose situation is normalised in Part I, on the one side, and the status of those who are considered absolutely irregular, on the other side. What is more, it is noteworthy that, contrarily to Part I, where stress is put on the penal provisions imposed upon offenders, namely both the foreigner and the trasporter or the transporter company that may have favoured the foreigner's border crossing, in Part II one article regulates the offence committed by irregular migrants (Art. 50). Instead, in the following articles stress is also put on law enforcement officials or those entrusted with controlling the entry and exit flows or those in charge of trasport, or organised crime, or any other person who, upon payment or not, helps, supports, arranges or facilitates illegal migration. A differentiation is also made between those who do so habitually and those who do not. Moreover, important penal provisions are envisaged for members and heads of criminal gangs if people suffer permanent injury or die during border crossing (in the latter case, life imprisonment is envisaged). The former offenders may be deprived of property (i.e., the means of transport used and not only). Offenders other than irregular migrants are, for instance, hinted at as:

Art. 51: كل شخص = every person (who) // هذا الشخص = this person

every person who gives help and support in the committing of the above mentioned offences if…	كل شخص قدم مساعدة أو عونا لارتكاب الأفعال المذكورة أعلاه إذا كان

This sentence is characterised by synonym couplets followed by a number of coordinated clauses, four if-clauses, which are also features of legal Arabic, where the exact ways how people can illegally help irregular migrants are provided. In three of them the previously given logical subject, كل شخص, is not repeated; in the fourth of such clauses,

instead, the subject is clearly stated and is provided in a slightly distinct form – هذا الشخص –, because the sentence structure requires some change. We also have usual cases of archaic terms: المذكورة أعلاه = above mentioned.

Again, in Art. 52 offenders are indicated by means of: كل من = whoever // الفاعل = the offender // أعضاء كل عصابة أو كل اتفاق = the members of every organisation or *entente* // أعضاء العصابة أو الاتفاق = the members of the organisation or the *entente* // الأشخاص الذين = the people who. In Art. 53 we can read, among others: مرتكبي الجريمة = those/the offenders who committed the crime/offence. In Art. 54, الشخص المعنوي الذي = legal person who.

The aim of this swift excursus was to show the absence, except for the points hinted at above, of terms sharing the root *hjr*, hence the verbs *hajara yahjuru* and *hàjara*, migrate. As already mentioned, there is a strong similarity between the Arabic text and the French one. In my opinion, this is a quite interesting facet, since in other legal texts regarding migration there is a redundancy of this root.[39] Moreover, it must be highlighted that, even though in the 1945 French *Ordonnance* as modified in 2003 there is not an excessive use of lemmas that come from the Latin verb *migrare*, these latter are slightly more numerous there than they are in the French edition of the Moroccan law. Since the Arabic text is a translation of the Moroccan law proposal in French, it is characterised accordingly by an extremely rare use of lexemes coming from the verbal root *hjr*. However, can this specificity be due only to the fact that the Arabic text is a 'faithful' translation-adaptation of the original French draft, or is it likely to imagine a different reason? The method followed leads to suppose that the Moroccan legislator may have decided not to emphasise lexemes deriving from *migrare* and *hjr* for cultural motivations, given the predominantly Muslim target he addresses. In this case, within the framework of bilinguism and bijuridism that characterises Moroccan legal system, there may have been a will not to hurt the *idem sentire* of a whole community and Nation. In fact, that might represent a cunning strategy to 'smoothily', though very incisively, get to the point. Apart from every other consideration expressed by observers, there is a sense, I would say, that this way lawmakers and policymakers may have aimed at expressing their attitude to shed light on an appalling truth of overall and excruciating misery that completely af-

[39] An example is in H. EL-FARAHATY (2015), *Arabic-English-Arabic Legal Translation*, cit., 46.

fects human beings' lives before, during and after migration, which, however, cannot be expressed by means of a redundant use of the verbal root *hjr* here. Notoriously, the term *hijra* has relevant religious, social and political connotations, since it immediately reminds of Prophet Muhammad's and His Companions' migration to Yathrib (622), the would-be Medina, an event that marked both the breaking up of tribal ties, which was considered an absolutely negative fact, and the birth and strengthening of a novel socio-political pact founded on the newly revealed and accepted religion, hence the beginning of the Islamic community or Nation, the *Umma*.

5. Conclusions

After a reading of the whole document, and of Part II in particular, what emerges is that the two editions of this same legal text have almost no significant differences, except, obviously, for those specificities proper to each (legal) language. Nonetheless, for instance, the sentence structure is inverted in Art. 52, par. 4, so that in the Arabic text the reference to Art. 294 of the Moroccan Penal Code precedes the reference to the designated offenders, whereas in the French edition the contrary occurs. Such a choice does not seemingly originate from any synctatical imposition coming from Arabic grammar rules, but from a need for variation, as compared to the other articles and paragraphs contained in this part, thus imitating the French edition where also this passage does not conform to the same structure normally followed in other passages. By doing so, however, the translators from French into Arabic emphasised the provisions established in the Moroccan Penal Code. You can imagine that this fact may have its justification in the will to give preminence to a norm belonging to a code proposed and promulgated after the French colonisation during King Hasan II's reign in 1963 and modified during his son's reign. This might be considered as further evidence of the need felt by new Moroccan governance to differentiate itself from a colonial past which, however, seems to be still dominating its present. At least, that would dramatically happen in the difficult period that led to the adoption of Law 02-03. As a matter of fact, its reading, and specifically of Part II, lets the observer get in touch with a text which might be labelled as an alert close examination, with an almost scientifical approach, to the concrete situation of the ways how illegal migration to and from Morocco was being carried out, supported and even fostered

those days. Contemporaneously, this legal text highlights the untold that, in its turn, comprises a good deal of practices whose existence, despite being widely known, was perhaps ignored – or feignedly ignored. Otherwise the 'rethorics' of migration remittances, return migration and their key role in the socio-economic development of Morocco and of other countries involved in in – and out-migration would be dangerously challenged.[40] The truth behind these latter policies almost appears as a taboo that never should be broken. The proof is in preterition, or omission, of specific terms, despite the fact that they are in key passages of this very law. A reticence or aposiopesis that necessarily remarks the untold, as rhetoric teaches us.

The migration policy in Morocco has come a long way since 2003 and especially since 2013. In fact, many observers have been discussing its attitude towards a humanitarian approach to migration, although many problems and criticalities still remain. As Yousra Abourabi puts it: "While working to preserve its good relations with the EU by conceding to part of its policies for outsourcing control of migration, Morocco affirms its own inward migration policy. It does so by inserting itself consensually into the multilateral frameworks of the UN and the AU so that the conduct of its policy of migratory openness is protected and does not assert itself as a counterpoint to European interests. […] the Moroccan position remains very consensual since it is not very disruptive, but also significantly different from the European official discourses because it willingly desecuritises migration".[41] From a security drift to desecuritisation: were the seeds of such a policy already in the text of Law 02-03, in a way?[42]

[40] N. SORENSEN (2004), *Migrant Remittances as a Development Tool: The case of Morocco*, IOM-OIM Migration Policy Research, Working Papers Series, 2, 1 ff., available online.

[41] Y. ABOURABI (2022), *Governing African Migration in Morocco: The Challenge of Positive Desecuritisation*, in *IDP*, 14, available online.

[42] A. BELGUENDOUZ (2009), *Le Maroc et la migration irrégulière*, cit., 20 ff.