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MIGRATIONS RULE OF LAW AND EUROPEAN VALUES

edited by

Angela Di Stasi
Rossana Palladino Angela Festa

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FOREWORD

Angela Di Stasi*

This book is the result of a cultural project conceived by a number of lecturers of the University of Salerno and widely shared among scholars from Italian and foreign universities and research institutions. Following a call for proposals, the Legal Observatory on the European Area of Freedom, Security and Justice (FSJ Observatory), together with the PRIN research groups "*International Migrations, State, Sovereignty and Human Rights: Open Legal Issues*" and the Jean Monnet Module "*Democracy and Rule of Law: A New Push for European Values* (EU-DRAW)", invited young researchers (PhD candidates, postgraduates, postdoctoral fellows, etc.) to present and discuss their scientific work in a workshop held at the University of Salerno on 25 May 2023.

The research carried out in this volume is based on the awareness that the (always) sensitive management of the migration phenomenon remains an extremely critical factor for each European State, for the Union as a whole, and for other international organizations. It is also a general "challenge" to the effective guarantee of human rights (both substantive and procedural), in conflict with the values of the rule of law and respect for human dignity, as a unifying element in the affirmation of the indivisibility of human rights in relation to the rights of migrants.

The book examines the topic along a line of inquiry reflected in the three parts into which the volume is divided – Part I: *Management of Migration Policies and the Impact on Rule of Law and European Values*, Part II: *Human Rights Issues at Borders between International*

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and European Law, and Part III: *Detention of Migrants and Vulnerable Situations as (also) a Rule of Law Concern*.

The variety of perspectives is testified by the multilingual nature of the work and by the fact that, instead of general conclusions, each chapter has its own, responding to its scientific peculiarities and its specific framework of analysis.

It is hoped that the analyses and reflections presented in this volume – without claiming to exhaust the many facets of a complex prism – can help in finding solutions to fill the gaps in the current legal instruments from a human rights perspective, with a view to ensuring the effectiveness of existing guarantees and strengthening them towards the construction of an "integrated" European judicial area.

MIGRATIONS, RULE OF LAW, AND EUROPEAN VALUES: AN INTRODUCTION

Rossana Palladino - Angela Festa***

The need to control and manage migratory flows is one of the crucial nodal points of the policies of European States and the Union as a whole, and lies at the heart of the functioning of the European integration process, which has been severely affected by a prolonged crisis.

The refugee crisis has highlighted the limitations in the legal design and implementation of EU asylum policy, notably a structural solidarity deficit.

In terms of design, the most critical aspect is the so-called "first entry clause" established in the Dublin Regulation[1]. The principle underlying the current system is that responsibility for examining an asylum application lies primarily with the Member State that played the greatest role in the applicant's entry into the European Union. In practice, this means that responsibility for the majority of asylum applications rests with a limited number of Member States – those in which third-country nationals in an irregular situation first arrive. These States are also required to support reception measures for asylum seekers, ac-

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[1] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013, *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, in OJ, L 180 29 June 2013.

cording to a rule that undermines the effectiveness of the solidarity principle enshrined in Art. 80 of the Treaty on the Functioning of the European Union (TFEU)[2].

In terms of implementation, the European Union's main objective in dealing with the large migratory flows (especially from the Mediterranean and Balkan routes) has been to protect the security of Member States by implementing policies aimed at containing the flows and

[2] According to which the migration and asylum policies and their implementation "shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States…". Among the different meanings of solidarity in the European regulatory framework, this guiding principle of immigration and asylum policies can be attributed a triple role: preventive (as mutual assistance to improve the implementation, control, and repression of violations); rebalancing (as mutual assistance between States to rebalance, in case of difficulty, the existing unequal distribution of common responsibilities); emergency (such as mutual assistance in emergency situations). The last role has been concretized in decisions no. 2015/1523 and 2015/160117, adopted by the Council based on Art. 80 and Art. 78(3) TFEU. See G. MORGESE, *La solidarietà tra gli Stati membri dell'Unione europea in materia di immigrazione e asilo*, Bari, 2018. See also D. THYM, E. TSOURDI, *Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimension*, in *Maastricht Journal of European and Comparative Law*, 2017, n. 5, pp. 605-621; F. MAIANI, *The Reform of the Dublin system and the dystopia of 'sharing people'*, ibid, pp. 622-645; A. MELONI, *EU visa policy: What kind of solidarity?*, ibid, pp. 646-666; E. TSOURDI, *Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System*, ibid, pp. 667-686; V. MITSILEGAS, *Humanizing solidarity in European refugee law: the promise of mutual recognition*, ibid, pp. 721-739; C. FAVILLI, *La politica dell'Unione in materia d'immigrazione e asilo. Carenze strutturali e antagonismi tra gli Stati membri*, in *Quaderni costituzionali*, 2018, no. 2, pp. 361-388; G. MORGESE, *Solidarietà e ripartizione degli oneri in materia di asilo nell'Unione europea*, in G. CAGGIANO (ed.), *I percorsi giuridici per l'integrazione. Migranti e titolari di protezione internazionale tra diritto dell'Unione e ordinamento italiano*, Torino, 2014, p. 365 ss.; M. MESSINA, *Il fallimento della solidarietà nella gestione dei flussi migratori: la responsabilità degli Stati membri con la complicità delle Istituzioni dell'Unione?*, in A. DI STASI, L.S. ROSSI (eds.), *Lo spazio di libertà, sicurezza e giustizia. A vent'anni dal Consiglio europeo di Tampere*, Napoli, 2020, p. 477; M.I. PAPA, *Crisi dei rifugiati, principio di solidarietà ed equa ripartizione delle responsabilità tra gli Stati membri dell'Unione europea*, in *Costituzionalismo.it*, 2016, no. 3, p. 295; F. BUONOMENNA, *Solidarietà e responsabilità nella giurisprudenza di Lussemburgo*, in M. SAVINO, D. VITIELLO (eds.), *Asilo e immigrazione tra tentativi di riforma e supplenza dei giudici: un bilancio*, Napoli, 2023, pp. 79-90.

combating irregular migration and secondary movements. To mitigate the impact of the migration crisis on public opinion and national political equilibria, the EU and its Member States also engaged in the "externalization" of EU border control[3], outsourcing it to non-EU States with the aim of limiting departures and "preventing" the arrival of migrants and refugees on EU territory. This has also been achieved through the use of informal readmission agreements negotiated and adopted in a non-transparent manner – the "EU-Turkey Statement" of March 2016 is quite emblematic, as well as the recent implementation of the "Comprehensive Partnership Package" between the EU and Tunisia[4] of 16 July 2023 – which inherently lack guarantees of democratic and judicial control. Moreover, through the so-called "hotspot approach", EU migration policies have introduced selective measures to categorize individuals arriving in Europe, distinguishing between those who are "entitled" to seek asylum and those allegedly travelling for "economic reasons" and therefore channeled through detention and return routes.

Such an approach, as implemented in its entirety, not only poses a particular challenge to the principle of solidarity as a guiding principle of migration policy, but also raises numerous questions as to its com-

[3] Especially following the 2015 European Agenda on Migration (Comunication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, *A European Agenda on Migration*, COM(2015) 240 final, Brussels, 13.5.2015). On the concept of "externalization" see T. GAMMELTOFT-HANSEN, *The Externalisation of European Migration Control and the Reach of International Refugee Law*, in E. GUILD, P. MINDERHOUDI (eds.), *The First Decade of EU Migration and Asylum Law*, Leiden, 2012, pp. 273-298; F. CHERUBINI (ed.), *Le migrazioni in Europa. UE, Stati terzi e* migration outsourcing, Bordeaux, Roma, 2015; R. ZAIOTTI (ed.), *Externalizing Migration Management. Europe, North America and the spread of 'remote control' practices*, London-New York, 2016.

[4] See E. NALIN, *Esternalizzazione delle frontiere nel nuovo Patto sulla migrazione e l'asilo e accordi di "cooperazione" con i Paesi africani stipulati dall'Italia*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.), *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli, 2022, pp. 297-324. In the same volume, for some considerations on the role of Frontex, see I. INGRAVALLO, *Il rispetto dei diritti fondamentali nell'azione dell'Agenzia europea della guardia di frontiera e costiera*, pp. 111-140.

patibility with the EU constitutional order and the values on which it is based (Art. 2 TEU)[5].

While the strengthening of border controls and cooperation with third countries to manage migratory flows are not *per se* illegitimate, since States retain the right to control their borders, the methods used in these "securitization" strategies raise concerns because of their potential impact on the rule of law and the guarantees it embodies, such as legal and procedural certainty, non-arbitrariness, transparency, democratic control and participation in the decision-making process, and respect for fundamental human rights as protected by international and EU legal instruments.[6]

As well known, the rule of law and respect for fundamental rights constitute different, albeit closely related[7], sets of values within the meaning of Art. 2 TEU. On the one hand, the principles of the rule of law are a prerequisite for the enjoyment of fundamental rights and freedoms. On the other hand, fundamental rights are an essential component of the very notion of the rule of law[8]. According to the Eu-

[5] F.L. GATTA, *Migration and Rule of (Human Rights) Law in the EU: A "Constitutional" Crisis*, re:constitution Working Paper, Forum Transregionale Studien 3/2022, available at https://reconstitution.eu/ working-papers.html.

[6] F. L. GATTA, *Migration and the Rule of (Human Rights) Law: Two "Crises" Looking in the Same Mirror*, in *Croatian Yearbook of European Law and Policy*, 2019, no. 1, pp. 99-133.

[7] According to O. MADER, *Enforcement of EU Value as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law*, in *Hague Journal on the Rule of Law*, 2019, p. 133 ff., spec. p. 141, "Amongst the values of Art. 2 TEU, the rule of law appears to be an 'umbrella principle', with its basic concept of legality and a wide spectrum of other guarantees it acts as 'backbone' for the protection of fundamental rights".

[8] L. PECH, *A Union founded on the rule of law: meaning and reality of the rule of law as a constitutional principle of EU law*, in *European Constitutional Law Review*, 2010, no. 6, pp. 359-396; ID., *The Rule of Law as a Well-Established and well-Defined Principle of EU Law*, in *Hague Journal on the Rule of Law*, 2022, p. 107 ff. at pp. 112-113; T. KONSTANTINIDES, *The Rule of Law in the European Union – the Internal Dimension*, Oxford, 2017, p. 83; L. D. SPIEKER, *From moral values to legal obligations – on how to activate the Union's common values in the EU rule of law crisis*, in *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper*, 2018, no. 28, p. 28; M. CARTA, *Unione europea e tutela dello Stato di diritto negli Stati membri*, Bari, 2020; A. CIRCOLO, *Il valore dello Stato di diritto nell'Unione eu-*

ropean Commission, this notion must be viewed as a "constitutional principle with both formal and substantive components […] intrinsically linked to respect for democracy and for fundamental rights"[9]. Indeed, since the 1970s, the Court has reaffirmed that the European Community is "a Community of law" in which the institutions and Member States are subject to review in terms of the conformity of their actions with the Treaty and with the general principles of law, of which fundamental rights are an integral part[10].

On the contrary, the migration crisis undermines the idea of an ever-closer Union of law and deepens the crisis of the rule of law[11], revealing the gap between the rights recognized on paper and the guarantees provided in practice.

This double standard of the EU is certainly worrying, especially considering that values – far from mere political statements – embody, according to the Court of Justice's interpretation, "the very identity of

ropea. Violazioni sistemiche e soluzioni di tutela, Napoli, 2023, esp. p. 104. See also A. FESTA, *Lo Stato di diritto nello spazio europeo. Il ruolo dell'Unione europea e delle altre organizzazioni internazionali*, Napoli, 2021. As highlighted by the CoE Committee of Ministers, these three principles "can be seen as three partly overlapping circles". Cfr. *The Council of Europe and the Rule of Law - An overview*, CM(2008)170, Committee of Ministers 1042bis Meeting, 27 November 2008, para. 25. Citing the CJEU *Kadi* judgment, on the "interdependence" between rule of law and fundamental rights, see W. SCHROEDER, *The Rule of La as a Value in the Sense of Art. 2: What Does it Mean and Imply?*, in A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, C. GRABENWARTER, M. TABOROWSKI, M. SCHMIDT (eds.), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Action*, Berlin, 2021, p. 105 ff., at p. 123. On the interconnection between rule of law, democracy, and fundamental rights in the implementation of migration policy see also J. BEQIRAJ, K. GADD, B. GRABOWSKA-MOROZ, *Authority, legitimacy and the Rule of Law in EU migration policy*, Groningen, 2021, at www.reconnect-europe.eu.

[9] Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, COM/2014/0158 final, p. 4.

[10] Court of Justice, Judgment of 23 April 1986, *Parti écologiste "Les Verts"* v. *European Parliament*, case 294/83, ECLI:EU:C:1986166, para. 23.

[11] See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, *2023 Rule of Law Report*, Brussels, 5.7.2023, COM(2023) 800 final.

the European Union"[12] to be promoted both domestically and internationally. In fact, it is widely recognized that the EU's external actions should also be guided by the principles that inspired its own creation, development, and enlargement, namely "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law", as stipulated in Art. 21 of the Treaty on European Union.

Therefore, the EU's actions in the field of asylum and migration – both within EU Member States and in its agreements with third countries – should have at their core the respect, advancement, and promotion of the rule of law. Instead, the policy of outsourcing, coupled with informal arrangements, has raised doubts about the Organization's credibility and legitimacy, eroding respect for the rule of law within the democracy-rule of law-human rights triad, where all three values, as mentioned, are interrelated, interdependent, and interlinked[13].

[12] Court of Justice, Full Court, Judgment of 16 February 2022, *Hungary* v. *European Parliament and Council of the European Union*, case C-156/21, ECLI:EU:C:2022:97, para. 232; Court of Justice, Full Court, Judgment of 16 February 2022, case C-157/21, *Republic of Poland v. European Parliament and Council of the European Union*, ECLI:EU:C:2022:98, para. 264. See J. ALBERTI, *Adelante, presto, con judicio. Prime considerazioni sulle sentenze della Corte di giustizia che sanciscono la legittimità del "Regolamento condizionalità"*, in *Eurojus*, 2022, no. 2, pp. 25-45; ID., *Il regolamento condizionalità è pienamente legittimo e, Ucraina permettendo, certamente attivabile. Prime riflessioni sulle sentenze della Corte di giustizia nelle cause C-156/21 e C-157/21*, in *BlogDUE*, 17 March 2022, pp. 1-7; M. BERGER, *ECJ confirms Validity of the Rule of Law Conditionality Regulation*, in *European Law Blog*, 11 March 2022; B. NASCIMBENE, *Stato di diritto, bilancio e Corte di giustizia*, in *Eurojus*, 2022, no. 2, pp. 114-136; E. PERILLO, *Il rispetto dello "Stato di diritto europeo" alla luce delle sentenze Ungheria e Polonia sulla clausola di condizionalità finanziaria. Quali prospettive?*, in *BlogDUE*, 16 March 2022, pp. 1-6. See also A. FESTA, *Le sentenze «gemelle» del 16 febbraio 2022: oltre la questione di legittimità, un «manifesto» sui fondamenti del diritto europeo*, in *Papers di diritto europeo*, 2022, no. 1, pp. 81-110.

[13] As the European Commission recalled, "respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa". See Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, COM/2014/0158 final.

In an attempt to turn the tide and overcome a long period of impasse[14], on 23 September 2020, the European Commission presented a "New Pact on Migration and Asylum"[15] aimed at establishing a predictable and reliable migration management system that implements the fair sharing of responsibility and solidarity. The new system should be based on cooperation between Member States as well as increased cooperation with third countries[16]. But does the "New Pact" mark a new stage in the management of migration and asylum in Europe, an expression of EU identity values, such as solidarity and the respect for the human rights, or does the *sovereignty rationale* prevail?

Beyond a declaration of a paradigm shift in the management of migration and asylum at the European level, the contrast with irregular migration and secondary movements remains at the core of the New Pact, despite the regulation of legal migration and access channels to the territory of EU Member States. The entire package of reforms is guided by a transversal objective, namely the more efficient management of irregular immigration.

The paradigm of containment and prevention of unauthorized ac-

The Commission considers the rule of law principles in accordance with the Venice Commission, available at: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN.

[14] V. CHETAIL et al. (eds.), *Reforming the Common European Asylum System: The New European Refugee Law*, Leiden-Boston, 2016.

[15] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions *on a New Pact on Migration and Asylum*, Brussels, 23.09.2020, COM(2020)609 final.

[16] *Amplius*, S. CARRERA, *Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum*, in CEPS Policy Insights, September 2020; P. DE PASQUALE, *Il Patto per la migrazione e l'asilo: più ombre che luci*, in *I Post di AISDUE*, 2020, n. 2, Focus "La proposta di Patto su immigrazione e asilo", 5 October 2020, pp. 1-15; C. FAVILLI, *Il Patto europeo sulla migrazione e l'asilo: "c'è qualcosa di nuovo, anzi di antico"*, in *Quest. giust*., 2 October 2020; F. MAIANI, *A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact*, in *EU Immigration and Asylum Law and Policy*, 20 October 2020; S. PEERS, *First analysis of the EU's new asylum proposals*, *in EU Law Analysis*, 25 September 2020; D. THYM, *European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum*, in EU *Immigration and Asylum Law and Policy*, 28 September 2020; M. BORRACCETTI, *Il nuovo Patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col passato?*, in *Dir., Imm. e Cittad*., 2021, no. 1, pp. 1-27.

cess to the territory of the Union prevails and is in fact the only one on which Member States manage to agree[17], as shown by the political agreement reached at the Home Affairs Council on 8 June 2023[18]. The latter does not address the main issues of the asylum system, particularly those related to the Dublin rules, which remain largely untouched. On the contrary, the agreement focuses on the expanded use of border, inadmissibility, and accelerated procedures, which entail serious detriments to the rights of migrants and asylum-seekers in terms of constraints on their mobility and increased use of detention, restrictions on legal remedies, and reduced protection from the safeguards of the Return Directive.

Moreover, the latest agreement, reached on 4 October 2023,[19] focuses on a "key element" of the New Pact, namely the Regulation on situations of crisis and *force majeure* in the field of migration and asylum, which endorses an "emergency approach" to migration management. According to the European Commission's proposal[20], a number

[17] On the lack of progress in the adoption of the planned acts and measures: A revision of the Dublin system is therefore urgently needed to overcome the asylum seekers crisis. There have been many hypotheses about how this could be done, like for example replacing Dublin III with a system based on the choice of the asylum applicant. Another valid alternative should be an evener distribution or relocation of the asylum seekers.

[18] See the European Commission Statement on the political agreement on the New Pact on Migration and Asylum, available at www.europa.eu, regarding "two key pillars" of the Pact: the Asylum and Migration Management Regulation (European Commission, *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) and the Asylum Procedure Regulation (European Commission, *Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, Brussels, 23.9.2020, COM(2020)611 final).

[19] See European Commission Statement on the political agreement in the Council on the Crisis Proposal – New Pact on Migration and Asylum, available at www.europa.eu.

[20] European Commission, *Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum*, Brussels, 23.9.2020, COM(2020)613 final. It will also incorporate the proposal on the "instrumentalization" of migrants (European Commission, Proposal

of derogations are foreseen, both in terms of the solidarity mechanism set out in the proposed Asylum and Migration Management Regulation, and in terms of the asylum and return procedures[21]. Specifically, to address the ineffectiveness of a Member State's asylum, reception, or return system in the face of a large-scale influx of migrants, the core of the proposed "adaptations" concerns the extension of procedural deadlines, the limitation of border control, as well as extending the forms of deprivation of liberty of migrants, converging towards an assessment of the overall impairment of the rights of migrants. Moreover, problems arise in particular from *force majeure*, which, unlike cri-

for a regulation of the European Parliament and of the Council, *addressing situations of instrumentalization in the field of migration and asylum*, COM(2021) 890 final, Strasbourg, 14.12.2021), which raises critical issues first with respect to the not objectively definable concept of "instrumentalization" (pursuant to the first *considerandum* of the proposal, a situation of instrumentalisation of migrants may arise where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security) and consequently as regards the respect of mingrants' fundamental rights. See European Council on Refugees and Exiles, *ECRE comments on the Commission proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum COM (2021) 890 final*, 27 January 2022, online; S. MARINAI, *L'Unione europea risponde alla strumentalizzazione dei migranti: ma a quale prezzo?*, in *ADIM Blog*, 28 December 2021, online; M. FORTI, *Questioni giuridiche e problemi di tutela dei diritti fondamentali nella risposta dell'Unione europea alle pratiche di strumentalizzazione dei flussi migratori*, in *FSJ*, 2022, no. 3, pp. 245-265.

[21] C. FRATEA, *La proposta di regolamento concernente le situazioni di crisi e di forza maggiore: un limitato progresso rispetto alla direttiva sulla protezione temporanea*, in *I post di AISDUE*, 2021, III, pp. 165-182; C. SCISSA, *The (new) Commission's approach on temporary protection and migration crisis*, in *ADiM Blog*, 2020, pp. 1-8, available at http://www.adimblog.com; S. VILLANI, *Il fenomeno migratorio oltre l'ordinario: riflessioni sulla proposta della Commissione circa un solido sistema di preparazione e di risposta alle crisi e alle situazioni di forza maggiore*, in *FSJ*, 2021, no. 2, pp. 388-413.

sis situations[22], is not explicitly defined in the proposed regulation, potentially triggering a series of hypotheses that depend on Member States[23]. In fact, unlike a crisis situation, which is approved and managed by the Commission, *force majeure* only requires Member States to notify the Commission, without any EU supervision, allowing access to the derogations provided.

Within this framework, it seems that, despite a policy that should be "common" to Member States and instrumental to the construction of a European Area of Freedom, Security and Justice (AFSJ), the tendency is instead to renew an emergency approach, once again pandering to national fragmentation.

In reality, Member States have already shown some inclination to deviate from the common immigration and asylum policy by invoking Art. 72 TFEU, according to which Title V "[...] shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security".

A clear example of this tendency is the case brought before the Court of Justice by Hungary and Slovakia in 2015. Seeking the annulment of the relocation mechanism for applicants for international protection, ratified by the Council, they argued that Art. 72 TFEU read in conjunction with Art. 4(2) TEU on national identity allowed them to suspend the application of Council decisions[24].

[22] A situation of crisis is to be understood as an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State's asylum, reception or return system non-functional and is likely to have serious consequences for the functioning of the Common European Asylum System or the Common Framework, or an imminent risk of such a situation (Art.1(2)).

[23] On the lack of a clear definition of *force majeure* and the related limitation on the possibility for the Commission to verify compliance with the principle of proportionality of the measures adopted by the State in derogation from the ordinary rules, see AMNESTY INTERNATIONAL, European Institutions Office, *Position Paper*, 4 March 2021.

[24] Council Decision (EU) 2015/1523 of 14 September 2015, *establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*,

However, in its ruling of 6 September 2017, the Court emphasized that while it is the responsibility of Member States to decide on appropriate measures for the maintenance of public order and the security of internal and external borders, it should not be assumed that such measures are outside the scope of Union law. Indeed, TFEU explicitly provides derogations in situations that may affect public policy or public security, but only in clearly defined cases. In other words, Member States cannot derogate from Union law on the grounds of maintaining public order and national security without providing consistent, objective, and specific evidence of a potential threat.

The same defense grounds concerning the extension of the applicability of Art. 72 TFEU were also included in the pleadings of Poland, Hungary, and the Czech Republic, summoned by the European Commission for non-compliance with the binding relocation mechanism in the case ultimately decided by the infringement judgment of 2 April 2020[25].

If the positions of Poland and Hungary are associated with a general deterioration of the guarantees of the rule of law, as evidenced by the activation of Art. 7(1) TEU against both countries, the question arises as to whether a violation of the common immigration and asylum rules can be interpreted as a direct violation of the rule of law[26].

Worth noting is that while such a conclusion is hardly to be found in the judgments of the Court of Justice, a link between the migration crisis and the rule of law crisis seems to be clearly present in the conclusions of the Advocates General. In particular, Advocate Sharpston

and Council Decision (EU) 2015/1601 of 22 September 2015 *establishing provisional measures in the area of international protection for the benefit of Italy and Greece*.

[25] Court of Justice, Judgment of 2 April 2020, *European Commission* v. *Republic of Poland and Others*, joined cases C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257.

[26] Although there is no doubt that Art.7 TEU is inapplicable to the European Union itself, considering this point as a "significant lacuna" of the instrument given "the Union's growing powers and ability to emerge as an actor of injustice" regarding the management of migration, see D. KOCHENOV, *Article 7 TEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *The EU Treaties and the Charter of Fundamental Rights – A Commentary*, Oxford, 2nd ed., 2023, point 33, forthcoming, available at: SSRN: https://ssrn.com/abstract=4539729 or http://dx.doi.org/10.2139/ssrn.4539729.

explicitly mentions Art. 2 TEU in her Opinion in the solidarity saga case law[27], asserting that compliance with relocation obligations is an essential principle of the rule of law, recalling that "at a deeper level, respect for the rule of law implies compliance with one's legal obligations. Not fulfilling such obligations because they may be unwelcome or unpopular is a dangerous first step towards the erosion of the ordered and structured society governed by the rule of law from which we as citizens derive comfort and security[28]".

Former Advocate General Bobek, in his Opinion in the *Torubarov*[29] case, also based his reflections on what he called the "broader (constitutional) picture"[30] of the jurisprudence developed by the Court in the context of the crisis of the rule of law, starting with the case concerning the Portuguese judicial system[31].

However, the security-driven approach and the securitization process of Europe's external borders do not seem to be weakening, but rather renewing themselves in the current complex political conjuncture characterized by the intensification of crisis hotspots at Europe's borders and the rising threat of violence also within the Union.

The most urgent need is therefore to reconcile the European Union with its conceptual foundations[32], recognizing that the Community

[27] Opinion of AG Sharpston delivered on 31 October 2019, *European Commission* v. *Republic of Poland*, case C-715/17; *European Commission* v. *Republic of Hungary,* case C-718/17; *European Commission* v. *Czech Republic*, case C-719/17.

[28] *Ibid*, para. 241.

[29] Court of justice, Grand Chamber, Judgment of 29 July 2019, *Alekszij Torubarov* v. *Bevándorlási és Menekültügyi Hivatal*, case C-556/17, ECLI:EU:C:2019:626.

[30] Opinion of AG Bobek delivered on 30 April 2019, *Torubarov*, case C-556/17, paras. 48-62.

[31] Court of Justice, Grand Chamber, Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* v. *Tribunal de Contas*, case C-64/16, ECLI:EU:C:2018:117.

[32] The "solidaristic and humanitarian" rationale animating the decision on the protection of displaced Ukrainian people (Council implementing decision (EU) 2022/382 of 4 March 2022, *establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection*, in OJ EU, L 71 4 March 2022) seems to be an isolated case, not affecting the Union's overall asylum and immigration policy, as pointed out by U. VILLANI, *I principi della politica di asilo e d'immigrazione dell'Unione e il*

order "undoubtedly aims to safeguard human dignity as a fundamental legal principle"[33]. After all, the integration process has long favored the promotion and consolidation of the rule of law in the European legal area, while at the same time allowing for the democratic strengthening of the political-institutional systems of each Member State.

rischio di 'Fortezza Europa', in *FSJ*, 2023, no. 2, pp. 5-20, at p. 13. The author also highlights that the first application of temporary protection represents "an almost epochal event", as it expresses profound solidarity first of all towards the people (generally more fragile) victims of the war, but also in the mutual relations between the EU Member States.

[33] Court of Justice, Judgment of 14 October 2004, *Omega Spielhallen- und Automatenaufstellungs-GmbH* v. *Oberbürgermeisterin der Bundesstadt Bonn*, case C-36/02, ECLI:EU:C:2004:614, para. 34, endorsing the Advocate General's conclusions. On the concept of dignity, see A. DI STASI, *Human Dignity as a Normative Concept. "Dialogue" Between European Courts (ECtHR and CJEU)?*, in *Judicial Power in a Globalized World. Liber Amicorum Vincent de Gaetano*, Cham, 2019, pp. 115-130.

PART I

Management of Migratory Policies and the Impact on Rule of Law and European Values

INFORMALIZATION OF THE EU'S EXTERNAL MIGRATION POLICY: BYPASSING EU VALUES IN THE NAME OF EFFICIENCY?

Francesco Spera[*]

1. *Neofunctionalism in EU external relations*

Over the past decades, the European Union (EU) has developed several external policies and implemented its action at the extent of which it is possible to talk about a progressively raising of the EU as a global actor[1].

The paper explains this new development by conceptualizing the concept of EU as a global actor within the neofunctionalist theory of the EU integration[2]. The neofunctionalist method focuses on the logic

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[1] See a recent publication on conceptualization of EU external relations: A. NIEMANN, J. BERGMANN, *Theorizing Eu External Action: A Neo-Functionalist Perspective*, in S. GSTÖHL, S. SCHUNZ (Hrsg.), *The External Action of the European Union: concepts, approaches, theories*: *Red Globe Press*, 2021, pp. 157-172.

[2] According to Philippe C. Schmitter, the theory places major emphasis on the role of non-state actors – especially, the "secretariat" of the regional organization involved and those interest associations and social movements that form at the level of the region – in providing the dynamic for further integration. Member States remain important actors in the process. They set the terms of the initial agreement, but they do not exclusively determine the direction and extent of subsequent change. Rather, regional bureaucrats in league with a shifting set of self-organized interests and passions

of spillover whose causal rationality can be well simplified by the image of the concentric circles generated by a stone thrown into a pond: the image solidifies the expansive effects determined by the growing demand for broader and more concrete creations in sectors contiguous to those integrated and "functionalized" to specific objectives or subjected to certain rules, which is generated in turn by the interconnection of the economy and by the appreciation of the concrete advantages achieved over time in the aforementioned sectors and of the tested effectiveness of the solutions adopted or the tools used[3]. Moreover, the paper proposes another element that reinforces this theory on EU integration and that has not been yet assessed by the doctrine: the use of soft law in EU external relations.

The EU makes use of a variety of legal instruments in conducting its external relations with third countries and international organizations. Together with international agreements concluded on the basis of Article 218 TFEU, the Union also adopts a wide variety of bilateral soft law instruments. Carrying different labels[4] and employed by all EU institutions responsible for EU external relations[5], those soft bilateral tools are adopted between the Union and third states and international organizations in several policy areas. An important element that characterizes them, and, at the same time, differentiates them from international agreements, is their "non-binding nature" for the Parties

seek to exploit the inevitable "spill-over" and "unintended consequences" that occur when States agree to assign some degree of supra-national responsibility for accomplishing a limited task and then discover that satisfying that function has external effects upon other of their interdependent activities. The theory argues that if States share more and more their own resources and policies in order to implement common goals and achieve similar objective, the spill-over effects will help to create supranational institutions and common values. P. C. SCHMITTER, *Ernst B. Haas and the Legacy of neofunctionalism*, in *Journal of European Public Policy*, 2005, no. 2, p. 257.

[3] M. PERONACI, R. PALMA, *Il sogno europeo dalla CECA all'Unione attraverso le crisi: la nuova difesa europea*, Bari, 2022, p. 15. See more on neofunctionalism and its limits in P. CRAIG, G. DE BURCA, *The Evolution of EU Law*, 2nd ed., Oxford, 2011.

[4] Such as Memorandum of Understandings, Joint Communications, Joint Letters, Arrangements, and Codes of conduct etc.

[5] Council of the European Union, the High Representative of the Union for Foreign Affairs and Security Policy, the European Union External Action (EEAS) and some EU Agencies (Europol, Eurojust, Frontex).

that adopt them. From this characteristic, most of the literature in international law has derived the term "soft"[6] and has defined soft international instruments broadly as "any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behaviour"[7].

Thus, based on the most recent studies on soft law tools employed by the EU in its external relations, the paper argues that soft laws become a functional element to support and sustain the neofunctionalist logic for explaining EU external action. Building on their elements and characteristics, as it will be explained below, soft laws can therefore provide the spillover effects of certain EU external policies, such as in this case, the migration policy and the EU-Afghanistan soft law instrument[8].

2. *Soft law in international law and EU external relations law*

International law literature's discussion on the soft law has been ongoing for decades since the term of soft law has been coined. Any attempt for characterizing and cataloguing these instruments has not encompassed its complexity and diversity because soft law represents an "infinite variety" which presents a challenge for any analytical as-

[6] F. TERPAN, *Soft Law in the European Union - The Changing Nature of EU Law*, in *Eur. Law J.*, 2015, no. 1, pp. 68-96; G. C. SHAFFER, M. A POLLACK, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, in *Minnesota Law Review,* 2010, pp. 706-799; O. STEFAN, *EU Soft Law in the EU Legal Order: A Literature Review*, in *SoLaR Working Paper*, no. 1/2019, available at: www.solar-network.eu.

[7] This definition is adopted generally for the purpose of the research. The term will be discussed in greater detail below in paragraph 2. D. SHELTON, *'Soft Law'*, in D. ARMSTRONG (ed.), *Routledge Handbook of International Law*, London-New York, 2009, pp. 68-80; M. PANEBIANCO, *Origini Storiche del Diritto Globale*, in *Iura & Legal Systems*, 2018, no. 3, pp. 33-42; A. DI STASI, *Le Soft International Organizations: Una Sfida per le Nostre Categorie Giuridiche*, in *Com. int.*, 2014, no. 1, pp. 39-63.

[8] See D. MITRANY in its *A working Peace System. An argument for the functional development of international organizations* (London, 1943), in M. PERONACI, R. PALMA, cit., p. 15.

sessment that aiming at defining, classifying, or developing a framework for it[9].

The emergence of the notion of soft law has been closely connected to the challenges imposed on traditional national and international law-making methods by globalization, considering the growing importance of non-State actors and the supranational institutions at the international level. That entails that States and international organizations might agree on other types of norms which are not necessarily binding or enforceable with the possibility of carrying "a variety of differing impacts and legal effects"[10].

Generally, international law literature contains in most definitions of soft law two components that are used to identify a measure as soft law. First, the non-binding element contained therein and, second, the possibility that the measure gives rise to, sometimes indirect, legal effects[11]. Based on these two elements, which also derived from the traditional theory of legal acts, scholars usually argue that law is either hard or not law at all, rejecting the idea of soft law[12]: "instruments that are not legally binding simply cannot be law and, conclusively, soft law does not exist"[13]. On contrary, in opposition to this black-and-white view distinguishing measures being binding and non-binding, a relativist view acknowledges a spectrum of grey in between: "soft law begins where measures convey fewer obligations on its drafters than traditional hard law, either through a diminished binding power, less precision and/or the lack of delegation of authority for its interpretation

[9] R. BAXTER, *International Law in "Her Infinite Variety"*, in *ICLQ*, 1980, no. 4, pp. 549-566, and O. STEFAN, cit., p. 5.

[10] The creation of the term 'soft law' is attributed to Lord McNair. See: D. THÜRER, *Soft Law*, in R. WOLFRUM (ed.), *The Max Planck Encyclopedia of Public International Law*, *Oxford*, 2013.

[11] According to Thürer: "soft law, as a phenomenon in international relations, covers all those social rules generated by State[s], or together subjects of international law which are not legally binding but which are nevertheless of special legal relevance".

[12] J. D'ASPREMONT, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, in *EJIL*, 2008, no. 19, pp. 1075-1093.

[13] K. RAUSTIALA, *Form and Substance in International Agreements*, in *The American Journal of International Law*, 2005, no. 3, pp. 581-614.

and implementation"[14]. In consequence, it is advocated that these documents might produce commitments – yet softer ones – than binding instruments.

A similar debate on the nature of soft law has been developing among the European law scholars, and the paper embraces to the perspective which, in contrast with the previous one, places soft law in a grey area which, despite the non-binding element, looks at the legal effects and obligations that the instrument may produce or the enforcement mechanism it might be subjected to. It acknowledges that non-legally binding measures can still constrain parties that agree on the measure of the freedom to act, conditioning their actions, often leaving the possibility of deviation to mere fiction[15]. Therefore, the distinction between legally binding and non-binding measures does not reflect the reality of the complexity of soft law, especially with regard to soft bilateral instruments used by the EU in its external actions. Ignoring this complex nature of soft law would mean neglecting the complexity and the richness of International and European law by assigning a legal-theoretical non-binding framework to a large field of regulatory activity that does in fact affect – at least indirectly – the legal situation of a variety of actors, as will be demonstrated in this paper.

3. *Informalization in EU external relations law*

Despite the fact that formal international deals still constitute the key legal tools to regulate the EU's external action with third countries and international organizations, the choice to adopt soft law instruments by the EU is increasingly common. Compared to binding international agreements, "at least two times more bilateral soft law tools

[14] K. W. ABBOTT, D. SNIDAL, *Hard and Soft Law in International Governance*, in *International Organization*, 2000, no. 3, pp. 421-456.

[15] A. VON BOGDANDY, P. DANN, M. GOLDMANN, *Developing the Publicness of Public International Law*, in A. VON BOGDANDY, R. WOLFRUM, J. VON BERNSTORFF, P. DANN, M GOLDMANN (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*, Heidelberg, 2010, p. 11.

are agreed between EU actors and international organizations or third countries"[16]. In the last decade, EU organs and organism have increasingly resorted to international soft law instruments in politically sensitive and technically complex areas, especially in the framework of migration, security, and energy crisis[17].

Normally, following the common practice of States and international organizations those instruments are classified into two main groups based on their functions and the reasons for their deployment: political commitments and administrative arrangements[18]. Generally, those are represented by the need to increase the efficiency of external action, to allow greater smoothness in negotiation and conclusion of an instrument, or to enhance the margin of discretion of the signatories in the fulfilment of commitments[19]. In addition, non-binding agreements may be more suitable to the political sensitivity of the sub-

[16] R. A. WESSEL, J. LARIK, *EU External Relations Law: Text, Cases and Materials*, 2nd ed., Oxford, 2020. See also P. J. CARDWELL, *EU External Relations Law and Policy in the Post-Lisbon Era*, in ID. (ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*, The Hague, 2014, pp. 1-14, and L. A. J. SENDEN, *Soft Law and Its Implications for Institutional Balance in the EC*, in *Utrecht Law Review*, 2005, p. 79.

[17] The expansion of the use of soft law concerns other policy areas as well. See J. ALBERTI, *Challenging the Evolution of the EMU: The Justiciability of Soft Law Measures Enacted by the ECB against the Financial Crisis before the European Courts*, in *Yearbook of European Law*, 2018, p. 626; M. MARKAKIS, P. DERMINE, *Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu*, in *CML Rev.*, 2018, p. 643. See M. PANIZZON, *The Global Migration Compact and the Limits of "Package Deals" for Migration Law and Policy', What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration*, in *RWI Working Paper 2017/1*, p. 21; C. MOLINARI, *EU Institutions in Denial: Non-Agreements, Non-Signatories, and (Non-) Effective Judicial Protection in the EU Return Policy*, in *Maastricht Faculty of Law Working Paper No. 2019-02*, Maastricht, 2019, p. 3.

[18] R. A WESSEL, J. LARIK (eds.), *EU External Relations Law, Text, Cases and Materials*, cit., p. 119; P. G. ANDRADE, *Insight The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments*, in *European papers*, 2016, p. 115.

[19] P. G. ANDRADE, *Insight The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments*, cit., pp. 115-125. R. A. WESSEL, *Normative transformations in EU external relations: the phenomenon of 'soft' international agreements*, in *West European Politics*, 2021, pp. 72-92.

ject of the agreement or to its changing nature. These reasons are beyond the adoption in soft law instrument, especially the one taken into consideration in this study, namely the Joint Way Forward (JWF) on migration issues between Afghanistan and the EU of 2016[20]. Other representative examples are, for instance, the Memorandum of Understanding (MoU) between the European Community and the Swiss Federal Council on a contribution by the Swiss Confederation towards reducing economic and social disparities in the enlarged European Union[21].

4. *Emergence of EU external relation soft law: a taxonomy*

Hence, based on the most recent scholarship in the EU external relations doctrine and the case-law of the European Court of Justice, the soft law employed by the EU in its external relations present certain peculiarities that can reinforce the spillover mechanisms of EU external actions according to the neo functionalist logic. Among those spillover mechanisms, the paper takes into consideration the legal one.

EU External Relations soft laws have in common a similar type of rationale at the basis of their adoption as described above. The reasons are diverse, yet similar to those observed with regards to States and international organizations, where a special focus is given to the achievement of the efficiency of the EU external action, and provide a fast political answer to the EU citizens, allowing a certain discretion in interpreting vague norms by the parties of the deal[22]. It is also argued

[20] European Commission, 'Afghanistan. Joint Way Forward on Migration Issues between Afghanistan and the EU 2.10.2016' 369 https://eeas.europa.eu/headquarters/headquarters-homepage/11108/the-eu-and-afghanistan-hold-a-senior-officials-dialogue-on-migration_en.

[21] Decision C (2013) 6355 of the Commission on the signature of the Addendum to the Memorandum of Understanding on a Swiss financial contribution. Commission of the European Communities, Brussels, 20.10.2005, COM (2005) 468 final, 2005/0198 (CNS), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52005PC0468.

[22] P. G. ANDRADE, *Insight The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments*, cit., pp. 115-125.

that, non-binding agreements are those adopted by the EU in political and sensitive fields: the need for flexibility, the unwillingness of actors to run the risk of ending up in lawsuits, or simply the impossibility to agree on a more formal arrangement can be seen as relevant reasons to opt for informality[23].

Furthermore, what provides an element of peculiarity of EU external relations soft law instruments, unlikely the international ones, is the role of the ECJ, and the possibility of legal justiciability for soft law acts by the Court. The recent, yet scarce case-law, shows some attempts from the Court to set certain thresholds with regards of the use of soft law in external relations. An important element that determines the bindingness and the enforcement of EU soft law is the specific duty and degree of cooperation, and the impossibility to escape from the EU Treaties principles of institutional balance and principle of conferral and the fact that the intention of the parties and the content of the instrument constitute the real criteria for assessing the justiciability and the bindingness of those instruments[24].

It is observed therefore that EU external relations soft law seem to show a certain degree of bindingness, characterized by a continuum between hard and soft law (and possibly other qualities of the law): "[D]istinctions range along a continuum which is much more inflected than can be described by the 'hard' and 'soft'. Those terms are not only inadequate for description but are also insufficient for evaluation"[25]. Thus, "categories of hard and soft law are not polarized but lie within a continuum that itself is constantly evolving"[26].

[23] R. A. WESSEL, *Normative transformations in EU external relations: the phenomenon of 'soft' international agreements*, cit., p. 75.

[24] C. M. CHINKIN, *The Challenge of Soft Law: Development and Change in International Law*, in *ICLQ*, 1989, no. 4, pp. 850-866.

[25] M. W. REISMAN, *The Conceptions and Functions of Soft Law in International Politics*, in E. G. BELLO, P. BOLA, A AGIBOLA (eds.), *Essays in Honor of Judge Taslim Olawale Elias, Contemporary International Law and Human Rights. Volume II: African Law and Comparative Public Law*, Dordrecht, Boston, London, 1995.

[26] C. M. CHINKIN, *The Challenge of Soft Law: Development and Change in International Law*, in *ICLQ*, cit., p. 850. See also K. W. ABBOTT, D. SNIDAL, *Hard and Soft Law in International Governance*, in *International Organization*, cit., p. 422; K. W. AB-

With regards to their functions, EU external relations soft law can be grouped in three categories: pre-law, post-law and para-law. The pre-law constitutes a common feature for soft law tools, meaning the preparation for future binding tool. Post-law represents another relevant element that soft law is often deployed for, and it is represented by their essential functions to interpret and complement hard law instruments.

For this paper, the para-law function becomes more relevant because soft law might be used for substitute other formal agreements. This represents the case with some soft law instruments, such as the JWF. It is observed that soft law seems to be a central mechanism for regulating certain policy fields. It ceased to be the "substitute" for hard law and it has become the major "legislation form" of the norm-like activities of the EU, producing the spillover effects in other regulated policies of the EU and its EU member States by pushing for a certain practice in areas where the EU does not have competences yet. However, this practice by the EU poses several questions on the legality of these instruments according to EU law.

5. *EU law principles to EU external relations soft law*

The study does not enter the debate of the applicability of international law to EU external relation soft law instruments, especially the 1969 Vienna Convention on the Laws of Treaties[27]. For the purpose of this paper, it limits the legality of soft law to the EU law principles.

Despite the fact that, a "turn to informality" should not *per se* have

BOTT, R. O. KEOHANE, A. MORAVCSIK, A. M. SLAUGHTER, D. SNIDAL, *The Concept of Legalization*, in *International Organization*, 2000, p. 401.

[27] See S. SALUZZO, *The Court of Justice of the European Union and the Relevance of the Vienna Convention on the Law of Treaties to International Agreements Concluded with Third Countries*, in G. PASCALE, S. TONOLO (eds.), *The Vienna Convention on the Law of Treaties, the Role of the Treaty on Treaties on Contemporary International Law*, Napoli, 2023, pp. 473-493.

negative consequences for the legality of norms[28], soft law should not be utilized to avoid the basic principles of EU law[29]. In this regard, it is argued that "international soft law measures, as any other legal act, need to find, broadly speaking, a legal foundation in the Treaties in order to be correctly adopted"[30]. Most of the European law scholars agree that when soft law in EU external relations is deployed to substitute a formal agreement, the risk of stepping outside the scope of EU law increase[31]. Linda Senden, in 2004, already argued that the Commission and the Council for employment soft law instead of legislation upsetting the "horizontal division of powers – between the Community institutions – which in its turn can be seen as affecting the legitimacy of the European Community"[32]. Stating that an act "is not intended to create legal rights or obligations under international law"[33] or is "not intended to create legally binding rights and obligations"[34], regardless of its function, cannot in and of itself side-step values and principles of the EU legal order.

[28] J. PAUWELYN, R.A. WESSEL, J. WOUTERS, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, in *EJIL*, 2014, no. 3, pp. 733-763.

[29] See also Court of Justice, Grand Chamber, judgment of 28 July 2016, *Council v. Commission* ("Swiss MoU"), case C-660/13, ECLI:EU:C:2016:616. In the *Swiss MoU* case, the Court thus underlined the importance of the principles of conferral and institutional balance even in the case of soft external arrangements. In fact – and this is essential for the point made by the present paper – the 'soft' nature of the agreement does not transform it being part of the overall EU external relation regime.

[30] P. G. ANDRADE, *Insight The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments*, cit., p. 120. R. A. WESSEL, *Normative transformations in EU external relations: the phenomenon of 'soft' international agreements*, cit., p. 75.

[31] Meijers Committee, *1806 Note on the Use of Soft Law Instruments under EU Law, in Particular in the Area of Freedom , Security and Justice and Its Impact on Fundamental Rights, Democracy and the Rule of Law*; L. PECH, *The Rule of Law as a Guiding Principle of European Union's External Action*, in *CLEER Working Papers 2012/13*, pp. 28-45.

[32] L. A. J. SENDEN, *Soft Law and Its Implications for Institutional Balance in the EC*, cit., p. 97.

[33] JWF, cit., Introduction.

[34] MoU EEAS and LAS, cit., Miscellaneous.

In consequence, soft law might challenge several EU principles. For instance, the principle of conferral is often questioned in relation to the power to adopt a certain act. An important decision by the CJEU in 2004[35] held that the non-bindingness of an act does not confer the Commission "the competence to adopt it." When adopting a soft law act, the EU institutions should take into consideration "the division of powers and the institutional balance established by the Treaty in the field of the common commercial policy be duly taken into account (…)"[36]. This means that even if a given instrument is non-binding, this does not automatically give an institution the power to adopt it[37]. The case-law offered other examples of a contrast in terms of power of adopting certain acts between the Commission and the Council in a Commission's Decision of 3 October 2013 on the signature of an addendum to the Memorandum of Understanding of 27 February 2006, regarding a Swiss financial contribution to the new Member States of the EU (MoU 2006)[38]. This addendum contains "non-legally binding commitments" between the EU and Switzerland and was signed by the Commission, despite the fact that it merely had

[35] Court of Justice, judgment of 23 March 2004, *France v. Commission*, case C-233/02 regarding an action for annulment of the act by which the Commission had concluded an agreement with the United States on guidelines intended inter alia to improve regulatory competition.

[36] Court of Justice, *France v. Commission*, cit., para. 42. See on this judgment also the Annual Report 2004 of the ECJ, p. 14, available at http://www.curia.eu.int.

[37] P. G. ANDRADE, *Insight The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments*, cit., p. 117. The Court held that principles of conferral and institutional balance continue to apply and must be respected: Court of Justice, Grand Chamber, judgment of 7 October 2014, *Germany v. Council* ("IOV"), case C-399/12, ECLI:EU:C:2014:2258, in particular paras. 56-64. See also Court of Justice, judgment of 16 July 2015, *Commission v. Council* ("Australian Greenhouse Gas Emissions"), case C-425/15.

[38] Decision C(2013) 6355 of the Commission on the signature of the Addendum to the Memorandum of Understanding on a Swiss financial contribution. The MoU of 2006 served as a compromise in exchange for the Swiss access to the enlarged internal market within the framework of the negotiations between the EU and Switzerland on the second series of bilateral agreements known as "Bilaterals II", which were signed in 2004.

an authorization by the Council to negotiate it[39]. Given the absence of an authorization to conclude the non-binding agreement, the Court held that "the Commission cannot be regarded as having the right, by virtue of its power of external representation under Article 17(1) TEU, to sign a non-binding agreement resulting from negotiations conducted with a third country"[40]. Moreover, Advocate General Sharpston in his opinion noted that the 2013 addendum did not even correspond to the content of the negotiating directives given by the Council, which shows how political choices were actually made by the Commission. For this reason, it was noted that this action entails an infringement of Art. 13, para. 2, TEU, since the Commission exceeded its powers as granted by Art. 17 TEU and encroached upon the powers conferred upon the Council by Art. 16 TEU[41].

Other EU external relations soft law offered examples of tension between EU institutions. For instance, the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates from the European Union-led naval force to the Republic of Mauritius was considered as a possible breach of information obligation by the EU Commission and Council to the European Parliament under Article 218(10) TFEU, "at the very least, it could be upheld that the obligation to inform the EP in all stages of the procedure for concluding international agreements according to Article 218(10) TFEU should be extended to non-legally binding agreements"[42].

Overall, the issues with the principle of conferral and institutional balance are linked with the general principle of consistency in EU External Relations, stemming from Article 21(3), para. 3 TEU[43]. The

[39] Court of Justice, judgment *Swiss MoU*, cit.

[40] Court of Justice, judgment *Swiss MoU*, cit., para 38.

[41] Opinion of Advocate General Sharpston, case C-660/13, para. 94.

[42] P. GARCÍA ANDRADE, *The Role of the European Parliament in the Adoption of Non-Legally Binding Agreements with Third Countries*, in J. S. VARA, S.R. SÁNCHEZ-TABERNERO (eds.), *The Democratization of EU International Relations Through EU Law*, New York, 2019, p. 123.

[43] The article provides for the Union to "ensure consistency between the different areas of its external action and between these and its other policies". In this context, the role of the High Representative of the Union for Foreign Affairs and Security Poli-

Council and the Commission are mainly entrusted to ensure that consistency and cooperate to that effect[44].

Another EU principle often challenged is the lack of transparency enshrined in Article 15 TFEU. It is often argued that the practice between the EU institutions is inconsistent when it comes to access to these documents. If the EEAS and the Council do not provide systematic access, on contrary, the Commission provides access to these soft law tools through its register. Finally, EU agencies also publish their non-binding working arrangements with third countries on their respective websites. For instance, the above-mentioned MoU between the EEAS and the LAS has been criticized by the EU Parliament for its aforementioned lack of transparency, especially with regard to its public accessibility in the EEAS Registry: "[…] the lack of transparency of certain EU and Member State programmes in this field, and calls for the EU and Member States to make public information on what steps have been taken to ensure that European support for such schemes does not contribute to human rights abuses in their target countries, and to publish the text of bilateral agreements such as the MoU between the EEAS and the LAS"[45].

Finally, as judicial review of the European Union's external soft law measures and the principle of effective judicial protection poses serious challenge to EU legal order[46]. Taking into account Article 263 TFEU, it is important to clarify that applicants are divided into privileged actors (the Member States, Parliament, Commission and Council) which may bring an action for annulment purely in the interests of

cy and the European External Action Service (EEAS) are essential because "they ensure the consistency of the Union's external action".

[44] Art. 18(4) TEU and Art. 3(1) of the Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service (OJ [2010] L201/30) (EEAS Decision).

[45] 04.03.2015, MoU between the EU and LAS to Cooperate on Counter-terrorism, Greens/EFA Motion for Resolution, tabled by Alyn Smith, Barbara Lochbihler, Judith Sargentini, Eva Joly on behalf of the Greens/EFA Group, available at: https://www.greens-efa.eu/en/article/document/memorandum-of-understanding-between-the-eu-and-the-league-of-arab-states-to-cooperate-on-counter-terrorism/.

[46] C. MOLINARI, *EU Institutions in Denial: Non-Agreements, Non-Signatories, and (Non-)Effective Judicial Protection in the EU Return Policy*, cit., p. 12.

legality, without proving any particular interest; and, non-privileged (comprising all natural and legal persons), which may bring an action for annulment only if they prove that the contested act infringes upon their interests. More specifically, they may bring an action against an act addressed to them, or – if it is not addressed to them – if it is of direct and individual concern to them, as well as against a regulatory act that is of direct concern to them and does not entail implementing measures. For this reason, when the procedure regulated by Article 263 TFEU is concerned, non-privileged applicants do not have legal standing for international soft law instruments depriving them from exercising their rights, with a clear difficulty to assess possible violations of fundamental rights[47].

Hence, the use of soft law instruments thus raises concerns with respect to access to justice as a fundamental component of the individual right of an effective remedy[48]. This is particularly worrisome in relation to the sensitive migration issues dealt with in readmission agreements, such as the JWF at issue, or other similar informal migration agreements[49]. An example is represented by the Standard Operating Procedures concluded with Bangladesh, concerning the identification and return of persons without authorisation to stay, or the agreed with Bangladesh[50]: "informal patterns of cooperation and non-legally

[47] R. A. WESSEL, *Normative transformations in EU external relations: the phenomenon of 'soft' international agreements*, cit., p. 75.

[48] C. MOLINARI, *EU Institutions in Denial: Non-Agreements, Non-Signatories, and (Non-) Effective Judicial Protection in the EU Return Policy*, cit., p. 5.

[49] S. POLI, *The Integration of Migration Concerns into EU External Policies: Instruments, Techniques and Legal Problems*, in *European Papers*, 2020, no. 1, p. 78.

[50] Annex I to Decision C (2017) 6137 Final on the Signature of the EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay'. See the 'EU-Turkey Statement of 18 March 2016, European Council and Council Press Release 144/16' http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/. And General Secretariat of the Council, 'Item Note to Permanent Representatives Committee No. 15050/16, 6 December 2016, Draft Standard Operating Procedures between the EU and the Republic of Mali for the Identification and Return of Persons without an Authorisation to Stay' https://www.statewatch.org/news/2016/dec/eu-council-standard-operating-procedures-mali-return-15050-16.pdf.

binding instruments including a readmission angle enhance the legal uncertainty and the lack of sufficient procedural guarantees designing inter-state challenges"[51]. As will be discussed in the research, the standing of individuals will come particularly relevant for those soft international instruments that may produce a change in the legal sphere of persons.

In brief, the previous analysis, although remaining not exhaustive, shows in general that soft law instruments in EU External Relations might serve to solve many diplomatic, procedural, and political issues[52]. They, in common with international soft law in relation to the States' practice, "replace binding bilateral (or multilateral) agreements, and, in general, supplement, interpret and prepare existing or future (multi) or bilateral international treaties"[53].

Moreover, while both the procedures to conclude international agreements and the Court's abundant case law on these procedures are meant to guarantee consistency within the Union's legal order and a well-balanced role of the institutions, the soft bilateral instruments briefly assessed seem to fall into a grey area of the EU external relations: each EU actor enjoys a certain discretion with the adoption of tailor-made instruments, namely tools that are conceived with particular regard to the specific situation, and which obligate them to take certain practical actions. However, as observed above, soft bilateral instruments not following the procedural rules of Article 218 TFEU may seriously disturb the system of checks and balances and possibilities for legal review.

[51] S. CARRERA, *Implementation of EU Readmission Agreements: Identity, Determination, Dilemmas and the Blurring of Rights*, Berlin, 2016, p. 13.

[52] R. A. WESSEL, *Normative transformations in EU external relations: the phenomenon of 'soft' international agreements*, cit., p. 119.

[53] A. OTT, *Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges*, in *Yearbook of European Law*, 2020, no. 1, p. 570.

6. *Joint Way Forward: rationale for informality in EU return policy*

In this last paragraph, the paper applies the previous theories discussed to a case study. It thus takes into consideration one of the most recently discussed soft bilateral law instruments employed by the EU in its external migration policy. The instrument constitutes one of the six non-binding agreements that the EU has concluded with third countries as part of the EU return policy, namely the above-mentioned JWF.

The study explains the reasons for which the JWF constitutes an EU external relations soft law according to the above-mentioned taxonomy.

The JWF is adopted within the context of the outcomes of the so-called "Arab Springs" and the breakout of the Syrian War. In this period, the EU was facing an exceptional and unprecedent number of people across the Mediterranean Sea and the Balkans seeking asylum. It was suddenly clear how the EU return system became inefficient because of the difficulty of cooperating with migrants' countries of origin becoming additionally one of the reasons for low returns for those irregular migrants[54].

At that time, the most represented asylum seekers were Afghan (20.9%)[55]. However, a high number of them had little chance of recognition of asylum in some European Member States. Since 2015, some countries whereby most of the Afghans were concentrated[56] altered their policy guidelines on how to deal with asylum applications making it thus more difficult for protection to be granted. In consequence, thousands of people did not have the right to reside in the ter-

[54] European Court of Auditors, *Special Report, EU readmission cooperation with third countries: relevant actions yielded limited results*, 2021, p. 63.b.

[55] Monthly Arrivals by Nationality to Greece, Italy and Spain. Refugees/Migrants Emergency Response – Mediterranean. 31 March 2016. Retrieved 14 May 2016, available at: https://data2.unhcr.org/en/situations/mediterranean?page=1&view=grid&Type%255B%255D=3&Search=%2523monthly%2523.

[56] Germany and Sweden.

ritory of most of the European Union member States and had to be sent back[57].

Normally, in those circumstances, the EU treaties provides for the legal binding instrument for returning migrants to their country of origin. The EU Readmission Agreements (EURAs) are crucial to the EU's return policy, as defined in the Return Directive (Directive 2008/115/EC). The legal basis for concluding EURAs is Article 79(3) TFEU. They are based on reciprocal obligations and are concluded between the European Union and non-EU countries to facilitate the return of people residing irregularly in a State as opposed to their country of origin or to a country of transit.

Nevertheless, a number of circumstances often do not allow the Union and its Member States to conclude an EURA with a third-country, such as Afghanistan, and lead the EU to conclude an informal readmission agreement. Thus, given the disappointing movement on finalizing formal agreements in sub-Saharan Africa and beyond, the turn towards informality was to be expected[58].

In this sense, it seems that the Commission and the EEAS achieved limited progress in concluding readmission agreements but were more successful in negotiating legally non-binding readmission arrangements[59].

Firstly, the international legal framework and the urgency of the crisis. It seemed that both EU and Afghanistan had to find a rapid solution because they "face unprecedented refugees and migration challenges"[60]. As explained in paragraph two, "urgency" represents one of the main factors that drive the EU and a third country to conclude an informal instrument. Furthermore, the two parties had to overcome a legal obstacle "after the consideration of all relevant international law

[57] At a time when security in Afghanistan was worsening, policy changes seemed to be a reaction to the migration situation of Member States rather than to the objective security situation in Afghanistan.

[58] J. SLAGTER, *Informal Turn in the European Union's Migrant Returns Policy towards Sub-Saharan Africa*, Migration Policy Institute, in https://www.migrationpolicy.org/article/eu-migrant-returns-policy-towards-sub-saharan-africa.

[59] European Court of Auditors, cit., pp. 26-38.

[60] See the JWF.

and legal procedures" for which it was impossible to grant the Afghans international protection[61].

Moreover, like other soft law instruments adopted previously, internal political reasons lead to the adoption of the JWF. While the European countries needed to provide a rapid answer to this issue given the urgency of the situation[62], the Afghan Parliament was strongly opposed to the conclusion of a readmission agreement for political reasons due to humanitarian concerns regarding their nationals. Consequently, in order to overcome the impasse in the negotiations, a need for a "rapid, effective and manageable process for a smooth, dignified and orderly return"[63] led to the adoption of another informal or non-binding instrument circumventing ratification procedures on EU and Afghan side. Indeed, a binding readmission agreement was not acceptable by the Afghani members of the Parliament which "were hostile to forced returns" and during the debate, the quorum for approving an international agreement "was not enough to be effective on anything"[64].

Thus, soft law allowed the EU and Afghanistan for a common action, and combining financial means with other readmission aims. Consequently, a certain economic pressure by the Union[65] and a political compromise in the Afghani Parliament about the nature of the document[66] made the signature of the JWF possible[67]. It became there-

[61] Joint IOM-UNHCR, Returns to Afghanistan, Summary Report, 2018, available at: https://reliefweb.int/report/afghanistan/returns-afghanistan-2018-joint-iom-unhcr-summary-report-endarips#:%7E:text=Overview%20of%202018%20returns,the%20Islamic%20Republic%20of%20Iran.

[62] European Council on Refugees and Exiles, *EU Migration Polcy and Returns: Case Study on Afghanistan*, Summary and ECRE'S Recommendations 1, 2017.

[63] See the JWF, Introduction.

[64] Afghanistan Analyst Network, *EU and Afghanistan Get Deal on Migrants: Disagreements, pressure and last minute politics*, Jelena Bjelica, 6 October 2016, available at: https://www.afghanistan-analysts.org/en/reports/migration/eu-and-afghanistan-get-deal-on-migrants-disagreements-pressure-and-last-minute-politics/.

[65] Threatening Afghanistan to suspend humanitarian aid.

[66] MPs were now being told there would indeed be an agreement on deportations; Balkhi kept insisting that the new document was "a statement, which has less legal weight than an agreement".

[67] Afghanistan Analyst Network, cit.

fore clear that effectiveness and efficiency of a return policy is considered as an essential part of a comprehensive migration policy in the EU[68].

As previously mentioned, the turn to informality has not been a novelty in the EU return policy. The European Commission concluded a flurry of informal readmission agreements (2015-2019)[69]. Since other countries of origins of large groups of migrants were reluctant to engage in negotiations about readmission agreements mainly due to internal political considerations (such agreements can be a source of public hostility in some countries), since 2016, the Commission has therefore focused on developing practical cooperation arrangements with third countries, and has negotiated other five legally non-binding arrangements for returns and readmissions[70].

6.1. *JWF as EU external relations soft law*

According to the taxonomy explained in paragraph 4, the intention of the parties to the agreement represents an essential element to define the legal nature of a deal, by adopting the substantialist approach of the EU Court of Justice's case-law as mentioned in paragraph two. Similar to other non-binding soft law acts adopted by the EU, the Parties clearly state that "the JWF is not intended to create legal rights or obligations under international law". Legally non-binding arrangements are normally more politically acceptable for other third countries because of the political sensitiveness of the object of the agreement[71].

However, the case-law and the doctrine agree that despite the formal phrasing of the document, the substantial meaning and the words constitute the real parameters with which the document should be evaluated with[72]. As held by the ECJ in *France v. Commission*, "the intention of the parties […] is the only decisive criterion in international

[68] European Court of Auditors, cit., p. 42.
[69] European Court of Auditors, cit., p. 20.
[70] European Court of Auditors, cit., p. 11.
[71] European Court of Auditors, cit., p. 22.
[72] See supra.

law for the purpose of establishing the existence of binding effect"[73]. The weight that the States attribute to this document represent indeed its factor of success or not[74]. For this reason, the EU Commission and Afghanistan intentions matters in establishing legal and practical obligations under the JWF.

Consequently, because of the reasons illustrated above, it is argued that the JWF seems to represent an EU Return Directive in disguise. There are several elements that might support this argument, and thus, classify the JWF into the above-discussed para-law category of EU External Relations soft law.

The main elements of the EU Return Directive are the followings: the Directive is applicable to illegal staying third-country nationals and the purpose is their return to their country of origin[75]; the voluntaristic component[76] for the person subject of a return decision to leave the territory of an EU member State within a certain period; the forced removal when the period given is expired with all necessary measures, with some exceptions due to certain exceptional circumstances (for instance, the presence of unaccompanied minors)[77]. Those elements are very much present in the JWF.

Despite the non-legal binding effect, the wordings clearly indicate a certain level of commitment in the actions that the Parties decide to be bind for. The aim of the document is substantially similar to Article 1 of the EU Return Directive in terms of the issue to prevent "irregular migration" and the "return of irregular migrants" whose international protection has been decided by the executives of the parties and not by an open and fair ordinary decision-making process with all the guaranties and checks provided by the EU law. This is reinforced by

[73] Court of Justice, *France v. Commission*, cit., see supra.

[74] G. PASCALE, S. TONOLO, *The Vienna Convention on the Law of Treaties: An Introduction*, in G. PASCALE, S. TONOLO (eds.), *The Vienna Convention on the Law of Treaties, The Role of the Treaty on treaties in Contemporary International Law*, cit., p. 23.

[75] Art. 1, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (EU Return Directive).

[76] Art. 7 EU Return Directive, cit.

[77] Art. 8 EU Return Directive, cit.

the fact that "Afghanistan reaffirms its commitment" to readmit its citizens under this document. Furthermore, the voluntarist element appears to be similar in terms of timeframe and content to that enshrined in the EU Return Directive.

Elements of difference with the EU Return Directive seems thus to be the procedure for adopting it that, in case of the directive, need to comply with the provisions of the EU law. In the case of legally non-binding readmission arrangements, the process is simpler. The Commission requests authorization from the Council before starting a negotiation, and the Council has to confirm the outcome. However, the consent of the European Parliament is not required[78].

Moreover, the irregular Afghans under the JWF lack of legal protection, since the JWF does not have the procedural safeguards that the EU Return Directive contains[79].

Unlikely the EU Return Directive, the JWF ensures economic incentives for Afghanistan provided by the EU to cover all the expensive for return and reintegrate the Afghans in their country of origin. For this reason, the EU developed and fund "programs providing support for Afghan nationals return to Afghanistan", showing clearly the result of the negotiation above-mentioned when the EU deploys its own economic weight in order to achieve efficiency and effectiveness in the negotiation for soft law.

Another feature that fits the JWF into the taxonomy is the lack of sanctions. In order to compensate this absence, as for other soft law acts[80], "joint working group" and "exchange of documents" are normally established in order to monitor the implementation of the actions for which the parties to the soft law commit or agree to take. "Joint Working Group" and "Exchange of Documents" can be found in the Part VI and VII. They are useful for addressing most of the common obstacles to easing readmission and implement the return of illegal immigrants, however, the recurring nature of some of the issues discussed showed that there were limits to their effectiveness[81].

[78] European Court of Auditors, cit., p. 13.

[79] See Chapter III "Procedural Safeguards" of the EU Return Directive.

[80] See supra.

[81] European Court of Auditors, cit., p. 40.

6.2. *Legal issues of the JWF*

The analysis shows that the JWF might represent an EU Return Directive in disguise fitting into the taxonomy for EU external relations soft law. In consequence, as other legal EU scholars argued for similar acts[82], together with the case-law of the ECJ[83], EU law principles should apply, especially when the effect of the act directly concerns the private sphere of individuals[84].

Firstly, it therefore appears that the JWF poses a challenge to the horizontal divisions of attribution, as regulated by Article 13 TEU that provides that "each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them". The principle of conferral is related to the principle of mutual sincere cooperation between EU institutions[85].

Since 2016, the Commission has been played a major role in adopting and developing practical cooperation arrangements such as the JWF with third countries and has negotiated six legally non-binding arrangements for returns and readmissions[86].

Doubts might raise whether the Commission had the power to adopt it because the case-law of the ECJ sets certain thresholds for it. The legal qualification of an act as non-binding does not give the power to the Commission to adopt it. The ECJ impose the application of the principle of sincere cooperation to informal and not-binding acts[87]. Moreover, the Commission cannot be considered to have the right, by virtue of its power of external representation under Article 17(1) TEU,

[82] Such as the EU-Turkey Statement, see G. F. ARRIBAS, *The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem*, in *European Papers*, 2016, no. 3, pp. 1097-1104.

[83] See supra.

[84] See General Court, Order of 28 February 2017, *NF v. European Council*, case T-192/16, ECLI:EU:T:2017:128.

[85] See on the principles of conferral and mutual trust, K. LENAERTS, *The autonomy of European Union Law*, in *Post di Aisdue*, I, 2019, p. 6.

[86] European Court of Auditors, cit., p. 11.

[87] Court of Justice, *France v. Commission*, cit., supra.

to sign a non-binding agreement resulting from negotiations conducted with a third country if those EU principles are not complied with[88].

In the specific case of the JWF, the Council gave the mandate to the Commission to negotiate the six no-legal binding arrangements[89], therefore, those principles seem to be complied with.

As it has been explained in the first paragraphs, one of the reasons for which soft law instruments are adapted was to avoid the involvement of reluctant institutions such as Parliaments. In this paper, it is argued that the European Parliament should have been involved in the negotiations and approval of the JWF given its aim and content, and the fact that, according to Article 14 TEU, the EP "shall, jointly with the Council, exercise legislative and budgetary functions". On this regard, this argumentation is reinforced by two oral questions from the EP (2016-2019) to the Commission requesting that Article 218 TFEU must apply to the JWF given its nature and object.

The fact that Art. 218 TFEU is not applicable does not mean that the principle of conferral should not be respected. This principle requires that each institution must exercise its powers with due regard for the powers of the other institutions. The principle of institutional balance and the participatory right are also often mentioned in the European law literature about the use of certain soft law instruments by the Union with regard to the role of the European Parliament. As explained above, the practice of the use of soft law by the EU showed that the parliamentary scrutinity and the appropriate safeguards have been often bypassed. With reference to JWF, lack of parliamentary involvement was discussed on both sides. In Afghanistan "[…] some parts of the Afghan government have concerns about its provisions. The EU is attempting a difficult balance as Afghanistan battles for security and to support hundreds of thousands of returnees from neighbouring countries and internally displaced people across Afghanistan"[90]. In the EU, doubts were raised concerning the validity of the

[88] Court of Justice, *Germany v. Council*, cit., supra.

[89] European Court of Auditors, cit., p. 11.

[90] European Council on Refugees and Exiles, *EU Migration Polcy and Returns: Case Study on Afghanistan*, cit. See https://www.afghanistan-

JWF. If the JWF represents a readmission agreement in disguise, then not only stricter conditions concerning the participatory right of the EP apply but also formal requirements such as a publication (or access to documents) requirement and clarification of its adoption instrument should apply.[91] In this sense, during its Parliamentary questions, the European Parliament stated that, looking at the content from the wordings of the instrument, it should fall under Article 79(3) TFEU because it "provides a clear framework for cooperation on forced return and readmission to Afghanistan"[92]. Therefore, in violation with Article 218(6) (a) (v) TFEU[93], the EP claimed that its consent should have been obtained prior to the conclusion of the JWF and, in line with Article 218(10) TFEU, the EP shall be immediately and fully informed at all stages of the procedure. The EP "regrets the fact that, in spite of Article 28(4) of the Cooperation Agreement on Partnership and Development (CAPD), which states that the Parties should conclude a readmission agreement, no formal agreement has been achieved, but an informal one – the Joint Way Forward – deems it important that any agreements regarding readmission should be formalised in order to ensure democratic accountability; regrets the lack of parliamentary oversight and democratic control on the conclusion of the Joint Way Forward and stresses the importance of conducting continuous dialogue with the relevant actors in order to find a sustainable solution to the regional dimension of the issue of Afghan refugees"[94].

analysts.org/en/reports/migration/eu-and-afghanistan-get-deal-on-migrants-disagreements-pressure-and-last-minute-politics/.

[91] A. OTT, *Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges*, cit., p. 28.

[92] Parliamentary questions, 13 October 2016, *Question for oral answer to the Commission*, Rule 128, Judith Sargentini, on behalf of the Verts/ALE Group, https://www.europarl.europa.eu/doceo/document/O-8-2016-000123_EN.html.

[93] The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement. Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement: (a) after obtaining the consent of the European Parliament in the following cases (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

[94] European Parliament non-legislative resolution of 13 March 2019 on the draft Council decision on the conclusion, on behalf of the Union, of the Cooperation

These concerns raised by the EP become relevant especially with regard to those soft law tools that may substitute international agreements as mentioned above, where, *ex* art. 218 TFEU, the role of the EP is essential for their conclusions.

Furthermore, if the EU committed the disbursement of EU funds under the JWF from an instrument, namely the Development Cooperation Instrument of EU Budget Heading 4 (Global Europe), for which the ordinary legislative procedure is provided for, the EP had the right to be involved[95]. The legal basis of the Development Cooperation Instrument is constituted by the Regulation (EU) No. 233/2014 establishing a financing instrument for development cooperation that is part of the EU law budget disciplined by the multiannual financial framework. Under Article 20, it is mandatory to request the authorization of the EP for any annual appropriation of EU funds.

On the principle of transparency, according to Article 15 TEU[96], it is quite clear that confidentiality remain an essential element for the negotiation and the conclusion of those instruments, given the fact that the content of the six practical arrangements, except for Afghanistan, remains confidential[97].

On the principle of consistency, as for Article 21 TEU[98], recent analysis report that results of negotiations with third countries are suboptimal due to insufficient use of synergies with Member States

Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part (15093/2016 – C8-0107/2018 – 2015/0302M(NLE)), available at: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0170_EN.html.

[95] In the ordinary legislative procedure, the EP is one of the co-legislature. See the two oral questions by the EP (2016-2019) Article 218 TFEU.

[96] Article 15 TEU: "Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph".

[97] European Court of Auditors, cit., p. 23.

[98] The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

and across EU policies[99]. The JWF does not take into consideration and does not refer to any other binding instrument in the EU law, such as other EU development policies towards third countries. Its text is the outcome of the negotiations for solving an emergency issue at the request of some member States where the problem was more relevant.

Finally, it is argued that the ECJ made it clear that, in case all measures adopted by the institutions, bodies, offices and agencies of the Union, whatever their nature or form, if they are intended to produce legal effects *vis-à-vis* third parties, it means that an action for annulment laid down in Article 263 TFEU must be available[100]. The JWF contains clear indications that the return decisions produce legal effects to the legal sphere of an individual, especially those considered more fragile[101]: "Prior to returning Afghan nationals, the EU side will give fair consideration to humanitarian aspects in accordance with international law to unaccompanied minors, single women and women who are head of their families, family unity, elderly and seriously sick people. Special measure will ensure that such vulnerable groups receive adequate protection, assistance and care throught the whole process". Those Afghans who chose not to comply with the return decision on a voluntary basis have no choices but to return to Afghanistan, once administrative and judicial procedures with suspensive effects have been exhausted.

Thus, the practical effect of those decisions should give the possibilities for Afghans to use the legal remedies provided by the treaties by the ECJ[102].

[99] European Court of Auditors, cit., p. 17.

[100] Court of Justice, *NF v. European Council*, cit., supra.

[101] See the JWF.

[102] S. POLI, *The Integration of Migration Concerns into EU External Policies: Instruments, Techniques and Legal Problems*, cit., p. 78, R. A. WESSEL, *Normative transformations in EU external relations: the phenomenon of 'soft' international agreements*, cit., p. 74.

6.3. *Practical effects of JWF*

Having discussed the nature and the legal issues of the JWF, one could argue whether the instrument has obtained the results expected by the EU.

Recent reports state that the 10 third countries with the most non-returned irregular migrants during the 2014-2018 period (excluding Syria) were, in order of significance, Afghanistan, Morocco, Pakistan, Iraq, Algeria, Nigeria, Tunisia, India, Bangladesh and Guinea[103].

A Parliamentary question, on 23 March 2021[104], reported that in France, only 11 Afghan nationals were forced to return to their country of origin between 2017-2018, despite Afghans in 2020 representing the second largest group of asylum seekers with 48 578 applications, and 37% of unaccompanied minors. However, very different treatment based on the procedures of each country: in Italy (93.8% acceptance of requests) in Bulgaria (4.1%).

7. *Conclusion*

The analysis of the use of soft law in EU External relations shows how a new category of tools is emerging among the instruments that the EU deploys in regulating its external action with third countries and international organizations.

The paper tried to shed some light on the European integration path applying the neofunctionalism logic and the spillover effects. It did so by assessing the rationale and the nature of EU external relations soft law acts. The taxonomy of soft law become therefore functional to support this EU integration approach, arguing that the JWF, such as other similar informal instrument, constitute in certain fields and under certain conditions the first step for EU member States to regulate and discipline areas where the EU has no power to act, but a

[103] European Court of Auditors, cit., p. 17.

[104] Question for written answer E-001578/2021 to the Commission, Rule 138, Dominique Bilde (ID), Subject: *Ineffectiveness of the joint way forward on migration issues signed with Afghanistan.*

supranational neofunctionalism approach is necessary to find common standards and solutions. This is done by reinterpreting the concept of efficiency and effectiveness of a common action that, *prima facie*, goes beyond the data and the return rate. More in-depth studies should assess and define a new definition of efficiency and effectiveness applicable to the use of soft law in EU external relation, and to what extent they represent a decisive element for the EU to opt for soft law instead of hard law.

The JWF should be regarded as a product of broader migration relations and coordination towards a common EU migration policy and effectiveness should be regarded as a new main driving force for EU external migration policy, where the successful element should be considered the achievement for a common supranational solution, paving the way for more detailed and complex measures in the future under a formal EU treaties approach. Moreover, neofunctionalism is reinforced using soft law through effectiveness though the criteria of financial means and setting standards for a returning and reintegration policy.

Finally, the paper argues that the risk of employing soft law, especially when they substitute formal agreement, might be that of stepping outside or not complying with EU treaties principles[105].

[105] M. MORARU, *The new design of the EU's return system under the Pact on Asylum and Migration*, Center For Judicial Cooperation, in https://eumigrationlawblog.eu/the-new-design-of-the-eus-return-system-under-the-pact-on-asylum-and-migration/?print=print.

L'IMPATTO DELLA INTEGRAZIONE DIFFERENZIATA NEL CONTESTO NEL DIRITTO MIGRATORIO E LE PIÙ AMPIE SFIDE ALL'INTEGRITÀ *COSTITUZIONALE* DELL'UNIONE EUROPEA

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1. *Introduzione*

La politica di migrazione e asilo dell'Unione europea rappresenta un esempio di *governance* del modello ad "integrazione differenziata" o a "geometria variabile", in cui gli Stati membri partecipano a vari livelli ad accordi o iniziative, con l'intento di affrontare questioni e problemi a loro comuni. A causa delle sue radici intergovernative, questo tipo di *governance* è stata spesso vista come un "compromesso necessario" per una più profonda integrazione in questo campo politico, che si caratterizza per la mancanza di coesione tra gli Stati membri. Fin dall'entrata in vigore del Trattato di Amsterdam, l'adozione di meccanismi flessibili ha consentito di soddisfare gli interessi politici di alcuni Stati membri nelle politiche migratorie e questo ha fatto sì che la si considerasse come un compromesso necessario per un'ulteriore integrazione in alcuni settori dell'Unione europea. Tuttavia, non è chiaro fino a che punto questo modello di "partecipazione variabile" sia uno

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strumento di *governance* necessario ed inevitabile in un'Europa "a più velocità" o se, al contrario, riveli una lacuna nel più ampio progetto di integrazione europea stesso. Nondimeno, il modello differenziato, per sua stessa natura, può creare una frammentazione della politica migratoria dell'Unione europea e rivelare una "divisione" tra gli Stati membri per quanto riguarda il "nucleo di valori" che dovrebbe guidare lo sviluppo in questo settore. Alla luce di queste premesse il presente elaborato si propone di rispondere alla seguente domanda: in quale misura l'esercizio di questo strumento, sebbene riconosciuto dai Trattati, contrasta con i valori fondanti dell'Unione europea e, pertanto, fino a che punto l'integrazione differenziata nell'ambito del diritto e delle politiche migratorie dell'Unione europea è il mezzo adeguato per uscire dalla crisi Schengen?

Quando si parla di questioni migratorie, sembra che prevalgano sempre più ragioni pratiche per cooperare rapidamente in situazioni di crisi e di emergenza al fine di raggiungere obiettivi correlati piuttosto che realizzare un obiettivo a lungo termine, all'interno di un quadro di valori comuni. Ciò è ancora più evidente nel contesto attuale, nel quale l'arrivo di un numero senza precedenti di persone in cerca di protezione internazionale e l'afflusso di sfollati dall'Ucraina a causa del conflitto ha riportato in primo piano la questione dei valori che guidano la politica migratoria dell'Unione europea.

Si può pacificamente asserire che la risposta europea alla crisi migratoria solleva serie preoccupazioni soprattutto per quanto riguarda il rispetto del principio dello Stato di diritto inteso in termini di tutela dei diritti umani. La proliferazione di misure legate alla migrazione, che sembrano "legali" senza in realtà esserlo, è una tendenza preoccupante in alcuni Stati membri che operano in "prima linea". Questi Stati hanno fatto ricorso a processi di gestione della migrazione informali e non giuridicamente vincolanti al fine di evitare quadri legislativi, procedurali e democratici più complessi. Un simile approccio, sembra tuttavia essere incompatibile con le componenti essenziali del principio dello Stato di diritto, insieme alle lacune nella tutela giurisdizionale e ai problemi in termini di responsabilità per le potenziali violazioni dei diritti umani che comporta. Infatti, le risposte implementate dagli Stati membri in "prima linea" appaiono problematiche a causa del loro grave impatto sui diritti fondamentali dei migranti, nonostante la pro-

tezione loro offerta dalle pertinenti disposizioni del diritto internazionale e del diritto dell'Unione europea. Alcuni di essi, come i divieti di respingimento e di espulsione collettiva, hanno carattere assoluto e non ammettono eccezioni, con la conseguenza che la loro violazione appare, in una certa misura, ancora più grave se la si osserva in termini di tutela del principio dello Stato di diritto, inteso come dovere di osservare i pertinenti obblighi in materia di diritti umani[1].

A questo proposito, il presente contributo si propone di indagare l'interrelazione che esiste tra il modello di integrazione differenziata e le due "crisi" che l'Unione Europea si trova attualmente ad affrontare: la cosiddetta "crisi migratoria" o "crisi dei rifugiati" e la "crisi del principio dello Stato di diritto". In primo luogo si procede ad una disamina del concetto di integrazione differenziata al fine di mostrare come essa operi concretamente come strumento di *governance* nel campo delle migrazioni. Poi, si propone di mostrare come ciò riveli anche il profondo disaccordo tra gli Stati membri sui valori che sostengono questa politica. La questione della conformità delle politiche nazionali in materia di migrazione e asilo e gestione delle frontiere con lo Stato di diritto è stata ampiamente sollevata sia dal Parlamento europeo[2] che dalla Commissione europea[3]. Tuttavia, sembra esserci

[1] F. L. GATTA, *Migration and the Rule of (Human Rights) Law: Two "Crises" Looking in the Same Mirror*, in *Croatian Yearbook of European Law and Policy*, 2019, disponibile al sito https://www.cyelp.com/index.php/cyelp/article/view/346.

[2] EP Resolution of 12 September 2018 on a *Proposal Calling on the Council to Determine, pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded* (2017/2131(INL)). Il Parlamento europeo, in particolare, ha affrontato la questione in modo specifico per quanto riguarda l'Ungheria: il 12 settembre 2018, per la prima volta nella storia dell'UE, ha votato a favore dell'avvio della procedura di cui all'articolo 7 dell'Unione europea (TUE) nei confronti dello Stato ungherese a causa dell'esistenza di un chiaro rischio di una grave violazione dei valori fondanti dell'Unione. Questi valori, sanciti dall'articolo 2 del TUE e riflessi nella Carta dei diritti fondamentali dell'Unione europea, comprendono lo Stato di diritto e il rispetto dei diritti umani.

[3] *Inter alia*, *Relocation: Commission Refers the Czech Republic, Hungary and Poland to the Court of Justice*, (Press Release) IP/17/5002, 7 December 2017; Commission, *Migration and Asylum: Commission Takes Further Steps in Infringement Procedures against Hungary,* (Press Release) IP/18/4522, 19 July 2018; Commission, *Hungary: Commission takes next step in the infringement procedure for non-provision of food*

l'intenzione di porre dei limiti al modo in cui gli Stati membri possono reagire nel duplice contesto della "crisi", vale a dire quello dello Stato di diritto e della crisi migratoria. Per concludere, verrà analizzato l'approccio della Corte di Giustizia dell'Unione Europea (CJEU) all'argomento attraverso una breve disamina della pertinente giurisprudenza. Pertanto, si mostrerà come alcune delle questioni attualmente affrontate dalla Corte nella sua giurisprudenza sulla "crisi dello Stato di diritto" possano essere collegate con la sua giurisprudenza sulla migrazione e sull'asilo.

2. *L'integrazione differenziata come caratteristica intrinseca del più ampio progetto di integrazione europea*

Prima di analizzare le questioni ad oggetto dell'analisi in esame, è utile partire da una chiarificazione concettuale, ovvero dall'idea di base dell'integrazione differenziata (DI). Il concetto generale di differenziazione è apparso per la prima volta nel 1986, come sancito dall'articolo 8 *ter* dell'Atto Unico europeo[4]. L'idea alla base del concetto di differenziazione è facile da comprendere giacché si tratta di una forma di integrazione che non include tutti gli Stati membri, e che pertanto coinvolge solo alcuni di essi e non l'Unione europea nel suo insieme[5].

in transit zones (Press Release) IP/19/5994, 10 October 2019. Nei confronti dell'Ungheria, nell'ottobre 2019, la Commissione ha deciso di proseguire la procedura di infrazione relativa alla mancata fornitura di cibo alle persone detenute nelle zone di transito al confine magiaro con la Serbia.

[4] Ora articolo 27 del Trattato sul funzionamento dell'Unione europea "Nell'elaborare le proposte volte a conseguire gli obiettivi di cui all'articolo 7 bis [ora articolo 26 del TFUE], la Commissione tiene conto dell'entità dello sforzo che talune economie che presentano differenze di sviluppo dovranno sostenere per l'instaurazione del mercato interno e può proporre disposizioni appropriate. Se tali disposizioni assumono la forma di deroghe, esse devono essere di natura temporanea e devono perturbare il meno possibile il funzionamento del mercato interno".

[5] S. VERHELST, *A Beginner's Guide to Differentiated Integration in the EU*, in *Studia Diplomatica*, 2013, n. 3, pp. 7-18.

Più in generale, l'integrazione differenziata potrebbe essere intesa *latu sensu* e da alcuni Stati, come un sistema per lavorare verso una più stretta integrazione, dal momento che si adatta al desiderio contestuale di rafforzare l'integrazione dell'Unione e di ampliarne la sua *membership*. Allo stesso modo, l'integrazione differenziata può essere intesa anche come un modo per ridurre il livello di integrazione esistente di uno o più Stati membri. In questo senso, ogni Stato membro dovrebbe avere la possibilità di decidere il proprio grado di coinvolgimento nel progetto europeo. Questo punto di partenza è piuttosto semplice, salvo complicarsi quando le diverse forme e scelte gestionali di differenziazione ne fanno un concetto dalle molteplici implicazioni per il progetto europeo stesso.

L'ambiguità dell'integrazione differenziata è in gran parte dovuta al fatto che essa può assumere diverse variabili che ne influenzano la forma, vale a dire: la sua natura, la sua composizione geografica, la dimensione temporale e lo scopo sotteso ad essa[6]. Inoltre, un'ampia gamma di settori politici è stata interessata da differenziazioni a causa del diverso grado di coinvolgimento che gli Stati membri hanno avuto. Mentre fino alla fine degli anni '80 gli Stati membri applicavano in modo uniforme la maggior parte delle norme europee, oggi la stragrande maggioranza delle politiche dell'Unione europea viene attuata in modo non uniforme. Una caratteristica inevitabile e tangibile della natura multistrato del diritto dell'Unione europea è che il suo sistema giuridico si è gradualmente allontanato dal suo ideale originario di unità, per accogliere varie forme di applicazione ineguale tra i suoi Stati membri. Il risultato di questo è un divario tangibile tra l'obiettivo originario di un'applicazione uniforme e la caotica realtà pratica all'interno degli Stati membri.

Come sottolineato da De Witte, fino all'adozione del Trattato di Maastricht si era andato diffondendo un senso di unità in un "unico ordinamento giuridico comunitario integrato", e questo nonostante l'esistenza di tre diverse Comunità. Inoltre, questo ordinamento giuridico unitario era uniformemente applicabile a tutti gli Stati membri e la stessa Corte di giustizia nella sua giurisprudenza aveva attribuito

[6] *Ibidem*.

grande importanza a questa applicazione uniforme[7]. Questa aspirazione ad un'applicazione uniforme, però, si scontrava con due limiti. In primo luogo, contrastava con il fatto che il diritto dell'Unione europea è spesso applicato da autorità e tribunali nazionali, i quali in molte occasioni non lo applicano fedelmente e correttamente. In secondo luogo, un'altra limitazione a questa aspirazione era inerente allo stesso diritto dell'Unione europea; vale a dire il fatto che esistevano forme di diritto e di politica europea che contenevano un "permesso" per un'applicazione differenziale. L'esempio più evidente si rinviene nel fatto che le direttive possono essere recepite dagli Stati membri che hanno la libertà di decidere sulle "forma e modalità" di tale recepimento nonché sull'ulteriore applicazione delle stesse[8].

Questa, chiaramente, non è più la percezione dominante oggi e gli Stati membri possono sia derogare alle norme comuni o, in modo più radicale, possono non partecipare alla loro stesura e, di conseguenza, non essere tenuti ad applicarle. Quest'ultima forma di differenziazione è talvolta chiamata a "geometria variabile", a indicare il fatto che il disegno territoriale di una determinata politica dell'Unione europea viene alterato fin dall'inizio, a causa dell'assenza di alcuni Stati membri. La logica alla base di questa forma di *governance* è duplice. In primo luogo, mira a rendere le norme pertinenti in qualche modo "facoltative", nel senso che gli Stati membri dovrebbero decidere liberamente se applicarle o meno. Il secondo aspetto della governance differenziata riguarda proprio il suo ambito di applicazione geografico, esso stesso mutevole. Inoltre, si deve tenere presente la sua ragione funzionale, per la quale, nel tempo, la geometria variabile si è rivelata essenziale per consentire la continuazione dell'integrazione europea laddove l'allargamento, l'integrazione e l'uniformità non potevano andare di pari passo. A tal proposito, la scelta dell'allargamento con incremento del processo di integrazione è stata fatta più volte nel corso degli anni

[7] B. De Witte, *Variable Geometry and Differentiation as Structural Features of the EU Legal Order*, in B. De Witte, E. Vos (eds.), *Between Flexibility and Disintegration. The Trajectory of Differentiation in EU Law*, Northampton, 2017, pp. 9-10.

[8] Articolo 288 TFUE.

e ha portato con sé il rischio di sacrificare l'aspirazione di un ordinamento giuridico uniforme[9].

Nel dibattito dottrinale, la nozione di *Europe à la carte* è stata introdotta per definire "politiche comuni in cui esistono interessi collettivi senza alcun vincolo per coloro che non possono, in un dato momento, aderirvi"[10]. Fu negli anni '90 che Stubb affermò di aver identificato non meno di trenta forme di integrazione differenziata, che a sua volta classificò come creatrici di differenze lungo tre dimensioni di tempo, spazio e contenuto politico[11]. L'integrazione differenziata inoltre è stata spesso usata in modo interscambiabile con la nozione di "integrazione flessibile", ma è anche usata in varie terminologie che vanno dalla "geometria variabile" alla "*integration à la carte*", "integrazione flessibile", o alla "*closer cooperation*" e persino al "*multi-speed integration*", dove non è il livello di integrazione a lungo termine che varia da uno Stato membro all'altro, quanto piuttosto, la velocità adottata per raggiungere un'integrazione più stretta. Ancora, c'è chi in dottrina preferisce distinguere tra due dimensioni: quella che rappresenta le differenze di centralizzazione (differenziazione verticale); quella che rappresenta le differenze di estensione territoriale (differenziazione orizzontale)[12]. Inoltre, è comune distinguere tra una differenziazione orizzontale interna, che si verifica quando gli Stati membri hanno possibilità di scelta, e una differenziazione orizzontale esterna, riscontrabile quando ad avere tale possibilità sono gli Stati non membri[13]. Da ultimo essa potrebbe essere anche osservata come fenomeno nel suo complesso, come un *unicum*, piuttosto che distinguendola nelle sue di-

[9] D. THYM, *Competing Models for Understanding Differentiated Integration*, in B. DE WITTE, E. VOS (eds.) *Between Flexibility and Disintegration. The Trajectory of Differentiation in EU Law*, op. cit., pp. 26-27.

[10] P. CHIOCCHETTI, *Models of Differentiated Integration: Past, Present, and Proposed*, in *Robert Schuman Centre for Advanced Studies Research Paper No. 2022/09*, 2022, disponibile al sito https://www.ssrn.com/abstract=4035414.

[11] A. STUBB, *A Categorization of Differentiated Integration*, in *JCMS: Journal of Common Market Studies*, 1996, n. 2, p. 283.

[12] B. LERUTH, C. LORD, *Differentiated Integration in the European Union: A Concept, a Process, a System or a Theory?*, in *Journal of European Public Policy*, 2015, pp. 754-763.

[13] *Ibidem*.

verse dimensioni. Al fine di ottenere maggiore coerenza, agli occhi di chi scrive, si ritiene che sia inevitabile studiare l'integrazione differenziata nella sua dimensione dinamica, e pertanto, come un processo, la cui pratica funziona con diverse forme di differenziazione, ad esempio attraverso clausole di *opt-out*, cooperazione rafforzata e quindi come fenomeno che si evolve nel tempo anche attraverso la pratica politica quotidiana. Perciò si potrebbe ottenere una maggiore coerenza studiando l'integrazione differenziata come fenomeno nel suo complesso, come un *unicum*, piuttosto che distinguendolo nelle sue diverse dimensioni.

Oggi la differenziazione è una caratteristica permanente e normalizzata dell'integrazione europea così come dell'intera architettura istituzionale dell'Unione europea[14]. Curtin ha osservato che "la differenziazione è diventata un elemento stabile dell'ordinamento giuridico dell'Unione europea". Allo stesso modo, De Witte ha sostenuto che "l'esistenza di un sistema controllato di differenziazione tra gli Stati membri è ormai diventata una caratteristica stabile del diritto comunitario". Invero, l'integrazione differenziata si è rivelata essenziale per il proseguimento dell'integrazione europea nel suo complesso.

Si consideri, tuttavia, che negli ultimi decenni, una serie di sviluppi ha messo in dubbio la sostenibilità dell'attuale quadro dell'Unione europea. Di fatto, gli sviluppi politici più recenti suggeriscono che potrebbero emergere nuove forme di differenziazione. Pertanto, ancora, si suggerisce una visione della differenziazione nella sua dinamicità e da osservare come un obiettivo mobile, che si sviluppa nel tempo e fornisce nuove forme di integrazione. In questo senso, vari fattori come le diverse fasi dell'allargamento, la crisi economica, l'aumento dell'euroscetticismo e la crisi migratoria hanno svolto un ruolo importante nello sviluppo della stessa nel corso del tempo.

Da ultimo, anche se a volte tende a essere trascurata nei dibattiti, l'integrazione differenziata non è di per sé limitata ai soli Stati membri dell'Unione europea in quanto anche i paesi extra-UE possono aderire

[14] M. PATRIN, D. CURTIN, *EU Constitutional Standards of Democracy in Differentiated Integration*, in *Robert Schuman Centre for Advanced Studies Research Paper No. 2021/80*, 13 Dicembre 2021, disponibile al sito SSRN: https://ssrn.com/abstract=3984186 or http://dx.doi.org/10.2139/ssrn.3984186.

all'integrazione differenziata. Lo spazio Schengen è il primo esempio di integrazione differenziata che trascende i confini dell'UE. Quattro paesi extra-UE partecipano a Schengen, mentre due Stati membri dell'UE (prima Regno Unito e oggi solo l'Irlanda) hanno scelto di non parteciparvi. Al contrario, molti altri tipi di integrazione differenziata coinvolgono solo gli Stati membri dell'UE. Ne sono un esempio l'Unione economica e monetaria (UEM) e le iniziative di cooperazione rafforzata. Pertanto, anche la dimensione geografica dell'integrazione differenziata ha un impatto significativo sulla sua gestione.

3. *La politica migratoria e di asilo come modello di differenziazione "*par excellence*"*

Come per l'intero Spazio di Libertà, Sicurezza e Giustizia (SLSG), la politica di migrazione e asilo dell'Unione europea rappresenta un'area in cui l'integrazione differenziata ha trovato una delle sue massime espressioni.

A partire dagli anni '90, lo SLSG si è evoluto sino a divenire un'area politica profondamente integrata. Si potrebbe dire che in termini di integrazione verticale si è passati dal Trattato di Maastricht attraverso quello di Amsterdam e poi di Lisbona all'adozione di un metodo comunitario e intergovernativo[15]. Il Trattato di Maastricht ha istituito il terzo pilastro, che ha trasformato la giustizia e gli affari interni in una questione di cooperazione intergovernativa. Il Trattato di Amsterdam ha trasferito una serie di politiche dal terzo al primo pilastro, mostrando così un significativo spostamento verso un processo decisionale congiunto. Poco dopo, alla Commissione, insieme ad un determinato numero di Stati membri, è stato concesso il diritto di proporre nuove leggi. Infine, la Corte di giustizia ha iniziato ad esercitare la propria giurisdizione in questo settore. Il Trattato di Lisbona ha abolito del tutto il terzo pilastro e il metodo comunitario è diventato la regola.

[15] Vedi N. EL-ENANY, *The Perils of Differentiated Integration in the Field of Asylum,* in B. DE WITTE, E. VOS (eds.), *Between Flexibility and Disintegration. The Trajectory of Differentiation in EU Law*, *Northampton*, 2017, pp. 362-363.

Invero, è con esso che le questioni migratorie hanno iniziato a costituire una parte essenziale del Titolo V del TFUE sullo SLSG e fanno oggi parte del più ampio quadro costituzionale dell'Unione europea, compresi i principi generali e i diritti fondamentali. Questo ha pertanto reso possibile la realizzazione di una politica comune in materia di asilo, immigrazione e controllo delle frontiere esterne[16]. Infine, il Parlamento europeo è diventato attore chiave nella procedura legislativa ordinaria e nella maggior parte delle 'questioni Schengen'. Infine, il Parlamento europeo è diventato attore chiave nella procedura legislativa ordinaria e nella maggior parte delle "questioni Schengen".

Per di più, lo SLSG e il caso di Schengen mostrano un modello unico di differenziazione, se vogliamo, "orizzontale" interna ed esterna poiché alcuni Stati non appartenenti all'Unione europea partecipano ai regimi Schengen e Dublino, ovvero di controllo delle frontiere e politiche di asilo, mentre alcuni Stati membri dell'Unione europea vi hanno rinunciato (o vi hanno aderito selettivamente). In questo senso, tre Stati membri non hanno partecipato pienamente al titolo IV e/o all'*acquis* di Schengen. Questo è stato il caso dell'Irlanda – prima anche del Regno Unito – e della Danimarca. A questi ultimi è stata concessa l'opportunità di una partecipazione in materia di asilo, immigrazione e cooperazione giudiziaria. Per questi tre Stati membri sono stati aggiunti dei protocolli separati per determinare la portata della loro partecipazione a questo nuovo quadro politico. Le eccezioni irlandese e, prima di Brexit, britannica sono coperte da tre protocolli: il Protocollo n. 19 sull'*acquis* di Schengen integrato nell'ambito dell'Unione europea, il Protocollo n. 20 sull'applicazione di alcuni aspetti dell'articolo 26 TFUE e il Protocollo n. 21 del Regno Unito sullo spazio di libertà, sicurezza e giustizia. L'Irlanda – e in precedenza il Regno Unito – non è vincolata in alcun modo a meno che non decida di aderire ad un singolo provvedimento adottato, dandone comunicazione entro tre mesi dalla presentazione della proposta o in qualsiasi mo-

[16] Più precisamente, secondo l'articolo 67, paragrafo 2, del TFUE, l'Unione europea "(...) garantisce l'assenza di controlli alle frontiere interne per le persone e definisce una politica comune in materia di asilo, immigrazione e controllo delle frontiere esterne, fondata sulla solidarietà tra gli Stati membri ed equa nei confronti dei cittadini di paesi terzi (...)".

mento successivo all'adozione dell'atto. Per quanto riguarda le eccezioni danesi, invece, queste sono coperte dal Protocollo n. 22, secondo il quale si prevede che la Danimarca sia completamente esclusa dalla partecipazione alle misure adottate nel quadro dello SLSG[17].

Per usare le parole di Silga "l'attuale base giuridica esistente nel campo della migrazione dovrebbe essere considerata come un vero successo soprattutto se la si considera alla luce della storia tortuosa che ha da sempre caratterizzato questo campo politico"[18]. In effetti, sin dal suo inizio, la politica migratoria dell'Unione europea ha incontrato notevoli ostacoli, il che spiega alcuni dei problemi strutturali che ancora oggi è costretta ad affrontare, compreso il suo modello differenziato di integrazione. In breve, la base normativa della politica migratoria dell'Unione europea è sempre stata ambigua, e questa ambiguità l'affligge ancora oggi. Gli stessi trattati prevedono alcuni "spazi" di manovra in cui non è chiaro come determinate questioni relative alla migrazione possano rientrare o meno in queste regole. Una disposizione importante da evidenziare a questo proposito è l'articolo 72 TFUE, secondo il quale il Titolo V "[...] non pregiudica l'esercizio delle responsabilità incombenti agli Stati membri per il mantenimento dell'ordine pubblico e la salvaguardia della sicurezza interna". Ancora, l'articolo 67, paragrafo 1, TFUE, non brilla per cristallina chiarezza quando pone una certa enfasi sul rispetto dei diversi sistemi giuridici e delle tradizioni degli Stati membri. Ciò suggerisce chiaramente che le politiche migratorie nazionali differiscono le une dalle altre. E ciò appare in qualche modo in contraddizione con quanto affermato nell'articolo 2 TUE secondo cui i valori fondanti dell'UE sono "comuni agli Stati membri". In un simile contesto di ambiguità regolatoria, la "crisi" della politica migratoria dell'Unione europea rivela il profondo disaccordo – se non una frattura – che esiste tra gli Stati membri sui valori che dovrebbero essere alla base di questa politica[19].

[17] Fanno eccezione le misure relative alla determinazione degli Stati i cui cittadini devono essere in possesso di un visto per l'attraversamento delle frontiere esterne e quelle che costituiscono uno sviluppo del cosiddetto *acquis* di Schengen. La Danimarca è infatti parte dell'Accordo di Schengen e della sua Convenzione di attuazione.

[18] J. SILGA, *Differentiation in the EU Migration Policy: The "Fractured" Values of the EU*, in *European Papers*, 2022, n. 2, pp. 909-928.

[19] *Ibidem*.

4. *L'impatto della integratazione differenziata nel contesto della "crisi migratoria" e la conseguente frattura dei valori*

Gli Stati membri sono stati tradizionalmente riluttanti a rinunciare al completo controllo del settore, notamente molto delicato della sovranità nazionale, quale l'ambito delle politiche di migrazione e asilo e controllo delle frontiere. Pertanto, proprio in questo contesto di riluttanza ed esitazione da parte degli Stati membri, la *governance* differenziata è emersa come il compromesso necessario per una maggiore integrazione.

Si tenga inoltre presente che le preoccupazioni legate alla migrazione sono tradizionalmente inquadrate come questioni di sicurezza da parte degli Stati membri. Per questioni pratiche si è inoltre preferito spesso adottare una cooperazione tempestiva su tali questioni al fine di raggiungere obiettivi correlati nel più breve tempo possibile. Nondimeno, gli Stati membri sono sempre stati cauti affinché tale integrazione non comportasse una perdita della loro sovranità che gli imponesse chi ammettere nel loro territorio e a quali condizioni, se non in circostanze molto limitate.

È proprio l'articolo 72 del TFUE ad essere stato spesso invocato dagli Stati membri come *carte blanche* per disapplicare il diritto comunitario in nome della sicurezza nazionale. E questo potrebbe suggerire una tendenza da parte di alcuni Stati a differenziarsi dalle politiche migratorie. Tuttavia, questa predisposizione a invocare l'articolo 72 TFUE come norma imperativa per respingere qualsiasi richiedente per motivi di ordine pubblico è stata considerata invalida e di conseguenza respinta dalla Corte di Giustizia, come già più volte sottolineato nella sua giurisprudenza[20].

A questo proposito, la Corte ha chiarito che, se da un lato spetti agli Stati membri determinare le misure adeguate a garantire l'ordine pubblico sul loro territorio nonché la sicurezza interna ed esterna dei confini, dall'altro non ne si può dedurre che tali misure siano completamente al di fuori dell'ambito di applicazione del diritto dell'U-

[20] *Inter alia*, Opinione dell'Avvocato Generale E. SHARPSTON, cause C-715/17 *Commissione c. Polonia*, C-718/17 *Commissione c. Ungheria* e C-719/17 *Commissione c. Repubblica Ceca*, par. 160.

nione[21]. Come affermato dalla Corte, infatti, il TFUE prevede che deroghe espresse possano essere applicate in situazioni suscettibili di incidere sull'ordine pubblico o sulla pubblica sicurezza solo in casi ben circoscritti[22]. Ammettere l'esistenza di una siffatta riserva, a prescindere dai presupposti specifici stabiliti dal trattato, rischierebbe di minare la forza vincolante e l'applicazione uniforme del diritto dell'Unione europea.

Lo SLSG ha recentemente vissuto alcune gravi battute d'arresto nella pratica e, in particolare, la crisi migratoria, ha smorzato le dinamiche di integrazione e ha rivelato gravi carenze strutturali che finora non sono state affrontate. Inoltre, la crisi ha acuito la questione di quali "valori" stiano effettivamente guidando la politica migratoria dell'Unione europea, e ciò considerando le reazioni divergenti degli Stati membri[23]. È quindi necessario chiedersi fino a che punto la crescente spaccatura dei valori al centro del processo di integrazione nel campo della migrazione non sia piuttosto un campanello d'allarme che rivela una crepa più ampia nello stesso progetto di integrazione europea. In effetti, se visto nel contesto della crisi migratoria, il modello della integrazione differenziata ha introdotto un elevato livello di complessità nel funzionamento della politica migratoria dell'Unione europea, rendendo più difficile trovare una "via d'uscita" dalla crisi, come se non bastasse, portando con sé il rischio di ulteriore frammentazione giuridica e tensioni politiche. In ragione di ciò, la crisi migratoria ha portato a disfunzioni, restrizioni temporanee e pressioni per la rinegoziazione in diversi ambiti: si pensi, a titolo di esempio, alla libera circolazione, Schengen, Dublino, o a questioni di accesso ai benefici nazionali. In risposta a questi problemi, le istituzioni dell'Unione europea, gli Stati membri, gli esperti e i movimenti politici hanno sviluppato una serie di proposte di riforma, alcune delle quali vedono l'integrazione differenziata come parte della soluzione.

[21] *Ibidem*.

[22] Si veda, a questo proposito Corte di giustizia, sentenza del 17 dicembre 2020, *Commissione c. Ungheria*, causa C-808/18, ECLI:EU:C:2020:1029, par. 214; sentenza del 30 giugno 2022, *Valstybės sienos apsaugos tarnyba e altri*, causa C-72/22 PPU, ECLI:EU:C:2022:505, par. 70.

[23] J. SILGA, *Differentiation in the EU Migration Policy: The "Fractured" Values of the EU*, cit., p. 911.

Pertanto, alla luce di quanto esposto, sembrerebbe che questa incredibile gamma di "flessibilità" data dalla integrazione differenziata, sebbene offra uno spazio unico per accogliere gli interessi divergenti degli Stati membri, porti con sé un alto prezzo da pagare, ovvero una pletora di nuovi problemi e rischi.

L'asilo rappresenta un esempio di questo settore politico in cui si è verificata una significativa "frattura" di valori (es. dignità umana, libertà, uguaglianza e Stato di diritto). Nonostante le richieste di una "politica comune in materia di asilo", espresse a partire dal Consiglio europeo di Tampere nel 1999 e che fanno parte del TFUE all'articolo 78, paragrafo 1, le pratiche in materia di asilo differiscono ancora sostanzialmente da Stato membro a Stato membro[24]. A titolo esemplificativo basti pensare alla Direttiva Procedure che, garantendo agli Stati membri un ampio margine di discrezionalità nella loro interpretazione e applicazione, è essa stessa una fonte della cosiddetta "flessibilità informale"[25]. Pertanto, nella pratica, permangono grandi differenze tra gli Stati membri nel trattamento dei richiedenti asilo, ad esempio in relazione al loro riconoscimento come rifugiati.

Ancora, il sistema Dublino costituisce un altro buon esempio di "flessibilità" proprio in ragione delle differenze nei diversi livelli di condizioni di accoglienza che differiscono da Stato membro a Stato membro. La Corte europea dei diritti dell'uomo (CEDU) ha inoltre analizzato una serie di "casi Dublino" riguardanti trasferimenti di richiedenti asilo tra Stati membri dell'Unione ai sensi delle norme che stabiliscono i criteri e i meccanismi di assegnazione della responsabilità per l'esame di una domanda di protezione presentata nell'Unione europea. E in questi casi, la Corte ha chiarito che tali norme non possono essere applicate in modo automatico e meccanico, ossia senza prima effettuare un'adeguata valutazione delle condizioni di accoglienza dello Stato membro, in quanto le stesse potrebbero non essere compatibili con Articolo 3 CEDU. Ciò dimostra che l'interazione tra il funzio-

[24] Consiglio europeo di Tampere, *Conclusioni della Presidenza del 15 e 16 ottobre 1999*, consultabili al sito https://www.europarl.europa.eu/summits/tam_en.htm.

[25] Direttiva 2013/32/UE del Parlamento Europeo e del Consiglio, *recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale (rifusione)*, del 26 giugno 2013 in GUUE L 180/60 del 26 giugno 2013.

namento del sistema Dublino in un contesto di diversi livelli di condizioni di accoglienza negli Stati membri ha un effetto disastroso. E questo è stato chiarito per la prima volta nel caso *MSS c. Belgio e Grecia*[26], che ha rappresentato un caso storico in cui la CEDU ha ritenuto che il trasferimento di un richiedente asilo tra due paesi dell'Unione europea ai sensi del Regolamento Dublino violava una serie di diritti previsti dalla Convenzione, sia da parte dello Stato di origine che di quello di destinazione, e ha affermato inoltre, che diversi livelli di protezione tra gli Stati membri producono una sorta di "lotteria dell'asilo" nell'Unione[27]. In buona sostanza, i giudici di Strasburgo hanno riaffermato in termini generali che, sebbene esista un diritto sovrano e legittimo degli Stati di controllare le proprie frontiere, allo stesso tempo risulta necessario attuare misure di controllo dell'immigrazione nel pieno rispetto degli obblighi imposti dalla Convenzione, e questo anche in caso di forte pressione migratoria. Da ultimo, si tratta infatti di una sentenza nella quale si è fortemente ribadita la necessità che le norme europee sottostiano ai dettami della CEDU, ad esempio in tema di rispetto dell'Articolo 3.

5. *Integrazione differenziata, stato di diritto e crisi migratoria nella giurisprudenza della Corte di giustizia dell'Unione europea*

La crisi di valori ha trovato particolare espressione anche nella giurisprudenza della Corte di giustizia. Un esempio è il caso portato dinanzi ai giudici di Lussemburgo da due Stati membri, Ungheria e Slovacchia, che chiedevano l'annullamento della decisione di ricollocazione adottata dal Consiglio a sostegno della Grecia e dell'Italia sulla base dell'articolo 78, paragrafo 3, TFUE. Questo caso mostra una significativa frattura di valori proprio a causa del carattere allarmante

[26] Corte europea dei diritti dell'uomo, Grande camera, sentenza del 21 gennaio 2011, *MSS c. Belgio e Grecia*, ricorso n. 30696/09.

[27] L'approccio della Corte europea dei diritti dell'uomo nei confronti dei MSS è stato seguito anche dalla Corte di Giustizia nelle cause riunite *N. S.* (C-411/10) *c. Secretary of State for the Home Department* e *M. E. e altri* (C-493/10) *c. Refugee Applications Commissioner e il Ministro della giustizia, dell'uguaglianza e della riforma legislativa*, del 21 dicembre 2011.

delle argomentazioni addotte dalle parti[28]. Infatti, sebbene la Corte abbia respinto i ricorsi dei ricorrenti, è interessante notare che questi ultimi, sostenuti dalla Polonia, hanno sollevato alcune argomentazioni legate al fatto "che accettare la ricollocazione dei richiedenti asilo ne metterebbe a rischio l'omogeneità etnica".

La Corte di giustizia ha respinto tali argomentazioni non solo perché avrebbero reso praticamente inutile il programma di ricollocamento, ma anche per via del connotato manifestamente discriminatorio delle stesse. Agli occhi di chi scrive, si può certamente concordare con quella parte della dottrina che ritiene che, in questo caso, sebbene la Corte abbia ragionevolmente dismesso le argomentazioni delle parti, al tempo stesso ha perso una grande opportunità per riaffermare con maggiore forza che la politica migratoria dell'Unione europea è ancorata al più ampio quadro costituzionale dell'Unione espresso nell'articolo 2 TUE[29]. In questo senso, vale la pena ricordare come la Corte di giustizia non abbia interamente seguito l'invito dell'*ex* Avvocato Generale (AG) Bobek nella sua opinione sul caso *Torubarov*[30]. Nonostante la conclusione condivisa, il ragionamento adottato dalla Corte e dall'AG risulta leggermente diverso. In questo senso, l'AG ha ancorato le sue riflessioni in quello che ha definito il "*broader (constitutional) framework*"[31] in relazione alla giurisprudenza sviluppata dalla Corte nel contesto della crisi dello Stato di diritto, a partire dal caso sul controllo del sistema giudiziario portoghese[32]. Al contrario, la Corte si è discostata da questo approccio costituzionalmente orientato e ha collocato la sua decisione nel contesto delle sue pronunce in ambito di asilo, invocando la necessità di garantire l'effetto pratico del diritto a

[28] Corte di giustizia, Grande Sezione, sentenza del 6 settembre 2017, *Repubblica slovacca e Ungheria c. Consiglio dell'Unione europea*, cause riunite C-643/15 e C-647/15, ECLI:EU:C:2017:631.

[29] J. SILGA, *Differentiation in the EU Migration Policy: The "Fractured" Values of the EU*, cit., p. 916.

[30] Corte di giustizia, Grande Sezione, sentenza del 29 luglio 2019, *Torubarov*, causa C-556/17, ECLI:EU:C:2019:626.

[31] Opinione dell'AG Bobek nella causa *Torubarov*, C-556/17, parr. 48-62.

[32] *Ibidem*, par. 58.

un ricorso effettivo, come evidenziato anche nella sentenza *Alheto*, nonché il ruolo del giudice nazionale in questo specifico contesto[33].

Le sentenze della "saga ungherese" adottate all'indomani della cosiddetta "crisi migratoria" sembrano poter suggerire l'intenzione della Corte di porre determinati limiti al modo in cui gli Stati membri possono reagire nel contesto dello Stato di diritto e delle "crisi" migratorie[34]. Tuttavia, in poche occasioni la Corte si è spinta fino a collegare pienamente la politica migratoria dell'UE e i principi dello Stato di diritto come previsto dall'articolo 2 TUE. A tal proposito si noti che mentre la giurisprudenza sulla crisi dello Stato di diritto in altri Stati membri, come Polonia e Romania, si concentrava principalmente sull'indipendenza della magistratura, il nocciolo della controversia tra l'Ungheria e la Commissione si svolgeva nel campo dell'asilo. In questo senso, un esempio si rinviene nel caso riguardante il meccanismo temporaneo per la ricollocazione dei richiedenti protezione internazionale, che riveste una notevole importanza poiché si collega alla crisi dello Stato di diritto in atto nell'Unione europea e alla crisi migratoria ma anche alla questione di confine su integrazione e differenziazione[35]. Nel procedimento, la Commissione ha avviato una procedura d'infrazione e ha deferito alla Corte di giustizia i tre Stati membri, Polonia, Ungheria e Repubblica ceca, per non aver attuato due decisioni del Consiglio sulla ricollocazione dei richiedenti asilo dopo la crisi euro-

[33] Corte di giustizia, Grande Sezione, sentenza del 25 luglio 2018, *Serin Alheto c. Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, causa C-585/16, ECLI:EU:C:2018:584.

[34] V. tra queste, Corte di giustizia, sentenza del 19 marzo 2020, *PG*, causa C-406/18, ECLI:EU:C:2020:216; sentenza del 19 marzo 2020, *Bevándorlási és Menekültügyi Hivatal (Tompa),* causa C-564/18, ECLI:EU:C:2020:218; sentenza del 14 maggio 2020, *Országos Idegenrendeszeti Főigazgatósáa Délalföldi Regionális Igazgatóság*, cause riunite C-924/19 PPU e C-925/19 PPU, ECLI:EU:C:2020:367; sentenza del 17 dicembre 2020, *Commissione europea c. Ungheria,* causa C-808/18, ECLI:EU:C:2020:1029*;* sentenza del 16 novembre 2021, *Commissione europea c. Ungheria,* causa C-821/19, ECLI:EU:C:2021:930.

[35] Corte di giustizia, sentenza del 2 aprile 2020, *Commissione europea c. Repubblica di Polonia e a.*, cause riunite C-715/17, C-718/17 e C-719/17, ECLI:EU:C:2020:257.

pea dei rifugiati[36]. La Polonia e l'Ungheria hanno sostenuto che l'articolo 72 TFUE, sul mantenimento dell'ordine pubblico e la salvaguardia della sicurezza interna, letto in combinato disposto con l'articolo 4, paragrafo 2, TUE, clausola sull'identità nazionale, consentiva loro di sospendere l'applicazione delle decisioni del Consiglio poiché avrebbero creato un rischio per la sicurezza interna nel loro territorio[37].

Nella sua decisione, la Corte di giustizia ha ritenuto che, rifiutandosi di rispettare il meccanismo temporaneo di ricollocazione dei richiedenti protezione internazionale, tali Stati membri non avessero adempiuto agli obblighi derivanti dal diritto dell'Unione europea. Inoltre, la Corte ha respinto le argomentazioni delle parti secondo le quali il meccanismo di ricollocazione dell'Unione europea non poteva essere attuato a causa di una minaccia generale per l'ordine pubblico e la sicurezza, nonché l'argomentazione secondo cui il malfunzionamento e l'inefficacia del meccanismo ne impedivano il funzionamento[38]. In tal modo, la Corte ha colto l'occasione per ribadire che i governi non possono discostarsi dal diritto dell'Unione europea solo perché affermano di voler mantenere l'ordine pubblico e la sicurezza nazionale nei loro paesi, senza tuttavia fornire "prove coerenti, oggettive e specifiche" di un potenziale pericolo[39].

Appare sul punto rilevante il parere dell'AG Sharpston che ha suggerito la necessità di proteggere i principi dello Stato di diritto anche nella politica di migrazione e asilo dell'Unione europea, affermando che il rispetto degli impegni di ricollocazione è un pilastro dello Stato di diritto[40]. Nelle sue conclusioni, l'Avvocato generale ha osservato che "A un livello più profondo, il rispetto dello Stato di diritto implica l'osservanza dei propri obblighi giuridici. Il mancato rispetto di tali obblighi in ragione del fatto che, in un determinato caso, sono

[36] Decisione (UE) 2015/1523 del Consiglio del 14 settembre 2015 e decisione (UE) 2015/1601 del Consiglio del 22 settembre 2015 *che stabiliscono misure temporanee nel settore della protezione internazionale a beneficio dell'Italia e della Grecia.*

[37] Cause C-715/17, C-718/17 e C-719/17 parr. 134-138.

[38] *Ibid*. parr. 143-153.

[39] *Ibid*. parr. 159.

[40] Conclusioni dell'AG Sharpston del 31 gennaio 2019 nelle cause riunite C-715/17, C-718/17 e C-719/17.

sgraditi o impopolari è un pericoloso primo passo verso l'annichilimento della società ordinata e strutturata governata dallo Stato di diritto della cui comodità e sicurezza beneficiamo in qualità di cittadini[41]".

Come è noto, il caso non riguardava solo il mancato rispetto del diritto derivato dell'Unione da parte degli Stati membri, ma era anche di notevole rilevanza in quanto chiarisce che il principio dello Stato di diritto, così come previsto dall'articolo 2 TUE, richiede non solo l'indipendenza dell'ordinamento nazionale, ma anche e soprattutto il rispetto e l'attuazione dei regolamenti, delle direttive e delle decisioni europee che valgono anche in materia di asilo e migrazione. L'AG sul punto ha inoltre posto grande enfasi sul principio di solidarietà come elemento essenziale per il funzionamento dell'ordinamento giuridico europeo e per il successo del più ampio progetto di integrazione europea stessa[42]. Pertanto, ha concluso che la diffusa tendenza a invocare l'articolo 72 TFUE come norma imperativa per respingere qualsiasi richiedente per motivi di ordine pubblico non è valida, come già più volte sottolineato dalla Corte[43].

6. *Osservazioni conclusive*

Alla luce delle considerazioni che precedono, sembra di poter concludere che il vecchio ideale della Corte, secondo il quale le norme giuridiche dell'Unione sarebbero "pienamente applicabili contemporaneamente e con identici effetti su tutto il territorio della Comunità", è diventato impraticabile. E questo ha lasciato il posto a una differenziazione nei settori della *governance*, come nel campo della politica di migrazione e asilo. Tuttavia, si evidenzia come l'uso facile e quasi casuale della geometria variabile rischi di sfociare in una mancanza di trasparenza, in complicati meccanismi di responsabilità e nell'ab-

[41] *Ibidem*, par. 241.

[42] S. PEERS, *EU Law Analysis: The Three Villains and the Lifeblood of the European Union Project – Advocate General Sharpton's Opinion in C-715/17 (the Asylum Relocation Mechanism)*, in *EU Law Analysis*, 27 November 2019.

[43] *Ibid*., par. 160.

bandono della solidarietà intrastatale, e questi rappresentano gravi sfide all'integrità costituzionale dell'Unione europea.

Invero, si rinviene il rischio che i meccanismi di differenziazione, invece di fungere da utili strumenti di flessibilità, si trasformino in fattori che contribuiscono alla disintegrazione dell'Unione. A questo proposito, l'espressione comunemente usata "integrazione a più velocità" non sembra essere più appropriata, poiché gli Stati membri hanno smesso di perseguire obiettivi comuni in fasi diverse. Piuttosto, essi hanno adottato punti di vista fondamentalmente divergenti sul grado e sulla portata appropriati dell'integrazione, e questi punti di vista fondamentalmente divergenti sono da considerarsi come legittimi e duraturi.

Nondimeno, come ha sottolineato dall'AG Sharpston nel suo parere, l'Unione europea non è un sistema al quale si può partecipare con la sola intenzione di godere dei lati positivi, negando gli oneri e gli obblighi che derivano dall'adesione. Al contrario, benefici e oneri dovrebbero essere condivisi equamente, nello spirito della solidarietà[44].

Come sottolineato in precedenza, esiste una grande divergenza tra gli Stati membri nel loro approccio alla politica migratoria dell'Unione, di conseguenza, non esiste un solido accordo tra gli stessi sui valori su cui si basa questa politica. Inoltre, la riflessione sulla differenziazione come strumento di *governance* porta inevitabilmente con sé la questione della conformità delle politiche nazionali in materia di migrazione e frontiere con lo Stato di diritto e il rispetto dei diritti umani. Sebbene si sia ragionevolmente detto che l'integrazione è uno strumento di *governance* necessario, in questo contesto al fine di soddisfare diversi interessi, oggi non appare privo di problemi e rischi. Talvolta, infatti, gli Stati membri hanno abusato di questa flessibilità per paura di perdere il controllo e cedere la loro sovranità e lo hanno fatto invocando preoccupazioni relative alla sicurezza. E questo non può dirsi solo nel caso di Stati membri che sono vincolati ai loro obblighi ai sensi dello SLSG, come riportato dalla giurisprudenza sopra citata. Questo è valido anche per gli Stati membri che non sarebbero vincolati da esso, come nel caso della Danimarca. Nonostante alcuni Stati

[44] Conclusioni dell'AG Sharpston del 31 gennaio 2019 nelle cause riunite C-715/17, C-718/17 e C-719/17, para. 258.

membri siano spesso al centro del dibattito sulle violazioni dei diritti dei richiedenti asilo e per il mancato rispetto degli obblighi di solidarietà previsti dal diritto dell'Unione, occorre prestare attenzione ad altri Stati membri che spesso si sono trovati al centro del dibattito per le stesse ragioni. Sul punto, si consideri la Danimarca, dove recentemente il governo ha deciso di puntare su una politica a "zero migranti" e su misure drastiche che propongono il trasferimento dei richiedenti asilo in Ruanda. Tra le altre, sempre in Danimarca si ricorda una proposta secondo la quale i migranti che commettono crimini andrebbero trasferiti, dopo la condanna, in carceri in affitto localizzate in Kosovo. Oppure ancora, che ai rifugiati provenienti da paesi dove si possa constatare una situazione "migliorata" dopo la fine della guerra, venga ritirato il permesso di soggiorno già concesso. Se questo fosse possibile, a titolo di esempio, i rifugiati siriani rischierebbero il rimpatrio a causa della decisione delle autorità danesi di considerare sicure due aree della Siria controllate dal governo. Anche se la Danimarca non fa parte dello SLSG in virtù dell'integrazione differenziata, è soggetta al quadro costituzionale generale dell'Unione europea, compresi gli articoli 2 e 19, paragrafo 1, TUE. E questo dovrebbe fare riflettere sul fatto che tale Stato ha l'obbligo di rispettare gli obblighi derivanti da queste disposizioni, al fine di contribuire a garantire meglio il rispetto generale dello Stato di diritto nell'Unione.

In definitiva, si è constatato che le politiche nazionali di migrazione e asilo sono diverse perché la materia non è di competenza esclusiva dell'Unione e l'integrazione differenziata, formalmente riconosciuta dai trattati, consente di limitare l'impatto di eventuali politiche di armonizzazione. Tuttavia, non è chiaro come l'esercizio di questa scelta, sebbene effettuata nel rispetto dei margini di manovra riconosciuti dal Trattato agli Stati membri, contrasti con i valori fondanti dell'Unione europea. Rimane pertanto da chiarire se esista una contraddizione interna al sistema o se il problema è legato a concrete scelte di valore normativo. Da ultimo, sarebbe auspicabile che le politiche dell'asilo e della migrazione siano completamente libere da accordi di integrazione differenziata e questo perché tale ambito, per il diretto impatto che ha sui diritti umani, è diverso dalle altre competenze dell'Unione. In definitiva, l'integrazione differenziata non sembra essere lo strumento adeguato a uscire dalla crisi, piuttosto, essa stessa sembra essere la

chiave che collega le due crisi, cioè la crisi migratoria inserita nel contesto più ampio della crisi dello stato di diritto e dei valori. Pertanto, più che rappresentare un compromesso necessario per il progetto di integrazione dell'Unione europea, nel contesto del diritto migratorio risulta essere la sua principale "lacuna".

FUNDAMENTAL RIGHTS, ASYLUM, AND THE RULE OF LAW: A DISCREPANCY BETWEEN RHETORIC AND EFFECTIVE PROTECTION

Roila Mavrouli[*]

1. *Introduction*

The recent rule of law crisis has been the object of various debates focusing on the content of the rule of law, its legal and enforceable nature, and the effectiveness of its protection within the supranational legal order. While constitutional legal scholars examine the democratic backsliding or constitutional capture of the State and their consequences for the separation of powers, freedom of information and democracy in general, European legal scholars possess less theoretical material to define the concept of rule of law and need to contend with the traditional national precepts of rule of law as a limitation on gov-

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ernment and/or power[1]. The widely-accepted assertion that the rule of law is the guarantor of democracy and human rights does not generate a precise meaning, but refers to a concept of the rule of law understood primarily as a prescriptive model of social organization, without being able to point with any certainty to an existing model which it would reflect, or to a single political model to which it would be attached[2].

Within the European Union (EU), we find respect for the rule of law affirmed in Article 2 of the Treaty on European Union (TEU), together with democracy and the protection of fundamental rights, the very foundations of the EU's legal order[3]. Article 2 TEU also refers to respect for human dignity, freedom, and equality as founding values of the Union. On the one hand, the debate on the prescriptive nature[4] of Article 2 TEU has concerned European law scholars, as it has been argued that being a founding value could deprive it of the legal value of a fundamental legal principle in the context of European law. On the other hand, the jurisprudential silence emanating from the Court of Justice of the European Union (CJEU) has not – until recently – shed much light on the debate. If the rule of law is not a descriptive value, but a prescriptive legal principle, the same applies to democracy and

[1] For the need to reconnect rule of law and democracy see R. MAVROULI, A. VAN WAEYENBERGE, *EU Responses to the Democratic Deficit and the Rule of Law Crisis: Is It Time for a (New) European Exceptionalism*?, in *Hague Journal on the Rule Law*, 14 August 2023.

[2] É. MILLARD, *L'État de droit, idéologie contemporaine de la démocratie*, in *Boletín Mexicano de Derecho Comparado, nueva serie*, 2004, no. 109, pp. 111-140.

[3] N. LAVRANOS, *Revisiting article 307 EC: the untouchable core of fundamental European constitutional law values*, in F. FONTANELLI, G. MARTINICO, P. CARROZZA (eds.), *Shaping Rule of Law through Dialogue. International and Supranational Experiences*, Groningen, 2009.

[4] See L. PECH, *A Union founded on the rule of law: meaning and reality of the rule of law as a constitutional principle of EU law*, in *ECLRev*, 2010, no. 6, pp. 359-396; L. D. SPIEKER, *From moral values to legal obligations – on how to activate the Union's common values in the EU rule of law crisis*, in *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper*, 2018, no. 28, p. 28.

the protection of fundamental rights[5], whose application in EU law should not be ruled out on the grounds that they are merely values and not principles. While the CJEU has found it difficult to draw legal conclusions from the value of Article 2 TEU, it has recently succeeded in doing so through the lens of Article 19(1) TEU in its ruling on the independence of the justice system. Nevertheless, the independence of justice is only one among the manifold dimensions of the rule of law along with legality, legal certainty, prohibition of the arbitrary exercise of executive power, effective judicial review including respect for fundamental rights, separation of powers and equality before the law. These principles have been defined as constitutive of the rule of law within the EU by two communications of the Commission – in 2014 and 2019[6]. The Commission seemingly applies the rule of law principle according to the Venice Commission criteria[7].

Nevertheless, since the traditional mechanisms for the protection of the rule of law did not prove effective, the EU launched a new strategy aimed at the indirect protection of the rule of law. In the face of the ineffectiveness of the rule of law's political mechanisms[8] and due to the voting procedures, member States that have concerns about Article 7 TEU are in a position to protect each other and prevent any sanctions. Therefore, the EU's new strategy relies on judicial and techno-managerial mechanisms that would complete and strengthen the political ones. We call these mechanisms techno-managerial because they pertain primarily to the Economic and Monetary Union, cohesion policy, and European fiscal policy, and rely on tools such as indicators and scoreboards, benchmarking, peer reviews, national reform pro-

[5] D. KOCHENOV, *The acquis and its principles. The enforcement of the 'Law' versus the enforcement of 'Values' in the EU*, in A. JAKAB, D. KOCHENOV (eds.), *The enforcement of EU law and values. Ensuring member states' compliance*, 2016, Oxford, p. 11.

[6] European Commission, *A New EU Framework to Strengthen the Rule of Law*, COM(2014)158, p. 4; European Commission, *Further Strengthening the Rule of Law within the Union,* COM(2019)163, p. 1.

[7] See the rule of law principles according to the Venice Commission, available at: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN.

[8] See article 7 TEU. The other political mechanisms are the Cooperation and Verification Mechanism for Bulgaria and Romania, the Rule of Law Framework, the Rule of Law Dialogue, the resolutions adopted by the European Parliament.

grammes, and so forth[9]. These mechanisms are the European Semester, the European Structural and Investment Funds, the Rule of Law Conditionality Regulation, and the Recovery and Resilience Facility, which is embedded in the European Semester. The EU is making increasing use of these mechanisms, which were neither specifically designed nor envisioned to protect the rule of law. The problem with the new strategy developed by the EU institutions is that it is likely to result in insufficient protection, or even less protection for the rule of law and does not encompass all of its various dimensions[10].

The launch of this strategy of indirect protection of the rule of law highlights the difficulty of understanding the concept of the rule of law as it is conveyed by the EU institutions on different occasions and creates confusion as to the triumphant ensemble of democracy, rule of law, and fundamental rights[11]. The 2019 Communication from the Commission makes the European Semester the basic instrument of coordination not only of economic policies – as it was before – but of the indirect protection of the rule of law. Mechanisms such as the Rule of Law Conditionality Regulation, the Recovery and Resilience Facility, and the European Structural and Investment Funds are embedded in the European Semester's cycle. Therefore, the annual country-specific recommendations evaluate and examine the rule of law situation in every member State. The way the country-specific recommendations address rule of law issues is illustrative of a specific vision of the rule of law promoted by the EU. While some aspects of the rule of law are dealt with in the country-specific recommendations – demanding amelioration and that measures be taken for their enhancement by

[9] T. LE TEXIER, *Le maniement des hommes. Essai sur la rationalité managériale*, La Découverte, coll. «Sciences humaines», 2016, Paris.

[10] This is, for example, the case with conditionality. From now on, Member States will only be able to benefit from the European budget and the EU Recovery Plan on the condition that they respect the rule of law and the country-specific recommendations issued in the framework of the European Semester. See L. FROMONT, A. VAN WAEYENBERGE, *Trading rule of law for recovery? The new EU strategy in the post-Covid era*, in *Eur. Law J.*, 2021, vol. 27, pp. 132-147.

[11] See also M. BONINI, *Rule of law, EU integration and the emergence of a supranational constitutional regime*, in M. BELOV (ed.), *Rule of law at the beginning of the twenty-first century*, The Netherlands, 2018, pp. 69-95.

the member State concerned – certain other aspects are not covered at all. Indeed, failure to adhere to asylum policies through effective judicial review, which constitutes a significant part of infringement proceedings by the Commission, is absent from the country-specific recommendations.

It is therefore suggested that there is a discrepancy between the mechanisms that were originally envisioned to protect the rule of law and the new mechanisms that tend to assess the gravity and/or seriousness of the rule of law violations conditional upon the safeguarding of the EU budget. As a result, effective judicial review including respect for fundamental rights (migration and asylum) are not as effectively protected as other rule of law dimensions such as the independence of justice or even the fight against corruption[12]. Consequently, we are interested in identifying the gap that exists between the rhetoric of the European institutions[13] and the actual protection of the multiple aspects of the rule of law. While the country-specific recommendations within the framework of the European Semester and the CJEU insist on the independence of the judiciary, EU law asylum policy is enforced only through infringement proceedings[14].

The objective of this paper is to illustrate the imbrication of migration, asylum, and rule of law by understanding the approach – formal or substantive – to the rule of law conveyed by the EU institutions *vis-à-vis* these fundamental rights. The case of asylum is used as an example, as acknowledging that asylum is one of the many faces of rule of law backsliding is crucial regarding the effectiveness of the mechanisms employed by the EU (2). Next, we assess the extent to which the political and judicial mechanisms of the EU specifically aimed at protecting the rule of law associate it with migration and asylum as fundamental rights. To that end, this paper determines which aspects of the concept of the rule of law are effectively promoted by the EU insti-

[12] See the Recommendation for a Council Recommendation on the 2022 National Reform Programme of Hungary and delivering a Council opinion on the 2022 Convergence Programme of Hungary {SWD(2022) 614 final} - {SWD(2022) 640 final}, Brussels, 23.5.2022 COM(2022) 614 final.

[13] See the Commission's 2014 and 2019 Communications, supra no.7.

[14] They are EU law violations and not rule of law violations.

tutions (3). Finally, the paper acknowledges the failings in relation to fundamental rights and rule of law as a consequence of the development of instruments for the indirect protection of the rule of law – or what we call techno-managerial mechanisms (4)[15].

2. *Failings in relation to fundamental rights, asylum, and the rule of law*

The rule of law crisis is the most recent of the three crises that have affected the EU since its creation. While the 2008 economic and financial crisis gave rise to doubts as to the legitimacy of the EU[16], the 2015 migration crisis questioned the solidarity among member States. The migration crisis emerged in 2015 after the refusal of certain member States to accept the decision on the relocalisation of asylum seekers. Article 2 TEU appears in the Opinion of Advocate General (AG) Sharpston, creating a link between migration and rule of law. However, the migration crisis rapidly became a rule of law crisis, or what some scholars call democratic backsliding. Therefore, the legal narrative of fundamental rights within the EU reappears, now focusing on the reconsolidation of fundamental rights as normative ideas. In addition, the recent rule of law crisis is the consequence of multiple waves of de-Europeanisation that call into question the EU as a political community.

The imbrication of the two crises – migration and rule of law – materialises both as a question of 'thin' or 'thick' understanding of the rule of law within the EU and as a contestation of EU asylum policies. European Union member States that are blatantly anti-migration and opposed to any EU measures to improve solidarity and spread responsibility challenge the content of a human rights-based approach. The example of the Hungarian Fundamental Law is illustrative, as it entrenches in the constitutional system values that go against human rights in many areas. These laws impacted migration policy, and migrants who transited through Hungary were detained and subjected to

[15] See supra no. 10.

[16] L. PAPADOPOULOU, I. L PERNICE, J. WEILER (eds.), *Legitimacy issues of the European Union in the face of crisis*, Baden-Baden, 2017.

severe restrictions on liberty and lack of access to food and medical care. In EU discourse, Hungary's actions are presented as in conflict with EU founding values. In order to establish the relationship between migration and rule of law, we first assess the concept of rule of law in EU law (2.1) and go on to demonstrate that asylum policies are not only the cause but one of the many faces of rule of law backsliding (2.2).

2.1. *Which fundamental rights and rule of law concepts are contained in EU law?*

Since the beginning of the European construction, many debates have focused on the *status quo* of fundamental rights within the EU. The rule of law and democracy were not part of the foundations of the European project. According to J. Weiler, European integration is marked by a messianic political enterprise par excellence, with "messianism becoming a central element of its original and enduring political culture"[17]. The EU's "telos legitimacy" is driven precisely by this dream – this vision offered by the Schuman Declaration. The Schuman Declaration presents the dream of peace and the promise of a better land, while remaining silent on the values of democracy and the rule of law. The crisis of the rule of law calls into question the existence of a supranational legal order consisting of democratic member States, namely member States that have met the democratic criteria for EU membership[18].

These fundamental values received at the start of the EU's creation had a strong component of implicit freedom[19], establishing a clear link between democracy and the rule of law. Dictatorships and countries that were not "free" were not welcome in the Union. This configuration began, as an unwritten principle, part of the political messianism

[17] J.H.H. WEILER, *Europe in crisis – On 'political messianism', 'legitimacy', and the 'rule of law'*, in *Singapore Journal of Legal Studie*s, 2012, pp. 248-268.

[18] See C. HILLION, *The Copenhagen criteria and their progeny*, in C. HILLION (ed.), *EU enlargement: a legal approach*, Oxford, 2004; see also D. KOCHENOV, *Behind the Copenhagen façade. The meaning and structure of the Copenhagen criterion of democracy and the rule of law*, in *European integration online papers*, 2004, pp. 1-24.

[19] D. KOCHENOV, cit., supra n. 6.

of Europe's Promised Land[20], and was soon codified in the pre-accession strategy texts that prepared for EU enlargement. What is interesting in this constellation is that democracy and the rule of law were never part of the indisputable legal rules of the European Communities[21]. Despite the fact that adherence to these values has traditionally been approached as a national rather than a supranational concern, the EU appropriated the game of the holy trinity – rule of law, democracy, fundamental rights – after the Solange case[22]. The re-invention of the EU under the pressure of fundamental rights was in fact a profound reinterpretation – if not a de facto rewriting – of the treaties, this time including the holy trinity[23].

Legal scholars qualify the concept of fundamental rights as a political myth of the EU[24] that can craft narratives that grant the European polity a *raison d'être*. Even if fundamental rights were not an ancestral political myth of the EU (in contrast to the myth of "peace through European integration"), the CJEU developed fundamental rights narratives at the beginning of the 1970s[25]. It stated in the *Stauder* case that fundamental rights "were enshrined in the general principles of community law and protected by the court"[26]. While the political myth of fundamental rights becomes a legal narrative to reassure national constitutional courts, the rule of law has appeared in a few cases before the CJEU where its content has not been defined, but only mentioned as a value.

[20] J. WEILER, *Europe in crisis*, cit.

[21] See the Schuman Declaration.

[22] BVerfGE 37, 271 (282) - *Solange* I (English translation in Federal Constitutional Court (ed.), Decisions of the Bundesverfassungsgericht. Volume 1/Part II, 1992.

[23] D. KOCHENOV, cit., supra n. 6.

[24] S. SMISMANS, *Fundamental rights as a political myth of the EU: can the myth survive?*, in S. DOUGLAS-SCOTT, N. HATZIS (eds.), *Research handbook on EU law and human rights*, Chelthenam, 2017, pp. 13-34.

[25] Court of Justice, judgment of 12 November 1969, *Stauder v City of Ulm – Sozialamt*, case C-29/69, ECLI:EU:C:1969:57; judgment of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, case C-11/70, ECLI:EU:C:1970:114.

[26] S. SMISMANS, cit. para. 148.

The Single European Act stated in the preamble that the community was "determined to work together to promote democracy on the basis of fundamental rights". It was only in the Maastricht Treaty that fundamental rights were set out in the Treaty itself as foundational principles of the EU. The constitutionalising narrative of Article 2 TEU and of Article 6 TEU move the EU to a political union of law and fundamental rights, transcending the foundational core of the EU as a market building project[27]. While the key political myth of the EU that economic cooperation in Europe would lead to greater welfare and ensure peace has been undermined by the economic and eurozone crisis, the pairing of rule of law and fundamental rights could compensate for the decreased legitimacy of the EU[28].

Nevertheless, it seems easier to define fundamental rights within separate and specific areas of EU law[29] than to determine the concept of rule of law within the EU. This is because its precepts are philosophical, political, ideological and historical. "Illiberalism" – as proclaimed by the Orban regime in particular – seems to take the form of ideological commitments. Often portrayed as the democratic backlash dismantling the institutional rule-of-law guarantees, it does not however proceed to a systematic abuse of fundamental rights and freedoms. However, liberal democracy goes together with the rule of law, encompassing the split between majorities and minorities and between society and power specific to the political discussion, in order to avoid the capture of law by politics. This is why the constitutional form of democracy is crucial. This is also why fundamental rights became a procedural question, a question of the rule of law. Under this spectrum, different approaches have been adopted to the question of the rule of law. A. Von Bogdandy and Ioannidis argue that in distinguishing the rule of law from respect for human dignity, freedom, democracy, and equality, the EU Treaty seems to opt for a rather "thin" understanding[30]. T. Konstantides, for his part, argues that the EU's system of

[27] Ibid, pp. 13-14.

[28] J. WEILER, 2012, cit.

[29] Such as political rights and the Area of freedom, security and justice.

[30] A. VON BOGDANDY, M. IOANNIDIS, *Systemic deficiency in the rule of law: what it is, what has been done, what can be done*, in *CML Rev.*, 2014, no. 1, p. 64.

judicial review comprises both procedural and substantive elements, reflecting a "thick" version of the rule of law[31]. Furthermore, L. Pech points out that the conceptualisation of the rule of law as a constitutional principle made up of formal and substantive elements is perfectly in line with the understanding of the rule of law in European courts and at the Council of Europe. Without referring to the thin-thick divide, D. Kochenov argues that the rule of law should be distinguished from human rights and democracy, but that it should not be conflated with "mere" legality[32].

Two main theoretical starting points can be sketched out for conceptualizing the rule of law, namely the formal and the substantive approach of rule of law. The formal approach involves a qualitative appraisal of the law, whose essential requirements pertain to the manner in which the law was passed and promulgated, its clarity, and its temporal application[33]. Moreover, the formal approach addresses the qualities of law – for example, that the law should be prospective and relatively stable, that particular laws should be guided by open, general, and clear rules; moreover, that there should be an independent judiciary and access to the courts, and that the discretion of law enforcement entities should not be allowed to pervert the law[34]. Under this formal conceptualisation of the rule of law, a framework of law can pass a "rule of law" test without attention being given to its specific content[35]. By contrast, substantive conceptions of the rule of law relate to the content of the law itself. In terms of this approach, it is not

[31] T. KONSTANTINIDES, *The Rule of Law in the European Union: The Internal Dimension*, Oxford, 2017, p. 58.

[32] D. KOCHENOV, *The Missing EU Rule of Law?*, in C. CLOSA, D. KOCHENOV (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, 2016, pp. 290-296.

[33] P. CRAIG, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, in *Pub. L.*, 1997, pp. 467-487; A. BUYSE, K. FORTIN, B. MCGONIGLE LEYH, J. FRASER, *The Rule of Law from Below – A Concept Under Development*, available at: https://utrechtlawreview.org/articles/10.36633/ulr.771.

[34] J. RAZ, *The Rule of Law and Its Virtues* as re-printed in *The Authority of Law: Essays on Law and Morality*, Oxford, 1979, p. 218.

[35] Ibid, p. 214. It is on account of the mono-dimensional textural lens employed by the formal view of the rule of law that it is sometimes called a 'thin' rule of law, see supra n. 31.

enough for a law to be constituted properly, its content must also be "good"[36].

2.2. *Asylum as one of the many faces of rule of law backsliding*

The triumphant pairing of fundamental rights and rule of law is nonetheless striking without offering a precise and clear-cut solution for associating them within the framework of asylum policies. We use the case study of asylum in order to assess the relationship between the potential (systemic) weaknesses in asylum policies at judicial national level and the rule of law backsliding. L. Tsourdi calls on us to regard asylum policy violations not as "mere" policy-specific issues (law on paper)[37], but rather as a symptom of the broader phenomenon of rule of law backsliding[38]. As the migration crisis affected the EU before the rule of law crisis, a number of challenges facing the EU relate to the limitations inherent in the legal design and implementation modes of EU asylum policy[39]. The structural solidarity deficit as well as a persistent implementation gap have eroded mutual trust between member States[40]. B. Grabowska-Moroz and D. Kochenov state that reinforcement of the rule of law, broadly conceived, needs to be a part of the answer to the "migration crisis" in the EU[41]. Examining the asylum

[36] Ibid, p. 211 and p. 227. R. Dworkin is a defender of a rule of law that pays attention not only to its form, but also to its substantive provisions. R. DWORKIN, *A Matter of Principle*, Cambridge, 1985, pp.11-12.

[37] By implementation gap, we refer to the disjunction between "the law on paper", i.e. to the asylum-related obligations that member States have undertaken according to EU law, and their realisation in practice. See E. TSOURDI, *Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?*, in *ECLRev*, 2021, no. 3, pp. 471-497.

[38] Idem.

[39] *See* E. TSOURDI, *The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System*, in F. BIGNAMI (ed.), *EU Law in Populist Times: Crises and Prospects*, Cambridge University Press, 2020, p. 191; D. THYM, *The "Refugee Crisis" as a Challenge of Legal Design and Institutional Legitimacy*, in *CML Rev.*, 2016, p. 1545.

[40] *See*, e.g., A. SCHERRER and ECRE, *Dublin Regulation on international protection applications: European Implementation Assessment*, European Parliament, 2020.

[41] B. GRABOWSKA-MOROZ, D. KOCHENOV, *The Loss of Face for Everyone Concerned: EU Rule of Law in the Context of the 'Migration Crisis'*, in V. STOYANOVA, ST.

policy deficiencies through the lens of the rule of law can be crucial both to ascertain whether these problems are connected to broader weaknesses in the rule of law at the national level, which are linked to weak institutional capacities or insufficient resources at the administrative or judicial levels[42], and to ascertain to what extent (systemic) fundamental rights violations or an implementation gap are connected to the "backsliding" processes of grave constitutional capture described by L. Pech and K.L. Scheppele[43]. According to institutions concerned – the CJEU (2.2.1.) and the European Parliament (EP) (2.2.2.) – the solidarity crisis can be perceived as a values crisis (2.2.3.).

2.2.1. *According to the CJEU*

An examination of the relevant CJEU case law answers the above questions by placing these cases in the global context of the democratic backsliding of two member States, namely Poland and Hungary. While the judgments of the CJEU do not plainly acknowledge the correlation between fundamental asylum rights failings and rule of law, AG Sharpston specifically mentions Article 2 TEU in her Opinion during the solidarity saga case law. Since 2015, the spike in arrivals of individuals seeking asylum in the EU paved the way for the EU to take new measures vis-à-vis the influx. Two Council Decisions on relocation marked the beginning of the solidarity saga. While all other member States had pledged to relocate a certain number of asylum-seekers, the Commission decided to initiate an infringement procedure and re-

SMET (eds.), *Migrants' Rights, Populism and Legal Resilience in Europe*, Cambridge, 2021.

[42] See E. TSOURDI, 2021, cit., supra n. 35.

[43] L. PECH, K.L. SCHEPPELE, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 2017, vol. 19, p. 3 and p. 10. Building on Jan-Werner Müller's analysis of constitutional capture, L. Pech and K.-L. Scheppele have defined rule of law backsliding as: "the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party". See also J.W. MÜLLER, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, in *Eur. Law J.*, 2015, vol. 21, p. 141.

fer three member States to the CJEU for refusing to accept any asylum-seekers (Hungary) or for taking only a minimal number (Poland and Czech Republic)[44]. The CJEU stated that "in a European Union based on the rule of law, acts of the institutions enjoy a presumption of lawfulness", thus making both Council Decisions binding on the member States[45]. Furthermore, in its judgment in *Slovakia and Hungary v. Council*[46] the CJEU had already affirmed the lawfulness of the Council Decisions. Whereas in the former case, Poland pleaded the illegality of the Council Decision under Article 72 TFEU[47], in the present case, both Poland and Hungary argued that Article 72 TFEU allowed them to disapply the Council Decisions[48]. According to the CJEU, however, both arguments were flawed.

Poland and Hungary argued in particular that they were entitled not to apply the Relocation Decisions by virtue of Article 72 TFEU – read in conjunction with Article 4(2) TEU – according to which the provisions of the TFEU relating to asylum policy do not affect the exercise of the responsibilities incumbent on member States for maintaining public order and safeguarding internal security. Indeed, the Republic of Poland considered that Article 72 TFEU is a rule comparable to a conflict rule under which member States' prerogatives to maintain public order and safeguard internal security take precedence over their obligations under secondary law[49]. However, the CJEU did not consider that Article 72 TFEU confers on member States the power to derogate from provisions of Union law solely by invoking inter-

[44] See N. KIRST, *Protecting the Formal Rule of Law in the EU's Asylum Policy: The CJEU's Judgment on the Asylum Relocation Mechanism*, in *EU Law Analysis blog*, 20 june 2020, available at: http://eulawanalysis.blogspot.com/2020/06/protecting-formal-rule-of-law-in-eus.html.

[45] Para. 139.

[46] Court of Justice, Grand Chamber, judgment of 6 September 2017, *Slovak Republic and Hungary v. Council of the European Union*, case C-643/15, ECLI:EU:C:2017:631.

[47] See paras 306-309 of that judgment.

[48] See para 142 of the judgment.

[49] Court of Justice, judgment of 2 April 2020, *Commission v. Poland and o.*, joined cases C-715/17, C-718/17, C-719/17, ECLI:EU:C:2020:257; Court of Justice, Press Release, n° 40/20 Luxembourg, April 2, 2020, judgment in joined cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland, Hungary and Czech Republic.*

ests linked to the maintenance of public order and the safeguarding of internal security; rather, it requires them to prove the need to have recourse to the derogation provided for in this article for the purposes of exercising their responsibilities in these matters.

The CJEU pointed out that in the Union, founded on the rule of law, the acts of its institutions enjoy a presumption of legality and that accordingly Decisions 2015/1523[50] and 2015/1601[51] were, from the time of their adoption, binding on the Republic of Poland and the Czech Republic, as those member States were obliged to comply with those acts of Union law. The same applied to Hungary, with regard to Decision 2015/1601. The Hungarian Basic Law of 2011, revised in 2018, introduced the profession of faith protecting Hungary's Christian culture by all State agents. It was argued that the exercise of competence given to the EU must respect Hungary's constitutional identity, which ends up distorting the very concept of Article 4(2) TEU. Similarly, Poland would not be obliged to accept refugees because of the ethnic homogeneity set as a limit to the EU. These readings of national constitutions call into question the instrumentalisation of constitutional identity, which could undermine the foundations of liberal constitutionalism. The Hungarian Constitution has been interpreted to be in favour of a national, ethnic, and religious identity, which has made it possible to refuse asylum seekers on the basis of religious non-homogeneity, according to Article 4(2) TEU read in conjunction with article 72 TFEU.

Thus, under the terms of rulings C-715/17, C-718/17, and C-719/17, according to the CJEU, three member States – Hungary, Poland, and the Czech Republic – had failed to fulfil their obligations under Article 5(2) of Council of Europe Decisions 2015/1523 and 2015/1601, in relation to international protection and relocation. In particular, Poland and Hungary argued that they were entitled not to apply the Relocation Decisions under Article 72 TFEU – read in conjunction with Article 4(2) EU – according to which the provisions of

[50] Council Decision (EU) 2015/1523 of 14 September 2015 *establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*.

[51] Council Decision (EU) 2015/1601 of 22 September 2015 *establishing provisional measures in the area of international protection for the benefit of Italy and Greece*.

the TFEU relating to asylum policy do not affect the exercise of the responsibilities incumbent on member States for maintaining public order and safeguarding internal security. AG Sharpston was equally concise on this matter, as she stated that "respect for the rule of law implies compliance with one's legal obligations"[52]. She added that "solidarity is the lifeblood of the European project", which "requires one to shoulder collective responsibilities and burdens to further the common good"[53].

2.2.2. *According to the European Parliament*

Furthermore, in addition to the above judgments and AG Opinion, the close relationship between rule of law and asylum can also be demonstrated through the resolutions of the EP, which render clear-cut the intertwining of rule of law and asylum as a fundamental right. These resolutions offer a breeding ground for defining the concept of rule of law. In the resolution adopted on 12 December 2015, Members of the European Parliament (EP) deplored the criminalisation of refugees in Hungary, the increasing recourse to detention, the use of xenophobic rhetoric by the Fidesz party, and the fact that Hungarian legislation made it difficult for refugees to access international protection. As early as the 2000s, the Freedom Party of Austria's xenophobic discourse *vis-à-vis* migrants led to the suspensions of diplomatic relations between Austria and the 14 EU member States. In 2015, the EP urged both "the Council and the European Council to hold a discussion and adopt conclusions on the situation in Hungary"[54].

[52] Opinion of AG Sharpston delivered on 31 October 2019, *European Commission v. Republic of Poland*, C-715/17; C-718/17 *European Commission v. Republic of Hungary*; C-719/17 *European Commission v. Czech Republic*, para. 241.

[53] Ibid, para. 253.

[54] The Commission was once more invited to trigger the first stage of the RLF instead of following a technical approach (infringements). Article 7 TEU was invoked again, as the EP called on the Commission to closely monitor the situation in the country, evaluating the emergence of a systemic threat which could develop into a clear risk of a serious breach within the meaning of Article 7 TEU. See the European Parliament resolution of 16 December 2015 on the situation in Hungary

Furthermore, in 2017 the EP passed a new resolution[55], using fewer conditional forms such as "would" and "could", and explicitly stating that the situation in Hungary "represents a clear risk of a serious breach of the values referred to in Article 2"[56]. The resolution did not call for the triggering of Article 7 TEU *per se*; however, as a preliminary step, it instructed the EP's LIBE Committee to draft a report on a reasoned proposal calling on the Council to act pursuant to Article 7 TEU[57]. The 2017 resolution was approved by 393 votes in favour, with 221 against and 64 abstentions. The concept of the rule of law expressed in the above resolutions adheres to a rather substantive as well as procedural definition. The EP cherishes a broad definition of the rule of law, including not only the independence of justice and anti-corruption but also democracy and fundamental rights. This is obvious through several EP resolutions which raise concerns with regard to public discrimination and hate speech against lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI) persons and the criminalisation of sexual education in Poland[58].

2.2.3. *Solidarity crisis as a values crisis*

The above mechanisms of the CJEU and EP illustrate the way in which the asylum failings can be regarded as one of the faces of rule of law backsliding, in which the solidarity crisis becomes a crisis of values. According to B. Grabowska-Moroz and D. Kochenov the first aspect of the rule of law crisis is that certain member States deliberately

(2015/2935(RSP)); see also R. COMAN, *The Politics of the Rule of Law in the EU Polity: Actors, Tools and Challenges*, Cham, 2022, p. 143.

[55] European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)).

[56] Article 9, European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)).

[57] R. COMAN, cit., supra n. 50, p. 144.

[58] In order to compare with international standards, see Resolution 2316 (2020), Council of Europe, *The functioning of democratic institutions in Poland*, *Assembly debate,* 28 January 2020; see also Resolution 2359 (2021), *Judges in Poland and in the Republic of Moldova must remain independent*, *Assembly debate*, 26 January 2021.

undermine the existing system of checks and balances which allows the governments in power to amend and/or abuse the existing rules in order to remain in power[59]. The second aspect of the rule of law crisis consists in the fact that the EU has been rather anæmic in its attempts to counteract rule of law backsliding in the member States[60]. Therefore, the principle of the rule of law is compromised and no longer understood as a foundation of the EU, which does not ensure that the Union is truly composed of democracies that abide by the rule of law and respect human rights[61]. That being the case, if the Charter of Fundamental Rights guarantees the right to asylum – in line with the scope provided for by the Geneva Convention and in accordance with the EU Treaties – any attempt to limit the right to asylum is not only a violation of EU law, but also, significantly, a threat to globally recognised human rights instruments[62].

The interrelation between the rule of law and fundamental rights follows the narrative of Article 2's reference to values of democracy, fundamental rights, and the rule of law as co-constitutive – akin to a three-legged stool: "if one is missing the whole is not fit for purpose"[63]. L. Pech has argued that "the Union rule of law is correctly understood as sharing a consubstantial, one may say organic, link with the other foundational principles"[64]. The theoretical divide between

[59] B. GRABOWSKA-MOROZ, D. KOCHENOV, cit., supra n. 41, pp. 187-208.

[60] K. L. SCHEPPELE, D. KOCHENOV, B. GRABOWSKA-MOROZ, *EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, in *Yearbook of European Law*, 2020, no. 3, pp. 3-121.

[61] B. GRABOWSKA-MOROZ, D. KOCHENOV, 2022, cit.

[62] Idem.

[63] *See* S. CARRERA ET AL., *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism*, CEPS 2013, available at: https://www.ceps.eu/ceps-publications/triangular-relationship-between-fundamental-rights-democracy-and-rule-law-eu-towards-eu/, visited 20 July 2021.

[64] *See* L. PECH, 2010, cit., supra n. 4, p. 359. *See also* A. VON BOGDANDY, *Founding Principles*, in A. VON BOGDANDY, J. BAST (eds.), *Principles of European Constitutional Law*, Oxford, 2009, p. 11. The author states: "[s]ince the values of Article 2 TEU-Lis have been agreed upon in the procedure of Article 48 EU and produce legal conse-

formal and substantive approaches becomes problematic here, as "the foundational principles are interdependent and must be construed in light of each other"[65]. In terms of such an approach, the "rule of law crisis" could be understood as a "values crisis". Article 7 TEU seems to lend credence to this view, referring to a "clear risk of a serious breach" of "the values" of the EU. However, the term "value" – broad as it is – can imply different kinds of rule of law violations, including effective judicial review and respect for fundamental rights (migration and asylum) as well as other aspects of the rule of law such as the independence of justice, the fight against corruption and non-discrimination. Nonetheless, the broad scope of the term "value", which includes democracy and fundamental rights, is not sufficient. Indeed, recent developments in the fight against the rule of law crisis indicate that certain rule of law dimensions may be more effectively protected than others by means of an indirect strategy that goes beyond the traditional infringement proceedings for violations of EU law, or even the Article 7 TEU procedure.

3. *The concept of rule of law effectively promoted by the EU institutions*

Since the 2015 migration crisis and the escalation of the rule of law crisis, various mechanisms over and above Article 7 TEU have focused on safeguarding the rule of law. Each institutional actor has been confronted with issues of the rule of law crisis, and many mechanisms having been created in order to alleviate or solve the crisis, despite the Article 7 TEU deadlock. The Commission has gained considerable *savoir faire* in developing rule of law policy tools designed for the EU's internal and external policies. In the Eastern enlargement context, the Commission has sought to shed light on the normative foundations of the rule of law since the beginning of the 1990s – to a large extent borrowing ideas from other international organisations, while trying to adapt them to the specificities of the EU polity by favouring a thin ra-

quences […] they are legal norms, and since they are overarching and constitutive, they are founding principles", p. 22.

[65] Idem.

ther than a substantive understanding of the rule of law[66]. The thin understanding of the rule of law is something that can be assessed through the EU mechanisms envisioned to protect the rule of law – such as political[67], judicial[68], and techno-managerial mechanisms[69]. That said, theoretical conceptualisations of the EU rule of law seem scarce, as the CJEU had not defined it until recently, and this after the action for annulment from Hungary and Poland against the Rule of Law Conditionality Regulation (3.1). Moreover, the theoretical conceptualisation of the rule of law is subject to a discrepancy between the rhetoric of the Commission's discourse *vis-a-vis* the content of rule of law and its effective protection (3.2). Thus, in spite of the theoretical standpoints for its definition, two practical starting points can be illustrated for understanding the concept of rule of law within the EU, namely the concepts conveyed by the CJEU and the Commission[70].

3.1. *A contingent meaning of rule of law within the CJEU case law*

While the protean nature of the concept of the rule of law only obscures its application by the member States of the "Union based on a community of values", the CJEU has been markedly silent in giving it a precise and concrete content. While its jurisprudence has linked the development of the European Communities to the rule of law[71], it has been criticised for abstaining from any sophisticated value definition and instead promoting a theory of interpretation at the expense of a theory of justice[72]. Given the fact that the member States contest its

[66] R. COMAN, cit., p. 97.

[67] For the political mechanisms see supra n. 9.

[68] Judicial mechanisms in the form of infringement proceedings.

[69] For the techno-managerial mechanisms see supra n. 10.

[70] We will not use the discourse of the Council nor the Parliament as many of the mechanisms are under the initiative of the Commission.

[71] T. VON DANWITZ, *The Rule of Law in the Recent Jurisprudence of the ECJ*, in *Fordham International Law Journal*, 2014, no. 5, p. 1340.

[72] *See* A.T. WILLIAMS, *Taking Values Seriously: Towards a Philosophy of EU Law*, in *Oxford Journal of Legal Studies*, 2009, no. 29, p. 549.

status, justiciability, meaning and function[73], the CJEU has the important function to fulfill of not leaving EU values ill-defined, contingent, or incoherent[74]. However, L. Pech argues that even with the occasional differences in the articulation of its meaning[75], the wholesome core of the rule of law is unquestionably sound[76].

The legal tools provided by the EU to date have not been very effective *vis-à-vis* the rule of law backsliding. Undeniably, the political mechanisms envisioned for the protection of rule of law, such as the rule of law framework (a pre-Article 7 procedure)[77], the Council annual rule of law dialogue, the cooperation and verification mechanism, and of course Article 7 TEU had to be accompanied by judicial mechanisms, namely infringement proceedings for EU law violations. Specifically, the multiplication of infringement proceedings against Hungary and Poland were a core part of the EU's action to address the rule of law crisis. The C-286/12 case (*Commission v. Hungary*), was the first judgment in which the CJEU found a standard national statutory retirement measure to be in violation of EU law. The provisions abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures of such a kind as to protect

[73] J. GROGAN, L. PECH ET AL., *Unity and Diversity in National Understandings of the Rule of Law in the EU*, in *RECONNECT*, Deliverable 7.1, April 2020, available at: https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf; P. BLOKKER ET AL., *The democracy and rule of law crises in the European Union and its Member States*, in *RECONNECT*, Deliverable 14.1, April 2021, available at: https://reconnect-europe.eu/wpcontent/uploads/2021/04/D14.1.pdf.

[74] A.T. WILLIAMS, cit.

[75] L. PECH, *Promoting the rule of law abroad: on the EU's limited contribution to the shaping of an international understanding of the rule of law*, in D. KOCHENOV, F. AMTENBRINK (eds.), *The European Union's Shaping of the International Legal Order,* Cambridge, 2014, pp. 108-129.

[76] L. PECH, *The Rule of Law as a Constitutional Principle of the European Union*, in *Jean Monnet Working Paper*, 4/09; L. PECH, J. GROGAN ET AL., cit., supra n. 69.

[77] It allows the Commission to find a solution with any Member State concerned in order to prevent systematic threats to the rule of law that risk evolving into a persistent, serious breach which would then potentially trigger the procedure set out in Article 7 TEU. See Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, Brussels, 11.3.2014 COM(2014) 158 final.

the legitimate expectations of the persons concerned[78]. The CJEU declared that the new law did not comply with the principle of proportionality and did not guarantee a simple replacement of generations within the legal professions in question. The decision of the CJEU did not touch upon the issue of independence of the judiciary, unlike the AG, who – in a similar fashion to the Hungarian Constitutional Court – argued that the sudden retirement of a large number of judges raised doubts concerning the independence of the judiciary, since this principle includes the precept that the executive must avoid any external intervention or pressure on members of the court. This case was the first of many setting the scene for the rule of law crisis. However, the CJEU missed the opportunity to clarify the meaning of judicial independence in the Charter of Fundamental Rights of the European Union, and the criteria for the *de facto* dismissal of the judges. It focused on the difference in treatment on grounds of age which was not proportionate in relation to the objectives pursued; moreover, there was no mention at all of the rule of law and/or the independence of justice. However, a reference to the prohibition of discrimination as an expression of rule of law would have been welcome[79], as such a prohibition is one of the defining principles of the rule of law, according to the Venice Commission. It is interesting to note that the situation relating to the rule of law in Hungary was subject to an EP resolution as early as 2012[80].

The role of the CJEU in the interpretation of rule of law has nevertheless evolved. Later, in case C-192/18 (*Commission v. Poland*), the link between independence of justice and rule of law became obvious, as the CJEU focused on the independence of judges in Polish courts,

[78] The CJEU focused on Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[79] See supra n. 8.

[80] European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary P7_TA(2013)0315, Situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), (2016/C 075/09), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2016:075 :FULL &from=IT#C_2016075EN.01005201.doc.

the early retirement of ordinary judges in Poland, and the different retirement age for men and women. Article 2 TEU, Article 19(1) TEU, and Article 47 of the Charter were first mentioned in the legal context of the judgment. The independence of justice and Article 19(1) are a concrete expression of the value of the rule of law[81]. The CJEU recognised that the Republic of Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, focusing on the importance of the requirement of independence (internal and external aspect).

In case C-619/18 (*Commission v. Poland*), the CJEU ruled for the first time on the reform of the judiciary in Poland. Once again, Article 2 TEU and Article 19(1) TEU were mentioned in the legal context of the judgment, together with Article 47 of the Charter. It is interesting that the CJEU focused only on Article 19(1) TEU, which gives concrete expression to the value of the rule of law of Article 2 TEU[82], and did not mention any of its other dimensions. At this stage, Article 2 TEU did not seem to be enforceable on its own and was presented as a value rather than a legal rule. The importance of this case is that the CJEU, while establishing the principle of effective judicial protection[83], stated that "by requiring the Member States thus to comply with those obligations (deriving from EU law), the European Union is

[81] Paras 105-106: "(…) requirement that courts be independent which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU".

[82] The CJEU explicitly states (para. 47) that "Article 19 TEU, gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice".

[83] The second subparagraph of Article 19(1) TEU is protected by the ECJ (para. 49) as "the principle of the effective judicial protection of individuals' rights under EU law, (…) general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter".

not in any way claiming to exercise that competence itself nor is it, therefore, contrary to what is alleged by the Republic of Poland, arrogating that competence"[84]. Furthermore, the CJEU made clear that "(…) such a major restructuring of the composition of a supreme court, through a reform specifically concerning that court, may itself prove to be such as to raise doubts as to the genuine nature of such a reform and as to the aims actually pursued by it".

Similarly, we find the principle of independence of justice and effective judicial protection in case C-791/19 (*Commission v. Poland*). This case followed the same series of interrogations relative to the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. According to the CJEU, the Polish disciplinary regime undermined the judicial independence of Polish judges and failed to ensure the necessary guarantees to protect judges from political control. One can find many references to the rule of law in this judgment, not only in the legal context but also in the findings of the Court[85]. The CJEU repeated previous judgments relating to the importance of the requirement of the independence of the courts, which is "inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law"[86]. Moreover, with a view to strengthening its argumentation, the CJEU referred to the Venice Commission, in Opinion n° 904/2017 of 11 December 2017 (CDL(2017)031), and the Group of

[84] Para. 58: "That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded".

[85] Paras 50-51.

[86] Para. 58.

States against Corruption (GRECO), in its *ad hoc* report on Poland of 23 March 2018[87].

While the CJEU made clear reference in the above cases to the independence of justice as a concrete expression of the value of the rule of law, we nevertheless find no clear reference to the rule of law in cases C-808/18 (*Commission v. Hungary*) and C-821/19 (*Commission v. Hungary*). These two cases relate to two infringement proceedings against Hungary's violation of EU asylum law. While the first infringement proceeding in 2017 concerned the relocation mechanism and marked the beginning of the crisis, the CJEU did not theorise the rule of law in that case. The two infringement proceedings that followed in 2018 and 2019 were more specific in confirming the shortcomings in relation to fundamental rights and asylum.

It has been suggested that the link between rule of law and asylum should have been more obvious in these judgments. More specifically, in case C-808/18, the Hungarian legislation on the rules and practice in the transit zones situated at the Serbian-Hungarian border was regarded by the Commission to be violating EU law (fundamental rights and asylum law). However, the CJEU did not seize the opportunity to specify the content of rule of law, and there is consequently no direct link between the fundamental rights of asylum seekers and the rule of law; in fact, there is no mention at all of the rule of law principle in the judgment. Similarly, in case C-821/19 regarding the criminalisation of assistance to asylum seekers, the CJEU found that the 2018 "Stop Soros" law breached EU law. The CJEU made it clear that threatening people who assist asylum-seekers to claim asylum with imprisonment violated EU norms. However, there was no reference to the rule of law, once again no direct link between fundamental rights and rule of law, and no mention of Article 2 TEU. What is interesting is that in the previous joint cases C-715/17, C-718/17, and C-719/17 (*Commission v. Republic of Poland, Czech Republic and Hungary*), when three member States had refused to accept the relocation of international protection applicants in violation of EU Decisions, the CJEU men-

[87] Para. 86. The CJEU talks about the politicization of the KRS and the increase in the influence of those authorities on the process for appointing judges of the Disciplinary Chamber.

tioned article 2 TEU in its findings – however, without further developing the concept of rule of law or placing it in the context of asylum law and fundamental rights[88]. Reference to Article 2 TEU was nevertheless made in the judgment, unlike in cases C-808/18 (*Commission v. Hungary*) and C-821/19 (*Commission v. Hungary*). Therefore, the clearest concept of rule of law conveyed by the CJEU regarding infringement proceedings is linked to the independence of justice. Be that as it may, the disconnection of the "rule of law crisis" and the "migration crisis" within the CJEU case law demonstrates how "values" are diverging between the EU member States when it comes to how they approach EU migration policy[89].

If EU law delivers the rule of law with the status of a foundational EU value[90], it is believed that the use of the term "value" in Article 2 TEU, while unfortunate, should not be interpreted as meaning something other than a "legal principle" which is capable of creating a legal rule through judicial adjudication[91]. This explains the CJEU position and interpretation of Article 2 TEU in relation to the content of the EU's values; however, it is anticipated that this situation will evolve following current rule of law developments.

We should acknowledge the fact that the CJEU has held that the obligation to ensure effective judicial protection Article 19(1) TEU) should be understood by reference to the right to an effective remedy

[88] C-715/17, C-718/17 and C-719/17 (joint cases) para. 139: "In a European Union based on the rule of law, acts of the institutions enjoy a presumption of lawfulness" and para. 65: "Furthermore, to uphold, in circumstances such as those of the present cases, the inadmissibility of an action for failure to fulfil obligations brought against a Member State on the grounds of infringement of decisions adopted under Article 78(3) TFEU, such as Decisions 2015/1523 and 2015/1601, would be detrimental both to the binding nature of those decisions and, more generally, to the respect for the values on which the European Union, in accordance with Article 2 TEU, is founded, one such being the rule of law (see, by analogy, judgment of 27 March 2019, *Commission v Germany*, C-620/16, EU:C:2019:256, paragraph 50)."

[89] J. SILGA, *Differentiated Governance in a Europe in Crises*, in ST. BARONCELLI, I. COOPER, F. FABBRINI, H. KRUNKE, R. UITZ (eds.), *Differentiation in the EU Migration Policy: The 'Fractured' Values of the EU*, in *European Papers*, 2022, no. 2, pp. 909-928.

[90] E. TSOURDI, cit., supra n. 35.

[91] L. PECH, cit., supra n. 4, p. 359. See also A. VON BOGDANDY, cit., supra n. 60, p. 11.

and to a fair trial (Article 47 Charter), and read together with the articles on EU values (Article 2 TEU) and the principle of sincere cooperation (Article 4(3) TEU) to establish a general obligation on member States to guarantee the independence of their national courts and tribunals[92]. To this day, therefore, the CJEU understands the rule of law as including respect for the principle of effective judicial protection and the right to an effective remedy, which is of crucial importance for the effective access to asylum.

3.2. *The discrepancy between the Commission's rhetoric on the conceptualisation of the rule of law and its effective protection*

While the rhetoric of the European Commission addresses the rule of law as a concept that includes formal and substantive elements, the effectiveness of the protection is conditional on specific criteria. More specifically, as the political and judicial mechanisms designed for the protection of the rule of law have been merely effective, the new EU strategy consists in new instruments which were envisioned not to protect the rule of law, but rather to contribute indirectly to this objective through the suspension of funds and the accomplishment of milestones within the framework of the European Semester[93]. The Commission has been confronted with the lack of tools put in place by the European treaties to ensure that a member State of the Union respects its founding values. Political and legal tools such as Article 7 TEU and infringement procedures have proved to be relatively effective. The new strategy of the EU institutions, developed by the European Commission, while contributes to indirectly guarantee certain aspects of the rule of law, pertains primarily to the Economic and Monetary Union, cohesion policy, and European fiscal policy. Nevertheless, this

[92] Court of Justice, judgment of 27 February 2018, case C-64/16, A*ssociação Sindical dos Juízes Portugueses v. Tribunal de Contas*; M. BONELLI, M. CLAES, *Judicial serendipity: How Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses*, in *ECLRev*, 2018, no. 3, pp. 622-643; P. VAN ELSUWEGE, F. GREMMELPEREZ, *Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice*, in *ECLRev*, 2020, no. 8, pp. 23-25.

[93] L. FROMONT, A. VAN WAEYENBERGE, cit., supra n. 11.

strategy is founded on a discrepancy between the theoretical discourse of the Commission on the protection of the rule of law (3.2.1.) and the enhanced effectiveness of only several aspects of it related to the market economy (3.2.2.).

3.2.1. *The rule of law discourse of the Commission*

The rule of law discourse of the Commission can be apprehended through two communications on the rule of law, in April and July 2019[94]. The Commission stressed the important role of this new strategy and, more specifically, the role that both the European Semester and the European Structural and Investment Funds could play[95]. The Juncker Commission had also put forward the concept of a rule of law mechanism, which would lead to the adoption of an annual rule of law report[96] and the necessity to create, as a part of the Multiannual Financial Framework (MFF), a mechanism to protect the EU's budget when generalised deficiencies regarding the rule of law in member States affect or risk affecting that budget. The Commission's proposal was recently approved by the European Council following the COVID-19 pandemic and was subsequently fully integrated into the 2021-2027 MFF and into the European recovery plan – also known as Next Generation EU.

While not limiting the rule of law to legality, the European Commission seems to adopt an approach which distinguishes it from fundamental rights. It describes the rule of law as containing the principles of legality, legal certainty, prohibition of the arbitrary exercise of executive power, effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights, separation of powers and equality before the law[97]. Certain fundamental rights fall within its scope; for example, effective ju-

[94] COM(2019) 163 final; COM(2019) 343 final.

[95] See S. MIHAYLOVA, *Rule of law infringements in the field of European Structural and Investment Funds management*, in *Rule of law at the beginning of the twenty-first century*, cit., pp. 329-339.

[96] Published for the first time on 30 September 2020, COM(2020) 580 final.

[97] S*ee* supra n. 7.

dicial protection is intrinsically linked with the right to an effective remedy and a fair trial[98].

On the one hand, therefore, the discourse of the Commission focuses on the rule of law principles as set out by the Venice Commission. In 2014, for example, the Commission attempted to define the rule of law by listing its core elements, which included a mixture of formal and substantive qualities, namely: legality, legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, effective judicial review including respect for fundamental rights and equality before the law[99]. This understanding of the rule of law clearly comes from the Venice Commission. On the other hand, the country-specific recommendations incorporate only certain aspects of the rule of law. This is explained by the fact that the country-specific recommendations focused initially on economic aspects, public finances, public debt, and fiscal policy, and only progressively started integrating several rule of law dimensions.

The hypothesis lies in demonstrating the mismatches and gaps between a potential full (but practically ineffective) protection of the rule of law by means of Article 7 TEU and the potential segmented protection of only several aspects of the rule of law, indirectly protected by the above mechanisms. The country-specific recommendations tend to focus on quality, efficient justice systems, and well-functioning anti-corruption frameworks, which are essential for the soundness of member States' institutional resilience and a good business environment. However, they do not clearly insist on an overall protection of fundamental rights such as migration, asylum, and minority rights *per se*[100].

[98] S*ee* Art. 47 Charter; E. TSOURDI, *Of Legislative Waves and Case Law: Effective Judicial Protection, Right to an Effective Remedy and Proceduralisation in the EU Asylum Policy*, in *Review of European Administrative Law*, 2019, vol. 12, p. 143.

[99] COM(2014) 158 final.

[100] This until the 2022 rule of law report where a more concise rule of law situation is described for every Member State.

3.2.2. *The enhanced effectiveness of several aspects of the rule of law*

This new approach employed by the European institutions could alter the very way the rule of law is understood and protected by the EU. Indeed, while several rule of law dimensions are taken into consideration in the implementation of European policies, this enhanced effectiveness may only benefit those dimensions of the rule of law that contribute to "a highly competitive social market economy" according to Article 3(3) TEU. Other rule of law dimensions may be neglected and in particular, the fight against inequality and, more broadly, the protection of fundamental rights, such as the rights of LGBTQI persons and asylum. The question therefore arises as to which dimensions of the rule of law these techno-managerial mechanisms allow to be taken into account.

An examination of the country-specific recommendations within the framework of the European Semester can be illustrative of the concept of the rule of law effectively protected by the new EU strategy. It is useful to assess which rule of law dimensions appear within member States that exhibit signs of rule of law backsliding, namely Poland and Hungary. Regarding Poland, the country-specific recommendations between 2012 and 2017 address several rule of law issues such as legality through transparent and quality legislation, legal certainty through stable legislation, and efficiency of the judicial system through shorter court procedures. However, it was not until 2017 that the terms "legal security", "corruption", "rule of law", "independence", "efficiency", and "quality of the judicial system" appeared as such within the country-specific recommendations of the European Semester. There was also mention of the investment climate, a recommendation to ensure effective public consultations, and the involvement of social partners in the policy-making process, which are aspects related to the principle of legality[101]. However, no serious rule of law

[101] Recommendation for a Council recommendation on Poland's 2013 national reform programme and delivering a Council opinion on Poland's convergence programme for 2012-2016, COM/2013/0371 final; Council Recommendation of 12 July 2016 on the 2016 National Reform Programme of Poland and delivering a Council opinion on the 2016 Convergence Programme of Poland; Recommendation for a

concerns could be identified within the country-specific recommendations from 2012 to 2016.

The first explicit mention within the framework of the European Semester of rule of law concerns in Poland was made in 2017. This coincided with the first CJEU judgment in the field of international protection for Italy and Greece, the emergency situation characterised by a sudden influx of third-country nationals into certain member States, and the decisions on the relocation procedure (EU) 2015/1523 and (EU) 2015/1601 Article 5(2) and Article 5(4)-(11) of each of these decisions[102]. While the judgment made explicit mention of Article 2 TEU, no further development of the concept of rule of law took place in relation to asylum and fundamental rights.

Between 2018 and 2022, the country-specific recommendations addressed numerous rule of law issues, such as quality education, trust in the quality and predictability of regulatory policies and institutions, independence, efficiency and quality of the justice system, public consultations, involvement of social partners in the policy-making process, and quality of legislation[103]. However, no country-specific recommendation raised concerns related to asylum or migration[104]. At the same time, a huge number of infringement proceedings were initiated by the Commission, focusing on judicial independence in Poland. That is to say, while the country-specific recommendations addressed rule of law dimensions most of them were connected to the investment environment.

Regarding Hungary, the country-specific recommendations between 2012 and 2017 addressed several concerns relating to the quality of education, social exclusion, discrimination in education and em-

Council recommendation on the 2017 National Reform Programme of Poland and delivering a Council opinion on the 2017 Convergence Programme of Poland, Brussels, 22.5.2017 COM(2017) 520 final.

[102] See supra.

[103] See e.g. Recommendation for a Council Recommendation on the 2022 National Reform Programme of Poland and delivering a Council opinion on the 2022 Convergence Programme of Poland {SWD(2022) 622 final} - {SWD(2022) 640 final}, Brussels, 23.5.2022 COM(2022) 622 final.

[104] Idem within the 2022 rule of law report (only for journalists following the pushbacks and the state of emergency).

ployment in relation to gender gaps[105], corruption, access to public information, and freedom of the media, whereas the independence, efficiency, and quality of justice were mentioned only in the 2013 recommendation. From 2015 to 2017, the quality and transparency of the decision-making process, the need for social dialogue, the engagement of stakeholders in lawmaking, and the consultation of social partners and civil society – rule of law aspects related to legality – were incorporated in the country-specific recommendations. Nevertheless, from 2012 to 2017, the rule of law *per se* was not mentioned.

Be that as it may, we have already had the EP's resolution of 10 June 2015 on the situation in Hungary[106] which mentioned rule of law issues, followed by the EP resolution of 7 September 2015 on the situation relating to fundamental rights in the EU. In some ways, the future decline of the rule of law, as assessed by the EP resolutions, could not be predicted on the basis of the exclusive use of country-specific recommendations. Given their neutral language and the lack of systematic follow-up over the years, it is impossible to determine what exactly constitutes a serious threat to the rule of law or a violation of EU law.

While the 2016 country-specific recommendation mentions the refugee crisis, no further analysis is provided regarding Hungary's refusal to accept the relocation of refugees. Furthermore, all country recommendations from 2012 to 2016 raise a concern about discrimination in the education of Roma children facing school segregation. In May 2016, the European Commission initiated an infringement action against Hungary. The Commission demanded an end to discrimination against Roma children in the education system under the EU Racial Equality Directive, which prohibits discrimination in schools on the basis of race or ethnicity. The examination of the most recent country-specific recommendations reveals an indisputable rule of law crisis and

[105] From 2013 to 2017. See e.g. Recommendation for a Council Recommendation on the 2017 National Reform Programme of Hungary and delivering a Council opinion on the 2017 Convergence Programme of Hungary, Brussels, 22.5.2017 COM(2017) 516 final.

[106] European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)).

many serious rule of law breaches in Poland and Hungary. The escalation in the rule of law crisis between 2018 and 2022 highlighted the tangible reality that we can no longer talk about rule of law concerns, but about rule of law violations. Be that as it may, the latest country-specific recommendations within the framework of the European Semester raise issues of judicial independence, public procurement, and corruption[107]. These rule of law dimensions relate primarily to the market economy.

Hungary has been subject to numerous infringement procedures initiated by the European Commission, and multiple rulings by the CJEU find elements of the Hungarian legal framework to be in conflict with EU law. While cohesion funds have been suspended under the budgetary conditionality mechanism, the Council adopted Hungary's recovery and resilience plan, including the famous 27 "super milestones" on justice, transparency in public procurement, and the fight against fraud, corruption, and conflicts of interest. The 27 measures correspond to the shortcomings identified in the conditionality mechanism procedure and address the recommendations expressed in the framework of the European Semester. On 22 December 2022, the Commission approved the Partnership Agreement with Hungary on the country's cohesion policy 2021-2027, for a total amount of almost €22 billion. The agreement sets judicial independence as a horizontal condition – that is, one that could justify the suspension of the entire €22 billion programme and makes the disbursement of funds conditional on the implementation of the 27 super milestones required under the recovery plan. It also sets out a series of specific enabling conditions for several programmes, notably in the areas of LGBTQI rights and asylum. In these two areas, the Commission is trying through con-

[107] We can also see many serious rule of law violations that do not concern only judicial independence but freedom of expression and civil society as well. See Recommendation for a Council Recommendation on the 2022 National Reform Programme of Hungary and delivering a Council opinion on the 2022 Convergence Programme of Hungary {SWD(2022) 614 final} - {SWD(2022) 640 final, Brussels, 23.5.2022 COM(2022) 614 final.

ditionality to obtain the changes that Hungary has so far refused to make via legal action before the CJEU[108].

4. *Conclusion*

The above observations demonstrate that while a thin and thick conception of the rule of law underpin the discourse of the EU institutions (Commission, EP, and CJEU), the new mechanisms for the indirect protection of the rule of law offer an economic approach to the rule of law. The EU integration project is undoubtedly buttressed by at least certain elements of political morality, such as preferences about specific types of economic arrangement, as illustrated by the EU's internal market *acquis*, and forms of government and conceptions of fundamental rights, as illustrated by its Charter on Fundamental Rights. However, these are bound to influence the understanding of the rule of law and its requirements, even if democracy and fundamental rights are not viewed as co-constitutive. Moreover, as made clear by the European Commission and CJEU case law, the rule of law encircles at least certain fundamental rights, such as the right to an effective remedy.

Be that as it may, while this strategy for the indirect protection of the rule of law can be effective in terms of results, the effectiveness occurs only in several rule of law aspects relating to economic growth. Therefore, if the member States do not ensure compliance with the country-specific recommendations, they may be deprived of several benefits they currently enjoy[109]. This was the case with Hungary though the triggering of the conditionality regulation. The granting of

[108] See the 2022 Rule of Law report Recommendations to Hungary, Commission staff working document 2022 Rule of Law Report Country Chapter on the rule of law situation in Hungary Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2022 Rule of Law Report The rule of law situation in the European Union, Luxembourg, 13.7.2022 SWD(2022) 517 final.

[109] *Frozen EU funds threaten Erasmus student scheme in Hungary*, in *brusselstimes*, 24 May 2023, available at: https://www.brusselstimes.com/517174/frozen-eu-funds-threaten-erasmus-student-scheme-in-hungary.

European funds systematically linked to the European Semester through conditionality is a compromise between the rule of law and other interests (economic, political, and so forth) in negotiations[110]. Conditionality – as embedded in various 'national programmes' which form the basis for many reforms in the member States – implies a negotiation between the EU executive and national governments, without the involvement of the EP and/or national parliaments.

The challenge facing the new strategy is that economic, cohesion, and budgetary policies were not initially designed to ensure respect for the rule of law and thus pursue their own objectives. For example, since its creation in 2011, the European Semester has incorporated certain rule of law dimensions, such as the independence of the judiciary and the fight against corruption and fraud. Nevertheless, this new approach employed by the European institutions has modified the very notion of the rule of law within the EU by primarily ensuring the protection of those dimensions of the rule of law with budgetary implications, by resorting to sectoral policies, or mobilising the judiciary, Consequently, other dimensions of the rule of law – those that aresometimes politically sensitive – will continue to be dealt with via non-binding and/or ineffective instruments.

What is more, the disconnection of the rule of law and asylum[111] adds to a constant arbitrage between the rule of law and the economic and fiscal objectives pursued by the Economic and Monetary Union, the cohesion policy, and the protection of the EU's financial interest, as well as to a weakening of the rule of law at the EU level[112]. Experience with expenditure conditionality to date suggests that the Commission relies primarily on voluntary compliance by member States, exercising its enforcement powers only as a last resort. It is clear that enforcement logic has only been used against Hungary through the triggering of the cross-compliance regulation, while prevention and

[110] See supra n. 91.
[111] J. SILGA, cit., supra n. 86.
[112] See supra n. 91.

dialogue – typical management features – have been used in the case of Poland[113].

The use of techno-managerial mechanisms by the EU to protect the rule of law seems to pursue its own trajectory, both promoting the rule of law and safeguarding the EU budget and financial interests. The concept of rule of law conveyed through the European Semester and the country-specific recommendations is rather blurred and flexible; it does not clearly correspond to specific sanctions, but rather depends on the achievement of milestones. In the current state of affairs, the rule of law dimensions most effectively protected are those related to quality and efficient justice systems and well-functioning anti-corruption frameworks, which are essential for the soundness of member States' institutional resilience and a good business environment[114]. However, this is not the definition initially retained by the Commission and the Parliament[115]. Several concerns arise when it comes to evaluating the contribution of the European Semester to safeguarding the rule of law. Certain of these concerns relate to previous ineffective implementation of country-specific recommendations as well as to the "economisation" of the rule of law[116].

[113] M. FISICARO, *Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values*, in *European Papers*, 2019, no. 3, pp. 695-722.

[114] Communication from the Commission to the European Parliament, the Council, the European central Bank, the European Economic and Social committee, the Committee of the regions and the European Investment Bank 2022 European Semester, Spring Package, Brussels, 23.5.2022 COM(2022) 600 final, p. 7, available at: https://ec.europa.eu/info/system/files/2022_european_semester_spring_package_communication_en.pdf.

[115] See R. MAVROULI, cit. supra n. 90.

[116] G. B. WOLFF, *What to look out for in the latest European Semester package*, in *Bruegel*, 26 February 2019, available at: https://www.bruegel.org/blog-post/what-look-out-latest-european-semester-package.

PART II

Human Rights Issues at Borders between International and European Law

CLOSED PORTS AND THE RIGHT TO DISEMBARK: CLARIFYING CONTESTED LAW OF THE SEA CONCEPTS THROUGH INTERNATIONAL HUMAN RIGHTS AND REFUGEE LAW

Francesca Romana Partipilo[*]

1. *Introduction*

Since 2015, in response to States' failure to provide adequate search and rescue services to people in distress at sea[1], several non-governmental organizations (hereinafter: NGOs) have launched their own rescue missions[2]. The legal coordinates for maritime rescue missions are contained in the International Convention on Maritime Search and Rescue, so-called SAR Convention, adopted in Hamburg in 1979[3]. As clarified by the Annex to the SAR Convention, search is "[a]n operation, normally coordinated by a rescue coordination centre or rescue sub-centre, using available personnel and facilities to locate persons in distress"[4], while rescue is "[a]n operation to retrieve per-

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[1] E. CUSUMANO, *Emptying the sea with a spoon? Non-governmental providers of migrants search and rescue in the Mediterranean*, in *Marine Policy*, 2017, pp. 91-98.

[2] K. GOMBEER, M. FINK, *Non-governmental organisations and search and rescue at sea*, in *Maritime Safety and Security Law Journal*, 2018, no. 4, pp. 1-25.

[3] International Maritime Organization (IOM), *International Convention on Maritime Search and Rescue,* 27 April 1979, 1403 UNTS.

[4] Annex of the SAR Convention, Chapter 1.3.1.

sons in distress, provide for their initial medical or other needs, and deliver them to a place of safety"[5].

The letter of the SAR Convention suggests that the provision of search and rescue services at sea is not exclusively reserved to States, leaving the door open to privatized SAR missions. As a matter of fact, the SAR Convention encourages the cooperation between States and non-state actors, by prescribing that each State is responsible, within its search and rescue region (SRR), for the "performance of distress monitoring, communication, co-ordination and search and rescue functions, […] through the use of public and *private resources* including co-operating aircraft, vessels and other craft and installations"[6]. Consequently, the SAR Convention explicitly prescribes that States may avail themselves of the cooperation of private actors – such as NGOs – in the context of rescue operations taking place in their SRRs. Nonetheless, humanitarian rescue operations launched by NGOs in the Mediterranean raise multiple legal dilemmas[7].

One of the dilemmas raised by privatized SAR missions is represented by the perceived antinomy between shipmasters' duty to disembark rescued individuals in a place of safety – as codified in the SAR and SOLAS Conventions[8] – and the sovereign right of a coastal State to regulate access to its ports, protected by customary international law and codified by the UN Convention on the Law of the Sea (hereinafter: UNCLOS)[9]. In fact, whilst the right of innocent passage codified in Article 17 UNCLOS allows NGOs to lawfully navigate the territorial seas of coastal States when operating SAR missions[10], and

[5] Annex of the SAR Convention, Chapter 1.3.2.

[6] Regulation 1.3.3. Annex to the SAR Convention.

[7] E. CUSUMANO, *The sea as humanitarian space: Non-governmental search and rescue dilemmas on the Central Mediterranean migratory route*, in *Mediterranean Politics*, 2018, no. 3, pp. 387-394.

[8] International Maritime Organization (IMO), International Convention for the Safety of Life at Sea, 1 November 1974, 1184 UNTS 3.

[9] UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982.

[10] As explained by Ratcovich, "the right of innocent passage limits the sovereignty of the coastal State to the benefit of other States' navigational rights". M. RATCOVICH, *International law and the rescue of refugees at sea*, Doctoral dissertation, Department of Law, Stockholm University, 2019, p. 38.

whilst the SAR Convention requires shipmasters to disembark rescued individuals in a place of safety, it remains unclear whether NGOs also enjoy the right to disembark rescued people in a *specific* port, despite the relevant State's resistance. Such legal uncertainty often causes clashes between States and NGOs, leaving asylum-seekers stranded at sea for days, waiting for a port of disembarkation. Clearly, disputes regarding the disembarkation of survivors have a detrimental impact on the physical and mental health of migrants and refugees, and ultimately on their rights. The present contribution aims at illustrating two legal avenues – respectively hinged on human rights and refugee law – to enhance the protection of asylum seekers' rights during the process of disembarkation following rescue operations carried out by NGOs.

2. *A short history of closed ports and neglected rights*

The problem of seaborne migration began in the 1970s, with the Vietnamese "boat people"[11]. The so-called boat people were escaping Vietnam by boat following the fall of Saigon in April 1975[12]. At that time, shipmasters fulfilling their duty to rescue were often faced with coastal States' refusal to allow the disembarkation of survivors. Seaborne migration across the Indian Ocean did not stop until the early 2000s. In 2001 the incident of *MV Tampa* became exemplary of the plight of seaborne migrants in Southeast Asia. In late August that year, captain Rinnan rescued more than four hundred migrants in the Indian Ocean, off the coasts of Australia, but the *Tampa* was ordered to leave Australian territorial waters and the Special Air Service was deployed to ensure that rescued migrants were not disembarked on Australian territory[13]. The Australian government managed to resolve the

[11] B. M. TSAMENYI, *The 'boat people': Are they refugees?*, in *Australian Journal of International Affairs*, 1983, no. 1, pp. 40-48. See also M. T. CARGILL, J. Q. HUYNH (eds.), *Voices of Vietnamese boat people: Nineteen narratives of escape and survival*, McFarland, 2000.

[12] C. PARSONS, P. L. VÉZINA, *Migrant networks and trade: The Vietnamese boat people as a natural experiment*, in *The Economic Journal*, 2018, F210-F234.

[13] M. PUGH, *Drowning not Waving: Boat People and Humanitarianism at Sea*, in *Journal of Refugee Studies*, 2004, no. 1, pp. 50-70, at p. 50. D. R. ROTHWELL, *The Law*

stand-off by sending one hundred fifty asylum-seekers to New Zealand and the remainder to Nauru, to have their claims assessed off-shore[14]. The *Tampa* incident marked the beginning of the policy known as the "Pacific solution", consisting in sending migrants to the Australian territories in the Pacific, which are by law excised from the Australian "migration zone"[15].

The Vietnamese diaspora in the Pacific has been compared to the migration of Cubans and Haitians across the Carribbean Sea, in the early 1980s[16]. In 1981, to curb migratory movements towards its coasts, the US launched the Haitian Migrant Interdiction Program, which sought to dissuade Haitian migrants from seeking refuge in the United States. Initially, the program authorized US officials to board Haitian flag vessels on the high seas "outside the territorial waters of the United States", and to question the crew and passengers regarding the immigration status of those on board[17]. At its peak, the program prescribed the return of Haitians without verifying the veracity of their claims of persecution[18]. The interdiction program also included the constant patrolling of the Windward Passage, the body of water separating Haiti from Cuba, and the aerial surveillance of such body of water to ensure that suspicious vessels were identified and boarded by immigration officials[19]. The US government described the policy as an effective deterrent to Haitians fleeing by sea[20].

of the Sea and the MV Tampa incident: reconciling maritime principles with coastal state sovereignty in *Public Law Review*, 2002, no. 2, pp. 118-127.

[14] C.H. ALLEN, *The Tampa Incident: The IMO Perspectives and Responses to the Treatment of Persons Rescued at Sea*, in *Pacific Rim Law & Policy Journal*, 2003, no. 1, pp. 143-177.

[15] S. TAYLOR, *The Pacific Solution or a Pacific Nightmare? The Difference between Burden Shifting and Responsibility Sharing*, in *Asian-Pacific Law and Policy Journal,* 2005, no. 1, pp. 1-43, at p. 6.

[16] J. D. VILLIERS, *Closed borders, closed ports: The plight of Haitians seeking political asylum in the United States*, in *Brook. L. Rev.*, 60, 1994, at p. 841.

[17] U.S.-Haiti Agreement to Stop Clandestine Migration of Residents of Haiti to the United States, Sept. 23, 1981.

[18] Ibidem, at p. 875.

[19] Ibidem, at p. 876.

[20] Brunson McKinley, Address on U.S. Policy on Haitian Refugees, 3 U.S. DEP'T ST. DISPATCH, June 15, 1992, at 472. In explaining President Bush's Executive Or-

The issue of seaborne migration resurfaced in Europe on the occasion of 2009 *Pinar* incident, when a Turkish merchant vessel rescued more than one hundred persons in the Maltese SAR zone off the coast of Lampedusa and was subsequently refused permission to enter Italian territorial waters[21]. In that case, Italian authorities justified the denial of access to the State's ports by arguing that the responsibility for the disembarkation of rescued migrants fell on Malta, as the rescue operation took place in its SAR region. On its part, Malta denied responsibility and similarly refused access to its ports[22]. Finally, the migrants disembarked in Porto Empedocle, in Sicily[23]. As underlined by Trevisanut, the incident demonstrated the lack of coordination among Mediterranean States with regard to the implementation of their duty to render assistance at sea[24].

In June 2018, then Minister of Home Affairs, Matteo Salvini, declared Italian ports closed to NGO ships and foreign-flagged merchant vessels carrying migrants rescued off the shore of Libya[25]. As a

der of May 24, 1992, permitting the U.S. Coast Guard to return Haitians picked up at sea directly to Haiti, the Deputy Assistant Secretary for Refugee Programs stated: "One essential element of our policy is to safeguard human life. When the numbers of boat people began to exceed the capacity of our Coast Guard cutters to pick them up, we were forced to implement a practice of selectivity-asking the cutter captains to decide which boats were sufficiently seaworthy to let sail on. Sooner or later, a Haitian boat would go down and lives would be lost. Similarly, at some point the overcrowding at Guantanamo would pose serious risks to human health. These risks were clearly intolerable and unsustainable, and, on May 24, the President determined that the point of maximum capacity had been reached".

[21] E. CUSUMANO, J. PATTISON, *The non-governmental provision of search and rescue in the Mediterranean and the abdication of state responsibility*, in *Cambridge review of international affairs*, 2018, no. 1, pp. 53-75.

[22] S. TREVISANUT, *Search and rescue operations in the Mediterranean: factor of cooperation or conflict?*, in *The international journal of marine and coastal law*, 2010, no. 4, pp. 523-542.

[23] See *Pinar: Alta tensione con Malta, L'armatore: "Situazione tragica"*, in *La Repubblica*, 18 April 2009; *I migranti del Pinar in Sicilia*, in *Corriere della Sera*, 19 April 2009; *Maroni Claims Malta Sent 40,000 Migrants to Italy*, in *Times of Malta*, 21 April 2009.

[24] S. TREVISANUT, *Search and rescue operations in the Mediterranean: factor of cooperation or conflict?*, cit., at p. 524.

[25] E. CUSUMANO, K. GOMBEER, *In deep waters: The legal, humanitarian and political implications of closing Italian ports to migrant rescuers*, in *Mediterranean Politics*,

result, on the 10th of June, Italian authorities refused to allow the *Aquarius*, a vessel owned by the German NGO *Sos Mediterranee*, to access Italian ports[26]. Interestingly, the 629 migrants on board the *Aquarius* were rescued in a part of the Mediterranean Sea in which no State had assumed *de jure* responsibility for the coordination of SAR operations. Notably, even if *de facto* Italy had assumed responsibility for coordinating SAR events in the "Libyan Search and Rescue Region", and this made Italy the State responsible under the SAR Convention, it only followed that Italy had the duty to take the lead in finding a port for disembarkation. This did not mean that Italy was under an obligation to allow disembarkation on its own territory[27]. In fact, as a result of the 2004 amendments to the SAR and SOLAS Convention (introduced as a response to the *Tampa* incident)[28], Article 3(1)(9) of the SAR Convention now provides that "[p]arties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage […]. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and *delivered to a place of safety* […]"[29]. Similarly, as a result of the 2004 amendments,

2020, no. 2, pp. 245-253, at p. 253. As explained by the authors, Salvini's decision did not emerge out of nowhere, but was the culmination of previous attempts to limit NGOs'activities, including the infamous "Code of Conduct" imposed on NGOs in 2017.

[26] E. PAPASTAVRIDIS, *The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules*, in *EJIL Talk! Blog of the European Journal of International Law*, 2018.

[27] M. FINK, K. GOMBEER, *The Aquarius Incident: Navigating the turbulent waters of international law*, in *EJIL Talk! Blog of the European Journal of International Law*, 2018.

[28] IMO, Resolution MSC. 153 (78), adopted on 20 May 2004, and IMO, Resolution MSC. 155 (78), adopted on 20 May 2004.

[29] The definition of place of safety is provided by the MSC Guidelines, establishing that a place of safety means a location where the rescue operations can be considered completed. See IMO, Resolution MSC.167 (78), adopted on 20 May 2004. In addi-

the SOLAS Convention foresees that "the Contacting Government responsible for the search and rescue region in which […] assistance is rendered shall [ensure] that survivors assisted are disembarked from the assisting ship and *delivered to a place of safety*"[30]. However, such amendments only require the relevant State to take the lead in finding a port for disembarkation. They do not provide that the responsible State is under an obligation to allow disembarkation on its own territory. In other words, international maritime law only imposes an obligation of conduct on States, which must guarantee swift disembarkation in a place of safety, not an obligation of result implying that a certain State, responsible for a SAR operation, must guarantee disembarkation in its own ports. As a result, it has been argued that "situations in which people rescued at sea have had to wait off the coasts of Italy or Malta for several days or weeks before being told where to disembark are certainly a violation of the obligation to provide a safe location 'as soon as reasonably possible' but not a violation of the missing legal obligation to grant access to rescued persons in a State's ports"[31].

Again in 2018, a new dispute between Italy and Malta as to which country had to provide a safe port of disembarkation left an Italian military ship, the *Diciotti*, stranded at sea for days, with more than one hundred rescued migrants on board[32]. The *Aquarius* and *Diciotti* cases inaugurated a new erratic approach to the disembarkation of rescued migrants, based on informal agreements which, on a case-by-case basis and in an unpredictable manner, attempted to reach a compromise for the disembarkation of individuals rescued at sea[33].

Another notorious episode related to the closure of European

tion, in accordance with Principle 6.14 of the Guidelines, the rescuing vessel can be the place of safety but only provisionally.

[30] SOLAS Convention, Chapter V, Regulation 33 (1-1). Emphasis added.

[31] K. NERI, *The Missing Obligation to Disembark Persons Rescued at Sea*, in *It. YB. Int. Law*, 28, 2018, pp. 47-62, at p. 51.

[32] C. BALMER, (2018, June 11). *Italy shuts ports to migrant boat, asks Malta to open its doors*, available at: https://www.reuters.com/article/us-europe-migrants-italy-malta-idUSKBN1J60UY.

[33] S. CARRERA, R. CORTINOVIS, *Search and rescue, disembarkation and relocation arrangements in the Mediterranean. Sailing Away from Responsibility?*, in *CEPS Paper in Liberty and Security in Europe*, no. 2019-10, June 2019.

ports involved the German NGO *Sea Watch*, which was denied access to the port of Lampedusa in the summer of 2019[34]. In that instance, the *Sea Watch 3* had rescued almost fifty migrants off the Libyan coast. After the rescue operation, the shipmaster had requested the indication of a place of safety for the disembarkation of survivors. Libyan authorities replied, indicating that the migrants could be disembarked in the port of Tripoli. Rackete, however, refused to head to Libya, arguing that Tripoli could not qualify as a safe place. She then decided to navigate towards Italy. There, after an exhausting negotiation with Italian authorities, Rackete decided to enter the port of Lampedusa notwithstanding the explicit prohibition received by the Italian Ministry of the Interior[35]. For this reason, Carola Rackete was famously tried and subsequently acquitted of all charges by Italian judges[36].

In November 2022, a new dispute arose regarding the disembarkation of hundreds of migrants rescued in three different SAR operations off the coasts of Libya. Between late October and early November 2022, the Norwegian-flagged ship *Geo Barents*, owned by Médecins Sans Frontières, the *Humanity 1*, operated by the NGO Sos Humanity and flying the German flag, and the *Ocean Viking*, operated by the NGO Sos Mediterranée and flying the Norwegian flag, rescued 572, 179, and 234, migrants off the coast of Libya, respectively[37]. Interestingly, about 400 migrants were rescued during the same days in the Ionian Sea by the Italian coast guard ship *Diciotti*.

[34] S. ZIRULIA, *La Cassazione sul caso Sea Watch: le motivazioni sull'illegittimità dell'arresto di Carola Rackete*, in *Sistema penale*, 2020. Also see E. ESPOSITO, A. ZOTTOLA, *Intersecting hostilities around the European migration crisis: the case of Carola Rackete and the Sea-Watch 3*, in *Critical Discourse Studies*, 2023, pp. 1-16.

[35] F. PARISI, *Il caso Carola Rackete e la politica dei "porti chiusi": resistenza a pubblico ufficiale o adempimento del dovere di soccorso dei naufraghi-migranti? La decisione del Tribunale di Agrigento*, in S. GRECO, G. TUMMINELLI (eds.), *Migrazioni in Sicilia 2019*, Milano-Udine, 2020, pp. 244-252.

[36] S. ZIRULIA, *Caso Sea Watch (Carola Rackete): archiviate le accuse di favoreggiamento dell'immigrazione irregolare e rifiuto di obbedienza a nave da guerra*, in *Sistema penale*, 2022. Also see G. MAZZA, *Caso "Sea Watch": la Cassazione sulla non convalida dell'arresto di Carola Rackete in relazione al dovere di soccorso in mare*, in *Dir. pen. proc.*, 2020, no. 8, pp. 1068-1075.

[37] F. ALAGNA, E. CUSUMANO, *Varieties of criminalization: Italy's evolving approach to policing sea rescue NGOs*, in *Contemporary Italian Politics*, 2023, pp. 1-10.

Following the rescue operations, the three NGOs sent several requests for a port of disembarkation, without receiving response from any of the governments to which such requests were directed. The Italian government issued an inter-ministerial decree requiring NGOs' vessels anchored outside the port of Catania to stop at port only for the time strictly necessary to disembark the most vulnerable people[38]. More precisely, the decree, signed by the Ministers of Home Affairs, Transport and Infrastructures, and Defense, prohibited the ship *Humanity 1* from "stopping in Italian territorial waters...beyond the time strictly necessary to carry out assistance operations towards people in emergency conditions and in precarious health conditions". A similar decree was adopted on the evening of the 6th of November with regard to the ship *Geo Barents*, owned by the NGO Doctors Without Borders. At the same time, the Italian government suggested that rescued individuals should apply for international protection on board of the rescuing vessels[39].

In the meantime, the *Ocean Viking* had finally obtained permission to disembark survivors in the port of Marseille, in France. Finally, having both the physical and psychological conditions of all the migrants on board the *Geo Barents* and *Humanity I* worsened, all the survivors were disembarked in the port of Catania, following a psychiatric evaluation[40].

This episode gained substantial media and political attention, with the EU Commission calling for the immediate disembarkation of the

[38] M. CHIANESE, *The Role of Flag States of ngo Vessels under Italy's New Migration Policy*, in *The Italian Review of International and Comparative Law*, 2023, no. 1, pp.185-199.

[39] In order to allow NGO vessels to enter Italian territorial waters and ports, the Italian government requested shipmasters to inform rescued migrants of the opportunity to seek asylum on board the assisting vessels. Then, in the eyes of the Italian government, the asylum applications could be assessed by the flag state. On shipboard processing of asylum applications, see A. DASTYARI, D. GHEZELBASH, *Asylum at sea: The legality of shipboard refugee status determination procedures*, in *Int. J. Refug. Law*, 2020, no. 1, pp. 1-27.

[40] M. CHIANESE, *The Role of Flag States of ngo Vessels under Italy's New Migration Policy*, cit., at p. 189.

migrants "to avoid a humanitarian tragedy"[41], and illustrated, once again, that disputes between States and NGOs over the disembarkation of individuals following SAR operations may generate serious violations of the human rights of migrants stranded at sea.

3. *The law of the sea: coastal States' sovereignty over their internal and territorial waters*

International law does not provide a clear-cut answer to episodes in which States and non-state actors – such as NGOs – disagree on the disembarkation of rescued individuals after a search and rescue operation. On the contrary, it seems that different provisions, pertaining to different branches of international law, provide for conflicting answers. This paragraph examines some of the relevant legal provisions contained in the law of the sea framework, with a view to offering a comprehensive picture of the right to access ports in international law, as well as connected considerations linked to the notion of State' sovereignty and seaborne migration.

Before delving in a more detailed analysis of States' sovereign right to close their ports, it must be mentioned that States are always entitled to control immigration, a practice recognized to be within the reserved domain of their sovereignty[42]. UNCLOS codifies such entitlement by acknowledging that coastal States may "adopt laws and regulations relating to innocent passage through the territorial sea, in respect of [*inter alia*] the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State"[43]. Notably, the necessity to prevent the infringement of the customs, fiscal, immigration or sanitary laws of a certain country represents the legal basis for a *limited* coastal States' jurisdiction over ships

[41] EU Commission, *Statement by the European Commission on the situation in the Central Mediterranean*, 9 November 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_6745.

[42] I. BROWNLIE, *Principles of Public International Law*, 6th ed., Oxford, 2003, at p. 293.

[43] UNCLOS, Article 21(1)(h)

on the contiguous zone. In fact, pursuant to Article 33(1) UNCLOS, the "coastal State may within the contiguous zone exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea".

Similarly, interception operations at sea are justified on the basis that the State has a "legitimate interest in controlling irregular migration […] and a right to do so through various measures"[44]. Interception measures are also justified on the basis of the Protocol against the Smuggling of Migrants by Land, Sea and Air, containing measures against the smuggling of migrant by sea[45]. More precisely, Article 8 of the Protocol prescribes that "[a] State Party that has reasonable grounds to suspect that a vessel […] flying the flag of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State [and] request authorization from the flag State to take appropriate measures with regard to that vessel". Amongst such measures, "the flag State may authorize the requesting State, inter alia: to board [and] search the vessel [and] if evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board".

Under the law of the sea and customary international law, as well known, a coastal State may close its ports and refuse access to its territorial waters to foreign ships[46]. In fact, ports are included in the internal waters of coastal States[47], and consequently fall within the territori-

[44] UNHCR, *Conclusions on Protection Safeguards in Interception Measures*, no. 97 (LIV) 10 October 2003.

[45] UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

[46] R. BARNES, *Article 25: Rights of protection of the coastal State*, in A. PROELß, *United Nations Convention on the Law of the Sea: A Commentary*, München, 2012, at p. 223.

[47] Internal waters are waters on the landward side of the baseline, as specified by UNCLOS Article 8(1) and by the Convention on the Territorial Sea and the Contiguous Zone, at Article 5(1).

al sovereignty of such States[48]. In other words, internal waters are treated, by the law of the sea, as an integral part of the territory of a State. As for territorial waters[49], the sovereignty of the coastal State over this part of the sea is codified in Article 2(3) UNCLOS, providing that "[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law"[50].

The customary nature of the State's sovereignty over its territorial waters was confirmed by the ICJ in its judgment in the *Military and Paramilitary Activities in Nicaragua* case, where the Court noted that "[t]he basic legal concept of State sovereignty in customary international law [...] extends to the territorial waters and territorial sea of every State [...]. It is by virtue of its sovereignty that the coastal State may regulate access to its ports"[51].

The practice of denying the right of entry into national ports, grounded in the concept of national sovereignty, dates back many centuries[52]. The only authoritative view to the contrary is contained in the Aramco Arbitration[53], where the arbitral tribunal held that "[a]ccording to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require"[54]. Nonethe-

[48] As clarified by Guggenheim, "seaports are...integral parts of the territory of the State". "Les ports de mer sont...parties integrantes du territoire de l'Etat". P. GUGGENHEIM, *Traité de droit international public*, 1953, at p. 419.

[49] Article 3 of the 1982 UN Convention gives every State the right to establish a territorial sea of up to 12 nautical miles, measured from baselines determined in accordance with the Convention. This extends the sovereignty of the State over the seabed, water column, and airspace; the only significant difference between internal waters and territorial seas is that, in the territorial sea, the right of innocent passage for ships of other States is preserved.

[50] Emphasis added.

[51] Case Concerning Military and Paramilitary Activities in and against Nicarague (*Nicaragua v United States*), Merits, Judgment of 27 June 1986, §§212-213.

[52] A. V. LOWE, *The right of entry into maritime ports in international law*, in *San Diego L. Rev.*, 14, 1976, p. 611.

[53] *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)*, 1963, 27 ILR 117.

[54] Lowe recalls how the arbitration between the Saudi Arabian government and the Arabian American Oil Company (Aramco) has become the leading authority for a

less, the arbitral tribunal, though asserting that a general right of entry to maritime ports existed in customary international law, acknowledged that States had a right to supervise entry. It was stated, in fact, that "international case-law and doctrine unanimously admit that, for the purpose of furthering its commercial, fiscal and political interests a State must be able to supervise all ships entering, leaving or anchoring in its territorial waters"[55].

Today, the general scholarly consensus maintains that the openness of ports is only a presumption, and does not impose any obligation on the relevant coastal State. As explained by de La Fayette, "[t]here is a presumption that all ports used for international trade are open to all merchant vessels, but this is a practice only, based upon convenience and commercial interest; it is *not* a legal obligation"[56]. Vaughan Lowe, in its seminal article on the right of entry in maritime ports in international law, pushes his reasoning as far as maintaining that "the presumption lies in favour of the right of the coastal State to *deny entry*"[57].

Under international law, coastal States may close maritime traffic in their ports for reasons of national security and irregular migration control[58]. By way of example, Ratcovich recalls that UNCLOS permits coastal States to deny entrance to national ports to stateless ships, that is, ships which may not claim the nationality of any State[59]. In addition, States may close their maritime ports in a wide variety of circumstances in which the State deems closure "necessary to the peace, safety and

right of entry. See A. V. LOWE, *The right of entry into maritime ports in international law*, cit., p. 597.

[55] A. V. LOWE, *The right of entry into maritime ports in international law*, cit., p. 600.

[56] L. DE LA FAYETTE, *Access to ports in international law*, in *The International Journal of Marine and Coastal Law*, 1996, no. 1, pp. 1-22.

[57] A. V. LOWE, *The right of entry into maritime ports in international law*, cit., pp. 597-622.

[58] A. V. LOWE, *The right of entry into maritime ports in international law*, cit., pp. 597-622, p. 607.

[59] M. RATCOVICH, *International law and the rescue of refugees at sea*, cit., p. 38. The international lawyer explains that UNCLOS art. 17 assigns the right of innocent passage to "ships of all States". Ships of no State, that is, stateless ships are accordingly not covered by the provision at hand.

convenience of its own citizens"[60]. For instance, States may deny entry to their maritime ports to warships[61]. At the same time, it should be mentioned that when the coastal State has concluded bilateral or multilateral conventions in which the right to access to ports is guaranteed, its right to close access to its ports is substantially restricted. One such convention is the Convention and Statute on the International Regime of Maritime Ports, whose Article 2 stipulates that "[s]ubject to the principle of reciprocity […] every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels […] in the maritime ports situated under its sovereignty or authority […]"[62].

Considering the above-mentioned legal provisions, it appears that, under general international law and the law of the sea, the right of a coastal State to deny access to its ports is a well-established one. However, there exist one unanimously accepted customary exception to coastal States' sovereign right to deny access to their ports. Such exception concerns vessels in distress, or a situation of *force majeure*, where access to port is necessary to preserve human life[63]. Codifying such exception, Article 18(2) UNCLOS specifies that the concept of innocent passage – outlined in Article 19 UNCLOS – "includes stopping and anchoring […] in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress".

It is important to mention that, notwithstanding the existence of the "distress exception" as codified in UNCLOS, it is accepted that,

[60] Faber case, cited in H. LAUTERPACHT, *The Function of Law in the International Community*, 1933, p. 290.

[61] *Revue Générale de droit International Public*, 1973, at 809.

[62] *Convention and Statute on the International Régime of Maritime Ports*, 9 December 1923, 58 UNTS.

[63] A. N. HONNIBALL, *The Right of Access to Port and the Impact of Historic Fishing Rights*, in *Asian Yearbook of International Law*, 2021, pp. 105-129, p. 105. Also see the Creole case, (1853), reprinted J.B. MOOR, *International arbitrations*, 4375; R. V. FLAHAUT [1935] 2 D.L.R. 685 (Canada); the Carlo-Alberto case [1832] S. Jur. I, at 664 (France); [1808] The Eleanor 6 C.Rob. 39 (U.K.); the Kate A. Hoff, 5 Ann. Dig. 129 (1929).

where the coastal State provides urgent medical care, water and food supplies, or any other necessary assistance on board the assisting ship, this is sufficient to fulfil the State's responsibilities and disembarkation is not legally required[64]. In other words, States can deny access to NGO vessels – even where distress is invoked – provided they deliver immediate and sufficient medical assistance to the persons in distress on board the vessel. The coastal State is not obligated to grant access to the vessel if the life of the people on board is not at risk anymore. The issue was first examined by the Irish High Court of Admiralty in *ACT Shipping (PTE) Ltd v Minister of the Marine*[65]. In that case, the High Court dealt with the international custom whereby a ship in serious distress is entitled to a safe refuge[66]. In the first place, the Court clarified that the right of refuge was not an absolute right and was primarily humanitarian in character. The Court then added that where safety of life was not a factor, the State had a right in customary international law to refuse a ship refuge[67].

The principle in question was later also confirmed by the ECtHR with its decision on interim measures in the case concerning the *Sea Watch 3* vessel. In fact, in January 2019, the Court granted an interim measure in a case concerning the NGO vessel, which had not been allowed to enter the harbour of Syracuse, in Sicily, and was hosting more than forty migrants on board. As noted by the ECtHR in its decision, the applicants complained that they were being detained on board without legal basis, suffering inhuman and degrading treatment, with the risk of being returned to Libya without evaluation of their individual situation. Nonetheless, the Court did not grant the applicants a right to disembark. It merely required the Italian government "to take all necessary measures, as soon as possible, to provide all the ap-

[64] See "The Court decides not to indicate an interim measure requiring that the applicants be authorised to disembark in Italy from the ship Sea-Watch 3", European Court of Human Rights Press Release, 25.6.2019.

[65] ACT Shipping (PTE) Ltd. v. Minister for the Marine [1995] 3 I.R. 406; [1995] 2 I.L.R.M. 30.

[66] Paragraph 4 of the judgment.

[67] Paragraphs 6 and 7.

plicants with adequate medical care, food, water and basic supplies"[68]. Similarly, this was stressed by another ECtHR interim measure – also at the request of *Sea Watch 3* – where the Court insisted on the obligation of the Italian authorities "to continue to provide all necessary assistance to those persons on board Sea-Watch 3 who are in a vulnerable situation on account of their age or state of health"[69].

As a result of the two Strasbourg Court's interim decisions, a ship in distress has the right to have access to a port, offshore terminal, or other place of refuge but the coastal State may fulfil its legal obligations if it provides necessary assistance to persons in a vulnerable situation who are on board the ship. Nonetheless, it should be also noted that, pursuant to both the SAR and SOLAS Conventions, a rescue operation can only be considered completed once the shipwrecked persons have disembarked in a safe port, not when their basic needs are met on board the assisting vessel. Therefore, it seems that the law is not entirely clear with regard to the disembarkation of individuals after a SAR operation, especially when the rescue operation is carried out by a private vessel, and there remain grey areas where the fundamental rights of migrants and asylum-seekers may be easily violated. For this reason, the following paragraphs will examine two alternative legal avenues to argue that, under certain circumstances, States are under a legal obligation to allow the disembarkation of survivors on board of private ships anchored outside their territorial waters.

4. *Coastal States' jurisdiction under human rights law: the Alan Kurdi case*

Having analysed the concept of national sovereignty as applicable to States' territorial waters and ports, this paragraph argues that hu-

[68] Registrar of the Court, 29 January 2019. ECHR grants an interim measure in case concerning the SeaWatch 3 vessel [Press release], available at: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-6315038-8248463%22].

[69] See "The Court decides not to indicate an interim measure requiring that the applicants be authorised to disembark in Italy from the ship Sea-Watch 3", European Court of Human Rights Press Release, 25.6.2019.

man rights law may provide important legal tools to ascertain whether, under specific circumstances, there exists a right to disembark for asylum-seekers rescued by NGOs and private vessels. The answer here provided will be in the sense that, in some circumstances, a State may be under certain positive obligations *vis-à-vis* asylum-seekers on board of an assisting vessel, even though the ship is situated outside the State's territorial waters.

Preliminarily, it needs to be recalled that although the general rule is that no State may exercise its jurisdiction over a ship on the high seas except for the flag State[70], there are important exceptions to this rule. As explained by Ratcovich, the authority of the coastal State does not end immediately at the outer limits of its territorial sea. Instead, it continues in some aspects into international waters[71]. This is justified by the fact that, in certain circumstances, a State's interest may be affected by activities carried out in the high seas. For this reason, in exceptional cases a State may legitimately carry out interdiction operations on vessels flying the flag of another State and located on the high seas[72]. For example, as explained above, a State may take appropriate measures in relation to people on board under Article 8 of the Smuggling Protocol, if it is believed that the vessel is implicated in human smuggling[73]. In addition, Article 25 UNCLOS foresees that, "[i]n the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject". Similar-

[70] Article 92(1) UNCLOS: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas".

[71] M. RATCOVICH, *International law and the rescue of refugees at sea*, cit., p. 40.

[72] S. KIM, *Non-refoulement and extraterritorial jurisdiction: State sovereignty and migration controls at sea in the European context*, in *Leiden journal of international law*, 2017, no. 1, pp. 49-70. Also, see generally R. CHURCHILL, V. LOWE, A. SANDER, *The law of the sea*, Manchester, 2022; 1982 Convention on the Law of the Sea, 1833 UNTS 2, Art. 92 (UNCLOS).

[73] UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, 2241 UNTS 507, Article 8 (the "Smuggling Protocol").

ly, Article 33(1) suggests that a coastal State enjoys enforcement jurisdiction *vis-à-vis* foreign vessels located in the contiguous zone and may "exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea".

Therefore, in some circumstances international law enables coastal States to exercise certain rights *vis-à-vis* foreign vessels outside their territorial waters. This paragraph argues that there might be State duties as well. A notorious episode involving the Italian government and the *Alan Kurdi* vessel of the NGO Sea-Eye may illustrate such duties.

In April 2019, the NGO vessel Alan Kurdi was denied access to Italian ports after having autonomously carried out a rescue operation in the Libyan SAR zone. On the 4th of April, in fact, the vessel's shipmaster had notified Italian authorities his intention to dock in Lampedusa, requesting permission to do so. The request was forwarded to the Ministry of the Interior (and other relevant ministries), which in response prohibited the Alan Kurdi from entering territorial waters and requested the flag State, namely Germany, to assume the role of controlling and coordinating authority. After further requests addressed to MRCC Rome, as well as negotiations aimed at obtaining the disembarkation of individuals in a precarious physical condition, the Alan Kurdi sailed in the direction of Malta, where it finally disembarked on the 13th of April. After this episode, a criminal investigation was opened, aimed at assessing the legality of the conduct of Matteo Salvini, then Minister of the Interior. The legal proceeding revolved around the alleged violation of the duty to rescue at sea caused by the omission to provide a safe place of disembarkation to the Alan Kurdi[74].

In its decision, the Italian tribunal for ministerial crimes recalled that a State is under the obligation to provide a place of safety in cases where it "directly carried out a rescue operation in its own SAR zone or in the SAR zone of other States with its own means, or where it as-

[74] See Tribunale di Roma, Collegio per i Reati Ministeriali, Decreto del 21/11/2019 n. 21925/2019 R.G.N.R.

sumed coordination of such operations"[75]. In other words, when a State operates a SAR mission with its own vessels or coordinates a SAR operation materially performed by private vessels, it has the duty to provide a place of safety (POS). This obligation, according to the tribunal, is contained in the legal framework on search and rescue[76]. However, in their decision, the judges denied that a similar duty materializes when SAR operations are performed by private vessels, in the absence of the cooperation or direction of the relevant State authorities. In fact, the judges affirmed that "these vessels autonomously choose their route, after the rescue operation has been carried out, and the country to which to turn for the indication of a POS". As a result, the judges maintained that, when rescue operations are autonomously performed by private vessels, the existing international legislation does not provide unambiguous solutions with respect to situations in which all coastal States involved refuse to provide a POS.

From a human rights perspective, the Italian tribunal's conclusions are questionable. In fact, it can be maintained that human rights law contains the answers that Italian judges believed to be lacking in the law of the sea framework. In fact, the closure of ports to vessels situated outside territorial waters, and hosting dozens of desperate migrants, necessarily generates substantial legal consequences regarding the relevant State's compliance with international human rights law and refugee protection standards. In such circumstances, the relevant State exercises powers which are likely to affect the effective enjoyment of fundamental rights by those on board.

At this point, a brief digression is necessary to examine the issue under the perspective of States' jurisdiction under human rights law. As maintained by Milanovic, the concept of jurisdiction denotes a factual power that a State exercises over persons or territory[77]. As well known, whilst jurisdiction under international law is primarily territo-

[75] S. ZIRULIA, F. DE VITTOR, *Il caso della nave Alan Kurdi: profili di diritto penale e internazionale in punto di omessa assegnazione di un porto sicuro*, in *Sistema penale*, 2019.

[76] Paragraph 3.1.9, SAR Convention.

[77] M. MILANOVIĆ, *From compromise to principle: clarifying the concept of state jurisdiction in human rights treaties*, in *Human Rights Law Review*, 2008, no. 3, pp. 411-448, p. 417.

rial[78], under certain circumstances a State may exercise its jurisdiction extraterritorially[79]. When it comes to the *Alan Kurdi* case, certain authors believe that Italian extraterritorial jurisdiction on the people on board the Alan Kurdi was triggered as a result of Italian authorities' interdiction order. It was argued that the NGO's ship, having regard to the interdiction decree adopted by State authorities, may have been under Italian jurisdiction pursuant to Article 1 ECtHR, despite the fact that the vessel was in fact anchored outside Italian territorial waters[80]. Adopting Milanovic's notion of jurisdiction, the interdiction order represented a form of exercise of a factual power of the State on the people on board the *Alan Kurdi*. Accordingly, as a direct consequence of the exercise of its jurisdiction, Italy would have been under the positive obligation to protect the life and safety of the persons on board, by promptly disembarking all of them[81]. Such a theory seems to be *de facto* confirmed by the Italian government's decision to disembark the most vulnerable persons on board (two persons were disembarked on medical grounds, before the vessel sailed to Malta).

It is crucial to mention that the fact that an interdiction to enter territorial waters may trigger State jurisdiction under human rights law was implicitly accepted by the ECtHR in *Women on Waves v. Portugal*[82]. The case concerned an interdiction order issued by Portugal *vis-à-vis* the ship Borndiep, owned by the NGO *Women on Waves*, a Dutch organization involved with reproduc-

[78] *Bankovic and Others v. Belgium and Others* 2001-XII 333; (2007) 44 EHRR SE5.

[79] In the landmark case *Loizidou v. Turkey*, the ECtHR held that "the concept of 'jurisdiction' under this [Convention] is not restricted to the national territory of the High Contracting Parties". See *Loizidou v. Turkey* (1995) 20 EHRR 99, Judgment (preliminary objections).

[80] S. ZIRULIA, F. DE VITTOR, cit., at p. 153.

[81] Gombeer recalls that there is overall agreement that human rights obligations can be triggered on the high seas when a State exercises authority and control over persons. See K. GOMBEER, M. FINK, *Non-governmental organisations and search and rescue at sea*, cit. Also see S. BESSON, *The extraterritoriality of the European Convention on Human Rights: Why human rights depend on jurisdiction and what jurisdiction amounts to*, in *Leiden Journal of International Law*, 2012, no. 4, pp. 857-884.

[82] European Court of Human Rights, judgment of 3 February 2009, *Women on Waves et autres c. Portugal*, application no. 31276/05.

tive health and the right to abortion. In its judgment, the Strasbourg Court considered that the Convention was applicable – and that there had been a violation of Article 10 – even if the NGO's vessel was prevented from entering Portuguese territorial waters due to the interdiction order issued by national authorities[83]. Analysing the decision, Gombeer and Fink maintained that, although the question of jurisdiction was not specifically addressed, the Court seemed to assume that a combination of a government notification sent to the captain of the NGO vessel prohibiting it to enter Portuguese territorial waters as well as placing a war ship in the vicinity, was sufficient to make the European Convention on Human Rights applicable[84]. Arguably, since an interdiction to enter territorial waters may cause a violation of Article 10 of the Convention, there is no reason to deny that, under certain circumstances, it may also cause a violation of Article 2 or 3 ECHR.

The "functional jurisdiction" model proposed by Moreno-Lax is particularly relevant in the solution of similar episodes to the one commented here. The author relies on a conception of jurisdiction "predicated on an exercise of 'public powers' through which State functions are discharged, taking the form of policy delivery and/or operational action, whether inland or offshore, and which translates into 'situational' control"[85]. She argues that *any* exercise of public powers by means of which the State explicates its functions may trigger the jurisdiction of such State. In fact, she believes that "jurisdiction refers to 'some kind of normative power' that the sovereign ex-

[83] C. Q. ALCALÁ, *STEDH de 03.02.2009, Women on Waves et autres c. Portugal, 31276/05 «Artículo 10 CEDH» - Los límites de la libertad de expresión en relación con el derecho a la vida*, in *Revista derecho com. eur.*, 2010; J. DUTE, *ECHR 2009/12 Case of Women on Waves and others v. Portugal, 3 February 2009, no. 31276/05 (Second Section)*, in *European Journal of Health Law*, 2009, no. 3, pp. 288-290; C. LAMBERT-BEATTY, *Twelve miles: Boundaries of the new art/activism*, in *Signs: Journal of Women in Culture and Society*, 2008, no. 2, pp. 309-327.

[84] M. FINK, K. GOMBEER, *The Aquarius Incident: Navigating the turbulent waters of international law*, cit.

[85] V. MORENO-LAX, *The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, SS and Others v. Italy, and the "Operational Model"*, in *Ger. Law J.*, 2020, no. 3, pp. 385-416.

ercises *vis-à-vis* an individual […] and that serves to establish the human-rights relevant link between them"[86]. Thus, in the eyes of the author, jurisdiction in the human rights sense is founded on the sovereign/authority nexus connecting the State to those within its control[87].

Considering the above, a prohibition to enter a coastal State's territorial waters followed by the prolonged permanence of migrants and asylum-seekers on board of the assisting vessel would trigger the link between sovereign authority and individuals within State control interpreted by Moreno-Lax as triggering the "functional jurisdiction" of the relevant State. In the *Alan Kurdi* episode, for instance, the ministerial decree preventing the vessel from accessing Italian waters represents the material element triggering the exercise of public powers *vis-à-vis* the individuals on board. In fact, the Strasbourg Court has noted that the exercise of State powers affecting Convention rights and freedoms raises an issue of State responsibility, regardless of the form in which these powers happen to be exercised, in *Wos v. Poland*[88]. In addition, whilst it is true that the Italian government was not *physically* forcing the NGO vessel to remain anchored outside its territorial waters, but rather denying its right to enter Italian ports, it should be considered that resuming navigation, after several days at sea and with limited resources on board, might represent a significant hazard for the safety of the crew and the migrants on board. Accordingly, it is here suggested that jurisdiction, in the *Alan Kurdi* case, stems from the combination between such a *de facto* impossibility and the legal "ingredient" represented by the adoption of an interdiction order/decree *vis-à-vis* the NGO's vessel. Incidentally, it is also worth noting that a prolonged permanence on the assisting ship may generate difficult situations on board, as repeatedly explained by NGOs (involuntarily) anchored outside European ports, and eventually lead to a situation which may amount to inhuman or degrading treatment.

[86] *Ibidem*, p. 397.

[87] *Ibidem*.

[88] European Court of Human Rights, *Woś v Poland* (Admissibility Decision of 01 March 2005), at para 72. J. VILJANEN, *The role of the European court of human rights as a developer of international human rights law*, in *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, 2008, pp. 249-265, at p. 262.

5. *Refugee law: the prohibition of* refoulement *as a tool to "open European ports" to NGOs' vessels*

Turning to international refugee law, this paragraph argues that the prohibition of *refoulement* may represent a legal tool to "open" European ports to NGO vessels. In fact, migrants rescued in distress incidents at sea may include individuals who are refugees and asylum-seekers. In these cases, a series of legal safeguards apply. By way of example, Attard notes that States are required to ensure that shipmasters protect the rights of rescued asylum seekers and refugees, particularly the right to *non-refoulement*[89].

It was maintained that the prohibition of *refoulement* is essential in determining whether asylum-seekers have the right to enter the territory of the coastal State[90]. More specifically, authors like O'Brien and Stoyanova have repeatedly explained that, "although the principle of *non-refoulement* does not provide an absolute right to disembark, its practical implementation by coastal States will usually require a *temporary* granting of access to a territory until such time as the refugee status of the rescuees can be determined"[91].

As well known, refugee status determination (RSD) procedures represent a positive obligation of the host State under international law. Assessing the danger of *refoulement* faced by a specific individual necessarily implies the examination of that individual's personal circumstances, as well as the political and general situation in their State of origin. This was clearly explained by Pallis, who believes that a refugee status determination obligation binds States to conduct refugee status determination for asylum seekers rescued in territorial waters[92]. The author observes that the core of the RSD obligation stems from

[89] F. G. ATTARD, *The Duty of the Shipmaster to Render Assistance at Sea under International Law*, Leiden, 2020, p. 226.

[90] K. S. O'BRIEN, *Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem*, in *Goettingen J. Int'l L.*, 2011, no. 3, pp. 715 ff., at p. 726.

[91] *Ibidem*, p. 731. Emphasis added.

[92] M. PALLIS, *Obligations of states towards asylum seekers at sea: interactions and conflicts between legal regimes*, in *Int. J. Refug. Law*, 2002, nn. 2-3, pp. 329-364.

the norm of *non-refoulement*[93]. According to the author, as the prohibition of *refoulement* prohibits the return of "refugees" to a danger of persecution, the only way to determine who is a refugee is to conduct status determination, which then becomes obligatory[94].

Similarly, Stoyanova maintains that *non-refoulement* to a certain degree limits State sovereignty, because the prohibition in Article 33(1) could in certain situations amount to a *de facto* obligation to accept asylum-seekers in a State's territory if the denial of acceptance "in any manner whatsoever" results in exposure to risk[95]. Therefore, pushing Pallis' argument even further, Stoyanova maintains that *non-refoulement* entails an obligation to accept asylum-seekers in the State's territory, even when migrants were not rescued in territorial waters and find themselves stranded outside this body of water. In such circumstances, according to the author, the norm on *refoulement* requires a State to let people in and assess their claims for international protection.

The centrality of the principle of *non-refoulement* in granting access to a State's territory and to refugee status determination procedures was specifically acknowledged by the Tribunale di Roma in judgment n. 22917/2019. In the judgment, the Tribunal explicitly stated that "the right to asylum enshrined in Article 10(3) of the Italian Constitution can be understood in terms of a *right to access the territory of the State* to be admitted to the procedure for the recognition of international protection"[96]. According to Giuffrè, the judgment confirms that the principle of *non-refoulement* encompasses not only the negative obligation not to return an individual to a territory in which their life and freedom may be threatened, but also the positive obligation to grant access to the territory of the State, in order for the concerned individual to be able to submit an asylum application. Pursuant

[93] Also see R. MARX, *Non-refoulement, access to procedures, and responsibility for determining refugee claims*, in *Int. J. Refug. Law*, 1995, no. 3, pp. 383-406. For an overview of RSD when conducted by UNHCR, see M. ALEXANDER, *Refugee status determination conducted by UNHCR*, in *Int. J. Refug. Law*, 1999, no. 2, pp. 251-289.

[94] M. PALLIS, *supra* at 5, p. 346.

[95] V. STOYANOVA, *The principle of non-refoulement and the right of asylum-seekers to enter state territory*, in *Interdisc. J. Hum. Rts. L.*, 2008, p. 5.

[96] Tribunale di Roma, Sentenza n. 22917/2019. Emphasis added.

to the judgment, the right of entry must be recognized both to those who find themselves at the Italian border and to those who, although intercepted on the high seas, risk being rejected towards an unsafe country[97]. For this reason, the court granted applicants the right of entry into the Italian territory through the direct application of Article 10(3) of the Italian Constitution[98].

The fact that asylum procedures must take place on the territory of a State, thus necessarily implying the right of entry into the relevant State, is self-evident and undeniable. Despite arguments to the contrary[99], refugee status determination procedures cannot be carried out on board of assisting ships[100]. Firstly, it is crucial to note that requiring migrants to apply for international protection on board of NGOs' vessels, rather than on land, may place coastal States in violation of their international obligations as enshrined in the ECHR. In fact, as recalled by the ECtHR in the *Sharifi v. Italy and Greece* case[101], the failure to provide access to asylum procedures or any other legal remedy in the disembarkation port (in that case, the port of Ancona) constitutes a violation of Article 4 of Protocol No. 4. In that case, the Court observed that the applicants had been handed back to the captains of the ferryboats from which they had disembarked, without having access to an interpreter or anyone who could provide them with information regarding the application for international protection[102]. The Court noted that there was a clear link between the applicants' collective expul-

[97] M. GIUFFRÈ, *Esternalizzazione delle frontiere e non-refoulement: accesso al territorio e alla procedura asilo alla luce della sentenza 229117/2019*, in *Quest. giust.*, 2020, available at: https://www.questionegiustizia.it/.

[98] A. PELLICONI, M. GOLDONI, *La banalità dei porti chiusi per decreto. Osservazioni sui profili di legittimità del decreto interministeriale 150/2020*, in *Dir. Imm. e Cittad.*, 2020, no. 2, pp. 219-231, p. 225.

[99] *Italy stops dozens of asylum seekers on NGO ship from coming ashore*, in *The Guardian*, 6 November 2022, available at: https://www.theguardian.com/world/2022/nov/06/italy-stops-dozens-of-asylum-seekers-disembarking-ngo-ship.

[100] A. PELLICONI, M. GOLDONI, *La banalità dei porti chiusi per decreto. Osservazioni sui profili di legittimità del decreto interministeriale 150/2020*, cit., p. 225.

[101] European Court of Human Rights, *Sharifi v. Italy and Greece*, application no. 16643/09.

[102] Paragraph 242.

sions and the fact that they were thereby prevented from applying for international protection.

Moreover, the assisting ships' captains are in no way required to ask shipwrecked individuals whether they wish to apply for international protection. This is clearly explained in the guide on sea rescue drafted by UNHCR, International Migration Organization (IMO) and the International Chamber of Shipping (ICS). Further, UNHCR's interpretation of the rules of the law of the sea and refugee law makes it clear that shipmasters are not the competent authority to determine the status of those who only temporarily fall under their care, following a rescue operation. On the contrary, as clarified by UNHCR, shipmasters "should inform the rescued persons that [they] have no authority to hear, consider or determine an asylum request".

Furthermore, in its Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea, IMO tackled the obligations of the shipmaster under international refugee law, explaining that "any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress are to be carried out after disembarkation, in a place of safety. The master should normally only be asked to aid such processes by obtaining information about the name, age, gender, apparent health and medical condition and any special medical needs of any person rescued. If a person rescued expresses a wish to apply for asylum, great consideration must be given to the security of the asylum seeker. When communicating this information, it should therefore not be shared with his or her country of origin or any other country in which he or she may face threat"[103].

In light of the above-mentioned considerations, it is safe to say that, as explained by Pallis, it is for coastal States' authorities to disembark asylum seekers and grant them access to asylum procedures[104]. Significantly, not only does the scholar argue that the power to grant asylum lies with the coastal States and that it is not even granted to

[103] International Maritime Organization (IMO), *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea*, 22 January 2009, FAL.3/Circ.194, p. 1.

[104] M. PALLIS, cit.

States' coastguard vessels, but he goes as far as clarifying that, "aside from the obligation to rescue, flag States are under no obligation towards those they rescue as far as refugee status is concerned"[105]. Consequently, not only shipmasters lack the competence – and the means – to carry out asylum determination procedures, but also flag States may not be considered responsible for RSD on board of rescuing vessels.

Practically speaking, it must be borne in mind that a requirement to collect asylum applications would pose substantial challenges on board of the assisting vessels. As underlined by Dastyari and Ghezelbash, in fact, there are significant practical impediments to carrying out shipboard processing in a manner that is compliant with the international obligations of States[106]. In the first place, a SAR vessel is not equipped to deal with requests for asylum. Among other considerations, it is worth mentioning that: i) privacy cannot be guaranteed to every asylum-seeker on overcrowded assisting vessels, with foreseeable dangers for migrants' safety and wellbeing; ii) there are often very few cultural mediators and interpreters on board, as well as virtually no legal counsellors and lawyers, circumstance which may represent a violation of article 12 of the Procedures Directive[107]; iii) the collection of applications may be time consuming and distract the crew from more pressing matters, possibly determining safety hazards; iv) shipmaster do not receive the necessary training to deal with requests for asylum. In this regard, it is worth noting that Article 6(1) of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (the "Procedures Directive") establishes that "Member States shall en-

[105] *Ibidem*, p. 348.

[106] A. DASTYARI, D. GHEZELBASH, *Asylum at sea*, cit., at p. 12.

[107] Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 *on common procedures for granting and withdrawing international protection* (recast), 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU. Article 12 of Directive 2013/32/EU establishes that applicants "shall be informed in a language which they understand […] of the procedure to be followed and of their rights and obligations during the procedure". Further, the provision foresees that "they shall receive the services of an interpreter for submitting their case to the competent authorities".

sure that those […] authorities which are likely to receive applications for international protection […] receive the necessary level of training which is appropriate for their tasks and responsibilities […]"[108].

In addition, it is worth noting that the requirement that private shipmasters collect asylum applications would cause a violation of Article 4 of the Procedures Directive on the part of the relevant State. The provision rules that "Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of applications […]". Further, the provision specifies that "Member States shall ensure that such authority is provided with appropriate means, including sufficient competent personnel, to carry out its tasks […]"[109]. Undoubtedly, shipmasters cannot be considered as being competent authorities, with the skill-set necessary to carry out asylum procedures, as requested by the provision at hand. They do not receive any legal training and they are not endowed, by their respective States, with the power and competence to carry out RSD procedures. In addition, ships anchored outside European ports can hardly be considered as having the "appropriate means" on board, such as translators, cultural mediators, psychologists, and an adequate number of legal officers.

In light of these considerations and the impossibility to conduct shipboard processing of asylum claims, it is undeniable that denial of access to state territory equates to a denial of fair refugee status determination procedure, as held by Stoyanova[110].

Finally, it should be mentioned that the Italian Court of Cassation provided crucial guidance for NGOs' shipmasters in the *Sea Watch* decision. In that judgment, in fact, the Court deemed that Rackete's actions were justified on the basis of a systemic interpretation of Italian criminal law, the law of the sea, and refugee law. In that case, in fact, Italian judges were called upon to determine whether the shipmaster's decision to enter an Italian port despite an explicit interdiction to do so issued by State authorities constituted fulfilment of the

[108] *Ibidem*, art. 6(1).

[109] *Ibidem*, art. 4.

[110] V. STOYANOVA, *The principle of non-refoulement and the right of asylum-seekers to enter state territory*, cit., p. 5.

duty to rescue and was therefore justified under Italian criminal law. As anticipated above, the judges decided that this was the case, establishing that a shipmaster has the right, after a careful assessment of the specific circumstances of the case – including the time spent stranded at sea – to autonomously identify a safe port where disembarkation is to take place. Significantly, it was argued that in the light of a protracted inaction of the relevant coastal States, the protection of migrants' fundamental rights must be ensured by the shipmaster and must necessarily take precedence over any other type of consideration, including those linked to the protection of national borders and territorial sovereignty[111].

6. *Conclusion*

Grotius believed that the freedom of the sea imposed on States an obligation to obey "the law of hospitality"[112]. Building on Grotius' work, Mainwaring and De Bono argue that the "law of hospitality" involves the duty to assist those in distress and allow for their disembarkation in a place of safety[113]. Regrettably, this essay demonstrated that European States increasingly disregard their duty of hospitality, as well as their legal obligations as enshrined in the law of the sea, human rights law, and refugee law.

Nowadays, governmental attempts to curb NGOs' rescue activities at sea entail a wide array of increasingly sophisticated strategies. Such strategies include the public incrimination of civil society organisations through biased political and media discourses, the bureaucratic tightening of civil society space employed as a means to hamper NGOs' activities, the selective disembarkation of survivors from NGO vessels, new pieces of legislation requiring ships to disembark people in ports

[111] S. ZIRULIA, *La Cassazione sul caso Sea Watch: le motivazioni sull'illegittimità dell'arresto di Carola Rackete*, cit., p. 6.

[112] H. GROTIUS, *Mare Liberum*, Lodewijk Elzevir, 1609.

[113] C. MAINWARING, D. DE BONO, *supra* at 75. On the concept of hospitality, also see J. DERRIDA, A. DUFOURMANTELLE, *Of Hospitality*, Stanford, 2000.

a long way from where rescues typically occur, administrative measures to fine and impound private vessels, and so on.

Amongst the policies implemented by European States to limit civil society space, the increased recourse to the closure of ports to NGO vessels leads to the denial of the disembarkation of rescued individuals – in clear violation of the SAR Convention – and forces NGO vessels to remain at sea for days, with exhausted people on board and limited water and food supplies. Denying access to ports clearly generates serious human rights violations, frustrating migrants' fundamental rights and violating their dignity.

This work aimed at demonstrating that human rights and refugee law might represent useful legal tools to clarify contested issues of the law of the sea while offering increased protection to migrants and asylum-seekers at sea. It was argued that, under certain circumstances, human rights and refugee law entail a positive duty of the State to allow NGO vessels to disembark people in its ports, even when the assisting vessel flies the flag of a different State or the SAR operation was carried out outside the coastal State's territorial waters.

NAVIGATING RESPONSIBILITY: THE COMPLICITY OF STATES AND PRIVATE VESSELS IN PRIVATIZED PUSHBACK OPERATIONS

Danielle Flanagan[*]

1. *Introduction*

While generally perceived as a State prerogative, migration and border control have been increasingly entrusted to private actors. Within the past decade, as mixed migratory flows in the Central Mediterranean have grown in size and complexity, many private vessels – ranging from small fishing boats to commercial trawlers – were mobilized as part of a broader response to conduct search-and-rescue operations and to render assistance to migrants[1] attempting this route's crossing. Recently, however, private vessels have been mobilized for another, very different purpose: the interdiction and pushback of mi-

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[1] For purposes of this article, the terms "migrant" or "migrants" include individuals seeking asylum or other forms of international protection.

grants across maritime boundaries[2]. Contemporary examples of privatized pushbacks, including that of the *Nivin* in Italy and the *Dar Al Salam 1* in Malta, are representative of fundamental accountability challenges linked to the privatization of migration. Through the use of private vessels as a form of proxy, States have strategically endeavored to avoid their obligations under international human rights law including, *inter alia*, the prohibitions of refoulement, arbitrary deprivation of life, torture and other mistreatment. This article seeks to examine whether and to what extent States, such as Italy and Malta, incur responsibility under international law during the conduct of privatized pushback operations. The article will simultaneously explore whether private vessels, despite often acting at the behest of States, are themselves responsible for certain violations in the conduct of these operations.

2. *Emergence of Privatized Pushbacks in the Central Mediterranean*

Pushbacks, defined as a variety of State measures that summarily force migrants, including asylum-seekers, across an international border without providing access to individual assessment or asylum procedures[3], can hardly be considered a recent phenomenon. Following

[2] See The Irish Centre for Human Rights, Global Legal Action Network, *Submission to the UN Special Rapporteur on the human rights of migrants' report on pushback practices and their impact on the human rights of migrants*, p. 7, para. 16, https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/pushback/Joint_ICHR_NUIG_GLAN_Submission.pdf.

[3] While there is not an internationally-recognized definition of pushbacks, the UN Special Rapporteur on the Human Rights of Migrants defines such a practice to comprise "various measures taken by States which result in migrants, including asylum-seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of any individual assessment on their protection needs which may lead to a violation of the principle of non-refoulement". OHCHR, *Report on the means to address the human rights impact of pushbacks of migrants on land and at sea*, 12 May 2021, https://www.ohchr.org/en/special-procedures/sr-migrants/report-means-address-human-rights-impact-pushbacks-migrants-land-and-sea.

the conclusion of the *Treaty of Friendship, Partnership, and Cooperation* in 2008 between Italy and Libya, Italy effected several naval operations that intercepted and returned migrants to Libyan shores[4]. This direct form of pushback, however, was suspended in 2012 following the European Court of Human Right's (ECtHR) judgement in *Hirsi Jamaa and Others v Italy*, which condemned Italian authorities' transfer of migrants intercepted on the high seas to Libyan detention centers[5]. Subsequent to this decision, Italy, among other European coastal States[6], pursued indirect pushback strategies, relying on actors, such as the Libyan Coast Guard (LYCG), to conduct these operations on their behalf. These indirect pushbacks were reflected in the 2017 Italy-Libya M*emorandum of Understanding (MoU) on Cooperation on Development, Combating Illegal Immigration, Human Trafficking and Smuggling, and on Strengthening Border Security*, whereby Italy increased its provision of funding as well as logistical and technological support to expand LYCG operations at sea in exchange for Libya's assumption of search-and-rescue operations and migrant containment in the Central Mediterranean[7]. Malta followed Italy's example and

[4] *Treaty of Friendship, Partnership, and Cooperation between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya*, 30 August 2008, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2009;7; see also Human Rights Watch, *Italy-Libya Connection*, 23 September 2009, https://www.hrw.org/news/2009/09/23/italy-libya-connection.

[5] European Court of Human Rights, Grand Chamber, judgement 23.02.2012, application no. 27765/09, *Hirsi Jamaa and Others v. Italy*, paras. 201-207.

[6] See, e.g., https://msf-ureph.ch/publications/out-of-sight-out-of-mind-europes-increasing-pushback-against-migrants/.

[7] See Université des Libre Bruxelles Academic Network for Legal Studies on Immigration and Asylum in Europe, *Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic*, 2 February 2017; see also Anja Palm, *The Italy-Libya Memorandum of Understanding: the baseline of a policy approach aimed at closing all doors to Europe*, Istituto Affari Internazionali, https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/.

signed its own 2020 *MoU on Illegal Immigration* with Libya[8], similarly increasing coordination and funding for Libya's "interception and follow-up of human trafficking activities in the search and rescue region of the Mediterranean basin"[9].

By means of these MoU arrangements, both of which provide multiform coordination and support to Libya, Italian and Maltese authorities progressively delegated their search-and-rescue responsibilities and withdrew naval assets from areas of the Central Mediterranean frequented by migrant vessels in distress[10]. This outsourcing of responsibility, coupled with the criminalization of humanitarian organizations conducting search-and-rescue operations in the region[11], effectively gave rise to a rescue void where only a few actors, primarily LYCG

[8] Statewatch, *Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Com batting Illegal Immigration*, 28 May 2020, https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf; see also Yasha Maccanico, *Statewatch Analysis: Italy renews Memorandum with Libya, as evidence of a secret Malta-Libya deal surfaces*, March 2020, p. 12, https://www.statewatch.org/media/documents/analyses/no-357-renewal-italy-libya-memorandum.pdf.

[9] Statewatch, *Memorandum of Understanding Between the Government of National Accord of the State of Libya and the Government of the Republic of Malta in the Field of Com batting Illegal Immigration*, cit., Art. 5.

[10] See Y. MACCANICO, *Statewatch Analysis: Italy renews Memorandum with Libya, as evidence of a secret Malta-Libya deal surfaces*, March 2020, p. 12 https://www.statewatch.org/media/documents/analyses/no-357-renewal-italy-libya-memorandum.pdf; L. TODO, *Revealed: 2,000 refugee deaths linked to illegal EU pushbacks*, The Guardian, 5 May 2021, https://www.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-deaths-linked-to-eu-pushbacks (citing how "Italy and the EU withdrew their ships from the central Mediterranean, to leave it in Libya's hands").

[11] See Amnesty International, *Between the Devil and the Deep Blue Sea: Europe fails refugees and migrants in the central Mediterranean*, 8 August 2018, pp. 14-17, https://www.amnesty.org/en/documents/eur30/8906/2018/en/; E. CUSUMANO, M. VILLA, *From "Angels" to "Vice Smugglers": The Criminalization of Sea Rescue NGOs in Italy*, in *European Journal on Criminal Policy and Research*, 2020, no. 27, pp. 28-34; E. CUSUMANO, *Straightjacketing Migrant Rescuers? The Code of Conduct on Maritime NGOs,* in *Mediterranean Politics*, 2019, no. 24, p. 106.

and private vessels, remained present[12]. Given this development, and in maritime corridors where the LYCG was unable to conduct "rescues"[13], the Italian and Maltese authorities began to rely on private vessels, enlisting them to intercept and pushback migrants to Libya[14]. The deployment of these vessels, which was originally considered to be an exceptional measure, soon became a routine and established practice. This rise in privatized pushback operations has thereby signaled that States are employing yet another strategy of delegation to circumvent their obligations under international law.

3. *Legal Framework*

Concerns over the role of private vessels when intercepting and returning migrants have been raised in response to recent privatized pushback operations, with the *Nivin* and *Dar Al Salam 1* as only two examples. Notwithstanding their differences, these two operations raise similar questions as to the international obligations of the States and private vessels involved. This section will explore the applicable legal frameworks, both binding and non-binding, to determine whether and to what extent States and private vessels incur responsibility when engaged in privatized pushback operations.

3.1. *The Responsibility of States for Violations Committed during Privatized Pushbacks*

a. Attributing the Conduct of Private Vessels to States

[12] Global Legal Action Network (GLAN), *Communication to the Human Rights Committee in the case of SDG v. Italy*, p. 24, para. 59, https://www.glanlaw.org/_files/ugd/14ee1a_e0466b7845f941098730900ede1b51cb.pdf.

[13] "Search-and-rescue" operations are often a guise for conducting coordinated pushback operations. *See, e.g.,* OHCHR, *"Lethal Disregard": Search and rescue and the protection of migrants in the central Mediterranean Sea*, May 2021.

[14] Forensic Oceanography, *The Nivin*, December 2019, p. 14, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

The doctrine of State responsibility occupies a central position within the international legal architecture, outlining circumstances under which conduct may be attributed to a State, when an international obligation has been breached, and general defenses to responsibility. While the conduct of private actors is not directly governed by this doctrine, such conduct may nevertheless become relevant when establishing the responsibility of States.

As a general rule, State responsibility is engaged if conduct, consisting of an act or omission attributable to a State, constitutes a breach of an international obligation[15]. It is therefore apparent that State responsibility hinges upon attribution, the connection between the State and the conduct in question. The rules of attribution are set forth in the International Law Commission's Articles on State Responsibility (ILC Articles), specifically Articles 4 to 11. Although non-binding, these Articles are widely recognized as the most authoritative statement of law on attribution, codifying established and developing customary international law[16]. The rules of attribution provide a limited number of ways in which conduct may invoke the responsibility of a State, however, this section will focus only on those most relevant to the conduct of private actors, namely private vessels operating in the Central Mediterranean.

Under Article 5 of the ILC Articles, the conduct of a person or entity, which is not an organ of the State but which is "empowered by the law of the State to exercise elements of governmental authority… provided the person or entity is acting in that capacity in the particular instance"[17], shall be considered conduct of the State. The term "entity", under this Article, encompasses a broad range of bodies and in-

[15] See generally U.N. International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 2001; U.N. International Law Commission, *Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001)*, General Assembly Official Records Fifty-fifth Session, Supplement No. 10, U.N. Doc. A/56/10.

[16] See, e.g., J. CRAWFORD, *Investment Arbitration and the ILC Articles on State Responsibility*, in *ICSID Review - Foreign Investment Law Journal*, no. 25, 2010, p. 134; V. ENGSTRÖM, *Who is Responsible for Corporate Human Rights Violations?*, Åbo Akademi University Institute for Human Rights, 2002, p. 13, http://www.abo.fi/instut/imr/norfa/ville.pdf.

[17] ILC, *Draft Articles*, 2001, cit., p. 42.

strumentalities, including public corporations, quasi-public bodies, and certain private companies[18]. Recognized examples of such entities include, *inter alia*, private airlines exercising delegated authority in matters of migration and border control as well as private security companies contracted to provide services to correctional facilities[19]. The acts or omissions of private vessels, deployed to intercept migrant boats in distress and systematically return them to their point of departure, may similarly be attributed to the State under such a rule. Attribution, in such case, will however depend on the distinction between acts *jure gestionis* and acts *jure imperii*, as the exercise of any private or commercial function of a private vessel will fall beyond the scope of the Article[20]. Notably, too, the existence of a formal, legal relationship between the private vessel and the State in question is relevant, as the vessel must be legally authorized to exercise the public or governmental function of migration and border control[21]. It is likely difficult to prove that these private vessels' pushback operations, which are often clandestinely conducted[22], possess the requisite legal link to establish responsibility, as States tend to conceal any connection with such operations. However, a link may nevertheless exist even if States attempt to cover their tracks. Article 8 of the ILC Articles, by contrast, attrib-

[18] *Ibid.* at p. 43; J. CRAWFORD, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 2002, p. 100.

[19] See J. CRAWFORD, *The International Law Commission's Articles on State Responsibility*, cit., p. 100 (finding in Iran-U.S. Claims Tribunal, interlocutory award of 17 September 1985, no. 54-134-1, *Hyatt International Corporation v Government of the Islamic Republic of* Iran, p. 33, that although Iran established an autonomous foundation that held property in trust for certain charitable purposes, it maintained close control of the foundation and was thus covered by Article 5 of the ILC Draft Articles with respect to the execution of its charitable functions); see also D. M. CHIRWA, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, in *Melbourne Journal of International Law*, 2004, no. 5, p. 6.

[20] See C. KOVÁCS, *Attribution in International Investment Law*, 2018, pp. 135-136.

[21] See ILC, *Draft Articles*, 2001, p. 43.

[22] See, e.g., P. KINGSLEY, K. WILLIS, *Latest Tactic to Push Migrants from Europe? A Private, Clandestine Fleet*, New York Times, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html (referencing how authorities, in secret, have worked hard to prevent migrant arrivals).

utes to the State conduct of a person or group of persons that "is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"[23]. Interestingly, this rule, unlike Article 5, is not derived from the legal relationship between the actor and the State. Instead, responsibility arises where the actor, public or private[24], is either acting (i) on the instructions of the State, or (ii) under the direction or control of the State. Where conduct is carried out under the direction or control of the State, various degrees of control have been tested and applied by international courts and tribunals to establish State responsibility. By way of example, the International Court of Justice (ICJ), in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*[25], applied the "effective control" test, whereby the Court held that the United States must have "had effective control of the military or paramilitary operations in the course of which the alleged violations were committed" to be responsible for the activities of the counter-revolutionary group in question. Such control goes beyond mere influence or "even the general control by the respondent State over a force with a high degree of dependency on it"[26]. "Effective control's" high threshold therefore renders it practically difficult to find a State responsible for acts or omissions of private actors. Financing, training, equipping, or otherwise supporting a private actor, such as a private vessel, does not constitute "effective control"[27]. There must instead be evidence that the State exercised control in relation to the specific conduct or operation at issue[28]. In other words, if private conduct is carried out in a way that exceeds or is incidental to a State's direction or control, State responsibility is not incurred[29]. In contrast to the "effective control" test, a

[23] ILC, *Draft Articles*, 2001, p. 47.

[24] J. CRAWFORD, *The International Law Commission's Articles on State Responsibility,* cit., p. 110.

[25] International Court of Justice, judgement of 27 June 1986, I.C.J. Reports 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, para. 115.

[26] *Ibid*.

[27] *Ibid*.

[28] See ILC, *Draft Articles*, 2001, p. 47.

[29] *Ibid*.

more flexible "overall control" test was subsequently developed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Tadić* . In such case, and within the specific context of individual criminal responsibility, "overall control" extends beyond the mere equipping and financing of a military group to also include the coordination and participation in the planning of military activities[30]. Under this standard, evidence that a State directed or controlled specific acts or operations need not exist[31]. The "overall control" test, however, is widely considered to exclusively apply to the conduct of private individuals or groups organized into military structures with chains of command[32]. This limited scope of application would thereby exclude the conduct of private vessels in the Central Mediterranean. Accordingly, the more burdensome "effective control" threshold would need to be satisfied to establish State responsibility during privatized pushbacks under this Article, requiring State instructions or directives to be aimed at the commission of specific private conduct.

Alternatively, according to Article 9 of the ILC Articles, the conduct of private persons or groups exercising elements of governmental authority "in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority"[33] may also be attributed to the State. The wording, "in circumstances such as to call for," is indicative of the rare or exceptional nature of the circumstances envisaged by the Article so as to justify the exercise of governmental authority or public functions by private actors[34]. The Commentary has deemed situations such as "revolution,

[30] United Nations International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, judgement of 15 July 1999, no. IT-94-1-A, *The Prosecutor v. Dusko Tadić*, para. 131.

[31] *Ibid*. at p. 56, para. 132; see also United Nations International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, judgement of 2 October 1995, no. IT-94-1-AR72, *The Prosecutor v. Dusko Tadić*, paras. 131-32.

[32] United Nations International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, judgement of 2 October 1995, no. IT-94-1-AR72, *The Prosecutor v. Dusko Tadić*, para. 120.

[33] ILC, *Draft Articles*, 2001, p. 49.

[34] See *ibid*. (confirming how "exceptional" circumstances were envisaged by the Article).

armed conflict, or foreign occupation" to be sufficiently exceptional, as governmental authorities were inoperative, disintegrating, or suppressed[35]. In the context of privatized pushback operations, government authorities are indeed inoperative within the Central Mediterranean, as indicated by reports of the withdrawal of Italian and Maltese naval assets from the region. Due to the disjunctive "or" rather than the conjunctive "and" within the Article's text, the *absence* of these governmental authorities is sufficient for its application [emphasis added]. However, what remains to be determined is whether these States' absence is by any means exceptional. Exceptional, by definition, refers to conditions beyond the ordinary or expected course of events[36]. The deliberate withdrawal and subsequent absence of Italian and Maltese authorities in the region, where such States would otherwise have operational capacity to be present and to conduct search-and-rescue operations, may qualify as exceptional and therefore justify the exercise of public functions by private vessels, attributing their conduct to the relevant State.

Finally, Article 11 of the ILC Articles provides that a State may be responsible for conduct which is otherwise not attributable to it where the State acknowledges or adopts such conduct as its own[37]. *United States' Diplomatic and Consular Staff in Tehran (United States v. Iran)*[38] is one illustrative case where a State acknowledged or adopted the conduct of a private actor. In such case where certain militants seized the U.S. embassy and its personnel by force, the government of Iran issued a decree which expressly supported and authorized the militants' conduct and itself continued the occupation of the embassy

[35] U.N. International Law Commission, Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), General Assembly Official Records Fifty-fifth Session, Supplement No. 10, U.N. Doc. A/56/10, p. 49, Art. 9(1).

[36] Cambridge Dictionary, *Definition of "exceptional"*, https://dictionary.cambridge.org/us/dictionary/english/exceptional; see also Blacks Law Dictionary, *Definition of "exceptional"*, https://blacks_law.en-academic.com/9574/exceptional_circumstances.

[37] See ILC, *Draft Articles*, 2001, p. 52.

[38] International Court of Justice, judgement of 24 May 1980, I.C.J. Reports 1980, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*.

premises[39]. The result of Iran's decree "was fundamentally to transform the legal situation created by the occupation," translating the militants' conduct into acts of the State[40]. In view of the government's encouragement and approval of the militants' conduct described above, the ICJ held that such conduct was thus attributable to Iran[41]. Likewise, where the governments of Italy or Malta acknowledge or adopt the conduct of private vessels operating pushbacks in the Central Mediterranean, responsibility will similarly be imputed.

It follows from the discussion above that the general rules of international law recognize that State responsibility can be incurred for violations committed by either the State or by private actors, such as private vessels. There must only be a sufficient nexus between the State and the acts of such vessels for the State to assume responsibility. It is also worth noting that the rules of attribution are mutually exclusive[42]. That is to say that no more than one Article may apply and give rise to responsibility at a time. Within the context of privatized pushback operations, it appears that responsibility will most likely arise under Articles 5, 8, or 11, providing the most plausible recourse for attribution of private conduct to the States of Italy and Malta.

b. The Human Rights Obligations of States Applicable to Privatized Pushbacks

As mentioned above, State responsibility is engaged where there is a breach of an international obligation, including those arising under international human rights law[43]. Such an obligation can be both posi-

[39] *Ibid*. at p. 35, para. 74.

[40] *Ibid*.

[41] *Ibid*.

[42] C. KOVÁCS, *Attribution in International Investment Law*, cit., p. 4. ("The general rules of attribution contained in the ILC Articles 4-11 are mutually exclusive. Accordingly, if a conduct qualifies as an act of State under one of the rules, the inquiry ends there"); see also J. CRAWFORD, *The International Law Commission's Articles on State Responsibility,* cit., p. 93.

[43] Other international obligations such as those arising under the U.N. Convention on the Law of the Sea (UNCLOS) and the Safety of Life at Sea Convention (SOLAS), although relevant, are beyond the scope of this article.

tive or negative. The positive obligation to promote and protect human rights requires an affirmative action on the part of the State, such as through the adoption of "legislative, judicial, administrative, educative and other appropriate measures to fulfil their obligations"[44]. This obligation derives from the general duty, outlined in Article 2, paragraph 1 of the International Covenant on Civil and Political Rights (ICCPR), "to ensure all individuals within [a State's] territory and subject to its jurisdiction the rights recognized in the Covenant"[45]. To give effect to this provision, States are enjoined to take proactive measures to safeguard such rights, whether those measures be preventative or remedial.

With respect to preventative measures, the Human Rights Committee (the Committee) has acknowledged that States must "adopt any appropriate laws or other measures to protect life from all reasonably foreseeable threats, including from threats emanating from private persons or entities", even when such conduct is not attributable to the State[46]. Implicit within this duty is the obligation to monitor, conduct due diligence, and regulate the activities of private entities operating within the State's jurisdiction or effective control, "taking due account of related international standards of corporate responsibility"[47]. When transposed to the context of privatized pushbacks, States have the positive obligation to establish regulatory and monitoring mechanisms that ensure that private vessels and members of their crew do not engage in actions that interfere with or violate migrants' right to life or right to be free from torture or cruel, inhuman, or degrading treatment

[44] U.N. Human Rights Committee (U.N. HRC), *General Comment no. 31[80], The nature of the general legal obligation imposed on State Parties to the Covenant*, 26 May 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, p. 3, para. 7.

[45] See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art. 2(1).

[46] U.N. HRC, *General Comment no. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018,* U.N. Doc. CCPR/C/GC/36, paras. 18, 21, 22.

[47] *Ibid*. paras. 19, 21-22; see U.N. Committee Against Torture, *General Comment No. 2, Implementation of article 2 by State Parties*, 24 January 2008, U.N. Doc. CAT/C/GC/2, paras. 17-19; U.N. HRC, *General Comment no. 31*, p. 3, para. 8.

or punishment (CIDTP)[48]. Accordingly, even if Italy and Malta themselves did not act in a manner that directly violated migrants' rights, these States may have nevertheless violated such rights for permitting or failing to take appropriate action against private vessels operating within areas subject to their jurisdiction.

With respect to remedial measures, States have the positive duty to investigate, punish, and redress harm where human rights violations or allegations of such violations exist[49]. Importantly, a violation need not materialize for the State to be bound by this duty[50]. However, where a violation has been committed, such as by a private individual or entity, States are obliged to grant victims an effective remedy[51]. While international human rights law does not dictate the specific remedies or measures a State must implement in order to ensure certain rights and freedoms, these measures must be "appropriate", "reasonable", and "necessary"[52]. Guided by this consideration, and in the context of privatized pushback operations, States should conduct thorough and impartial investigations. If evidence of wrongdoing is found, appropriate legal actions, such as criminal prosecutions, should be pursued against both national authorities and private vessels complicit in the violations at issue. Other sanctions, including fines or revocation of licenses issued to private vessels, may also be imposed as a deterrent and means of accountability.

By contrast, negative obligations require States to refrain from engaging in, or knowingly contributing to, any acts or omissions inconsistent with the prohibitions against refoulement, arbitrary deprivation of life, and torture or CIDTP[53]. Such obligations apply where States

[48] See generally U.N. HRC, *General Comment no. 31*, p. 3, para. 8.

[49] U.N. HRC, *General Comment no. 31*, p. 3, para. 8.

[50] U.N. HRC, *General Comment no. 36*, p. 7, para. 27 (specifically regarding the right to life).

[51] *Ibid.* at p. 4, para. 15.

[52] See ICCPR Art. 2(2); see also European Court of Human Rights, Grand Chamber, judgement 8.07.2004, application no. 48787/99, *Illaşçu and others v. Moldova and Russia*, para. 313.

[53] Although privatized pushbacks implicate other international human rights obligations, such as right to liberty and security of the person, this article will only reference the prohibitions of non-refoulement, arbitrary deprivation of life, and torture and

exercise *de jure* or *de facto* effective control and may thus apply extra-territorially to vessels operating on the high seas[54]. Accordingly, any State involved in privatized pushbacks, including those that deploy their own naval assets to assist a migrant rescue, designate the nearest port of safety, or coordinate search-and-rescue operations through private vessels and the assets of other States, has a duty to abide by the above obligations[55].

It is worth noting that State involvement in privatized pushbacks may take different forms, whether as a State involved in the operation itself, a flag State of a private vessel, or a State in the vicinity of the operation. The application of these human rights obligations to all involved parties provides a complementary form of human rights protection, particularly as it pertains to ensuring private sector accountability.

3.2. *The Responsibility of Private Vessels for Violations Committed during Pushback Operations*

Privatized pushback events also demonstrate how private actors, similar to their State counterparts, can and often do violate human rights. In an effort to bridge the accountability gap that may stem from cooperation between States and private actors, this section examines how the UN Guiding Principles on Business and Human Rights (UNGP) apply to private vessels involved in the search, rescue, and return of migrants at sea. Despite its non-binding effect, UNGP was unanimously endorsed by the UN Human Rights Council in 2011[56]

other cruel, inhuman, or degrading treatment and punishment. Italy and Malta are State parties to the Refugee Convention, ICCPR, and the Convention Against Torture.

[54] See OHCHR, *"Lethal Disregard"*, May 2021, p. 20; see generally, U.N. General Assembly, Seventieth session, *Torture and other cruel, inhuman or degrading treatment or punishment*, 7 August 2015, U.N. Doc. A/70/303, para. 27.

[55] OHCHR, *"Lethal Disregard"*, p. 20; see also UNHCR, *Submission in the case of S.S. and Others. v. Italy before the European Court of Human Rights,* no. 21660/18, 14 November 2019, para. 4.5.

[56] U.N. Working Group on Business and Human Rights, *The U.N. Guiding Principles on Business and Human Rights: An Introduction*, p. 2,

and has progressively found expression, in whole and in part, within domestic legislative and regulatory frameworks[57]. Its three-pillar structure seeks to clarify obligations that prevent, address, and remedy business-related human rights abuses. Pillar II, in particular, sets out the responsibility of business enterprises to respect human rights and will thus be the focus of this section. Importantly, this responsibility, grounded in the recognition of the role of business enterprises as specialized organs of society performing specialized functions, exists independently of States' ability or willingness to fulfill their own obligations[58].

Among the various principles outlined in Pillar II, UNGP 13 begins by identifying the various degrees of corporate participation in human rights violations, whether by causing, contributing, or being involved *vis-à-vis* their business relationships. An enterprise's "business relationships" may be understood to include relationships with business partners, value chain participants, and other State and non-State entities directly connected to its operations, services, or products[59]. Within this contextual frame, business enterprises must neither cause nor contribute to human rights violations. Where such violations have already occurred or may occur, such enterprises must seek to mitigate or prevent adverse human rights impacts that are directly linked to their operations through their business relationships, irrespective of whether they themselves contributed to those impacts. This latter obligation is particularly relevant with respect to privatized pushbacks. Although States are likely to constitute a primary driver of adverse

https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf.

[57] See, e.g., Nicolas Bueno, *Mandatory human rights due diligence legislation*, Zurich.

[58] OHCHR, *Guiding Principles on Business and Human Rights*, 2011, U.N. Doc. HR/PUB/11/04, p. 1, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[59] See J.P. GAUCI, *When Private Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations*, British Institute of International and Comparative Law, 24 November 2020, p. 14, https://www.biicl.org/documents/124_private_vesselsresearch.pdf.

human rights impacts through their instigation and coordination of such operations, private vessels are not altogether absolved of responsibility. Rather, private vessels remain obliged, either through their contribution or involvement, to cease and to prevent human rights violations from occurring to the greatest extent possible[60].

Second, UNGP 14 clarifies that the responsibility to respect human rights applies equally to all business enterprises irrespective of their size, sector, operational context, ownership, and structure[61]. In other words, all vessels involved in the rescue of migrants at sea – ranging from large commercial vessels to small and medium-sized fishing vessels – share the same responsibility. The scale and complexity of the means through which these vessels meet this responsibility, however, are proportional to the above listed factors and to the severity of the adverse human rights impacts. Small and medium-sized vessels, for instance, may have less capacity and formal corporate structures relative to their large, commercial counterparts. For such reason, measures and procedures implemented by these vessels are permitted to differ. Although where human rights impacts are of a certain level of severity, which is determined according to their scale, scope, and irremediable character[62], certain corresponding measures will nevertheless be required by both small and large vessels, alike.

UNGPs 15-22 further elaborate on the specific policies and procedures that business enterprises must undertake to meet their responsibility to protect human rights, which include a policy commitment, a human rights due diligence process, and remediation to address adverse impacts. The policy commitment, which is to serve as a basis for integrating the enterprise's human rights responsibility within its operations and services, is required to communicate the enterprise's human

[60] J.G. RUGGIE, *Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate and Investment Banking Context*, Harvard Kennedy School, 21 February 2017, p. 1, https://media.business-humanrights.org/media/documents/files/documents/Thun_Final.pdf.

[61] OHCHR, *Guiding Principles on Business and Human Rights*, 2011, U.N. Doc. HR/PUB/11/04, p. 15, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[62] *Ibid*.

rights expectations of personnel and other affiliate entities[63]. Such a communication is to be made both internally and externally. It may be argued that as a form of internal guidance, the policy commitment could put private vessels and members of their crew on notice of the conduct expected during a search-and-rescue operation, thereby enhancing the capacity of vessels to comply with international and regional human rights law. Also, as a form of external guidance, the policy commitment could provide a measure of transparency to affected migrant populations and other relevant stakeholders, such as to investors and States. This commitment, which must be communicated in a mode and frequency that adequately reflects a vessel's human rights impacts[64], could potentially deter States from employing such vessels in pushbacks in fear of having their operations become public.

The human rights due diligence process, on the other hand, involves the assessment of actual and potential human rights impacts. This assessment may be included within broader enterprise risk management systems "provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders"[65], such as to refugees and migrants rescued at sea. A risk management system that exclusively monitors potential losses for the vessel would therefore fail to meet this requirement. In this regard, private vessels, especially those likely to encounter situations of migrants in need of assistance at sea, must undertake due diligence to be prepared for potential losses arising from such a possibility[66]. Considering privatized pushbacks as a critical human rights risk, the inclusion of adequate provisions to address efforts related to rescue and disembarkation can therefore be regarded as constituent parts of due diligence[67]. Such provisions may include ensuring that the vessel is properly equipped to support a migrant rescue, that the crew is briefed about the possibility of assisting migrants at sea, and that cer-

[63] *Ibid*. at pp. 16-17.

[64] *Ibid*. at pp. 23-24.

[65] *Ibid*. at p. 18.

[66] See J.P. GAUCI, *When Private Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations*, cit., p. 15.

[67] See J.P. GAUCI, *When Private Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations*, cit., p. 15.

tain consultative mechanisms with relevant stakeholders are in place, all of which would help prevent and mitigate pushback risks. Where adverse risks are identified, such as through human rights due diligence processes, business enterprises are then required to provide for or cooperate in their remediation. The remediation process may involve operational-level grievance mechanisms, consistent with the criteria outlined in UNGP 31, or cooperation with applicable judicial mechanisms.

Lastly, according to UNGP 23, all business enterprises have the same responsibility to uphold human rights irrespective of their operating environment. Where a domestic jurisdiction renders it impossible to comply with this responsibility, enterprises are expected to uphold "the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard"[68]. Put differently, this responsibility exists "over and above compliance with national laws and regulations protecting human rights"[69]. In practice, however, private vessels are under considerable pressure to meet this responsibility due to often competing State instructions during migrant rescue and disembarkation. Such instructions may involve returning migrants to a country, such as Libya, where they face a real risk of persecution, or delegating control over those aboard to State authorities, such as to the LYCG. Even where State-directed instructions are not enforceable against private vessels on the high seas, the vessels may nevertheless have to traverse through the State's territorial sea or contiguous zone. In such areas, the State enjoys prescriptive jurisdiction and can thereby block passage to vessels, require vessels to leave, or even resort to more forceful means necessary to prevent or punish infringement of its immigration laws[70]. Within this difficult operating environment, private vessels may

[68] OHCHR, *Guiding Principles on Business and Human Rights*, 2011, U.N. Doc. HR/PUB/11/04, pp. 25-26, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[69] *Ibid*. at p. 13.

[70] See L.M. KOMP, *The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?*, in *Boat Refugees' and Migrants at Sea: A Comprehensive Approach*, 2017, p. 224; see also J.P.

find themselves at a greater risk of being complicit in human rights abuses instigated by State actors. This reality, however, still does not release such vessels from their human rights responsibilities.

In summary, privatized pushbacks, by their very nature, implicate the responsibility of both States and private vessels. It is evident that the UNGP provides a comprehensive framework outlining the specific responsibility of private vessels to respect the human rights of migrants at sea. These guidelines, however, do not exist in isolation and should be read in conjunction with other relevant frameworks to help effectively map and reinforce the human right responsibilities of these vessels[71].

4. *Privatized Pushback Practices in Review*

In view of the dual responsibility of States and private vessels outlined above, this section examines the emerging practice of State delegation of the rescue and return of migrants to a private fleet. The regularity of such a practice has been documented by EUNAVFOR MED, Operation Sophia – the European Union (EU) anti-smuggling military operation – which found that 15 to 20 percent of all migrant launches, as of 2018, are "rescued" by private vessels[72]. As reviewed in the applicable legal frameworks, the State practice of delegating human rights violations to a growing network of actors, such as private vessels, does not negate their responsibility nor that of the vessels that become complicit. The case studies of the *Nivin* and *Dar Al Salam 1* therefore aim to shed light on how States, specifically Italy and Malta, are en-

GAUCI, *When Private Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations*, cit., p. 16.

[71] An example of a complementary framework includes the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, 2011, https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en.

[72] Forensic Oceanography, *The Nivin: Migrants' resistance to Italy's strategy of privatized push-back*, cit., p. 14, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

deavoring to avoid and undermine their obligations under international human rights law[73].

4.1. *The Nivin: A Case of Italy's Strategic Delegation of Migrant Rescue and Return to Private Vessels*

As part of a wider effort to stem migration through the Central Mediterranean route, Italian governmental authorities instructed the *Nivin*, a private merchant vessel flying a Panamanian flag, to rescue a migrant boat and to liaise with the LYCG to coordinate their disembarkation. To contextualize the situation further, the Italian authorities first became aware of the boat's exact location through the reporting of EUNAVFOR MED and subsequently contacted the *Nivin* "on behalf of the Libyan Coast Guard," who had previously left a series of calls from the migrant rescue hotline Alarm Phone unanswered[74]. Italy's communication not only directed the private vessel to alter its course and to proceed to the location of the migrant boat, but also instructed the vessel's captain to communicate with the Libyan authorities through the Italian Maritime Rescue Coordination Centre Rome (MRCC Rome)[75]. This Centre, despite its ceding of control and withdrawal from the search-and-rescue region, "continued to act as facilitator – or *de facto* coordinator – throughout the rescue operation"[76]. Following receipt of the MRCC Rome communication, the *Nivian* diverted its course towards the migrant boat[77]. The *Nivian*, pursuant to in-

[73] Although responsibility may be incurred by the flag States of each private vessel as well as by States in the vicinity of the pushback operations, namely Libya, this section will exclusively focus only on the responsibilities of Italy, Malta, and the relevant private vessels.

[74] GLAN, *Communication to the Human Rights Committee in the case of SDG v. Italy*, pp. 2, 9, paras. 9, 28, https://www.glanlaw.org/_files/ugd/14ee1a_e0466b7845f941098730900ede1b51cb.pdf.

[75] *Ibid.* at p. 3, para. 11; Forensic Oceanography, *The Nivin*, cit., p. 10, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[76] GLAN, *Communication to the Human Rights Committee in the case of SDG v. Italy*, p. 3, para. 11.

[77] This diversion was confirmed by the vessel's automatic identification system track. See GLAN, *Communication to the Human Rights Committee in the case of SDG*

structions received by the LYCG operating onboard an Italian naval ship moored in Libyan waters, then transported the migrants back to Libya, where they were violently removed from the vessel through the use of tear gas as well as live and rubber bullets[78]. Upon their forced disembarkation, the migrant passengers endured systemic beatings and torture, as documented by several independent reports[79]. This return – conducted in full knowledge of the conditions awaiting migrants in Libya – violated, among other things, the principle of non-refoulement, the right to life, and the right to be free from torture and other forms of ill-treatment[80].

With regard to Italy's involvement and corresponding responsibility for the above rights violations, it appears that the pushback was enabled by a shared operational structure, connecting Italian authorities, the LYCG, and the *Nivin*[81]. EUNAVFOR MED, for instance, identified the migrant boat in distress, conveying such information to MRCC Rome which then directed the *Nivin* on behalf of the LYCG. It is evident that the *Nivin* was thus acting on the instructions delivered by MRCC Rome, invoking responsibility under Article 8 of the ILC Articles. Even if this MRCC Rome communication did not amount to State instructions for purposes of the Article, the *Nivian* was nonetheless acting under the direction or control of the Italian

v. Italy, cit., p. 3, para. 11. Forensic Oceanography, *The Nivin: Migrants' resistance to Italy's strategy of privatized push-back*, cit., p. 62 (noting how the automatic identification system (AIS) is an automatic tracking system that uses transponders on ships and is used by vessel traffic services. Information provided by AIS equipment, such as unique identification, position, course, and speed, can be displayed on a screen or an electronic chart display and information system. AIS is also intended to allow maritime authorities to track and monitor vessel movements).

[78] Global Legal Action Network (GLAN), *Communication to the Human Rights Committee in the case of SDG v. Italy*, cit., p. 2, para. 6.

[79] Forensic Oceanography, *The Nivin*, cit., p. 73.

[80] See, e.g., M. MENDUNI, *Giro: "Fare rientrare quelle persone vuol dire condannarle all'inferno"*, in *La Stampa*, 6 August 2017, http://www.lastampa.it/2017/08/06/italia/cronache/giro-fare-rientrare-quelle-persone-vuol-dire-condannarle-allinferno-SXnGzVlzftFl7fNGFCMADN/pagina.html (citing the Italian Deputy Minister for Foreign Affairs Mario Giro, as well as several migrant testimonies within the report, that such returns can be equated to "taking [migrants] back to hell").

[81] Forensic Oceanography, *The Nivin*, cit., p. 25.

State. The degree of control required to warrant the attribution of conduct is indeed high, as there must be evidence of State control in relation to specific conduct rather than in relation to a general situation of dependence or support. In the case of the *Nivin*, it appears that not only did the LYCG depend on Italian naval equipment and communication support to liaise with crew members aboard the private vessel, but Italian authorities first actually responded and coordinated on behalf of incapacitated LYCG authorities. The LYCG's initial incapacity is both exhibited through Alarm Phone's series of unsuccessful attempts to alert the Coast Guard of the distressed migrant boat[82] and through interviews conducted with Libyan authorities themselves, who confirmed that the LYCG cannot conduct and coordinate rescue operations with vessels at sea without relying on the infrastructure of other actors[83]. Therefore, the actions of the LYCG and that of the *Nivian* were not carried out in such a way that was merely incidental to Italy's direction or control. Rather, such actions would not have otherwise occurred nor been made possible without such control. Accordingly, while Italian authorities seek to frame their contribution as mere "support and assistance" rather than "coordination or control," the case of the *Nivin* suggests that the coordination of these privatized pushback operations is "essentially entrusted to the Italian Navy, with its own naval assets and with those provided to the Libyans"[84]. Italy, in this case, thereby exercised the requisite degree of control in relation to the specific conduct decided upon and undertaken during the *Nivin* pushback. In the event that the degree of control is disputed, a State, such as Italy, providing material support to another State when carry-

[82] *Ibid.* at p. 57.

[83] *Ibid.* at p. 30.

[84] In a similar case relating to the ship Open Arms, a judge held that the intervention of the Libyan patrol vessels happened "under the aegis of the Italian navy ships present in Tripoli." See Tribunale di Catania, *Sezione del Giudice per le Indagini Preliminari, Decreto di convalida e di sequestro preventivo*, 16 April 2018, http://questionegiustizia.it/doc/decreto_rigetto_sequestro_preventivo_tribunale_Ragusa_gip.pdf; see also, Forensic Oceanography, *The Nivin*, cit., p. 22; M. PETRILLO, L. BAGNOLI, *The Open Arms case continued: new documents and Malta*, Open Migration, 12 April 2018, https://openmigration. org/en/analyses/the-open-arms-case-continued-new-documents-and-malta/.

ing out search-and-rescue operations, retains the responsibility to mitigate the risk that the State and corresponding vessel performing the operation do not commit human rights violations[85]. In other words, Italy has the obligation to take action to mitigate the risk of the LYCG or the *Nivin* from violating the rights of migrants aboard the vessel. Such action may involve ensuring a place of safety for disembarkation or halting funding, communication, and other forms of operational support to the *Nivian* and LYCG. In this instance, Italy failed to take such action and thus bears responsibility.

In addition to the government of Italy, the *Nivian* also bears responsibility for the abuses committed against the migrant passengers. As previously noted, private vessels are expected to uphold "the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard"[86]. During this pushback operation, the *Nivin* first navigated the vessel to a meeting point in the open sea, where it then attempted to disembark the migrant passengers onto a LYCG vessel[87]. Having failed to disembark the passengers, the LYCG stated it would seek to use additional force and instructed the *Nivian* crew to withhold food from the migrants in the meantime[88]. Despite this directive and explicit indication of future harm, the *Nivin* continued to sail the vessel to the Libyan port of Misrata. There, the migrant passengers resisted disembarkation for 12 days and the Libyan authorities beat and shot those still aboard the *Nivin*, clearing the vessel and transporting shot those migrants aboard the *Nivin*,

[85] OHCHR, *"Lethal Disregard",* p. 19; OHCHR, Global Migration Group (GMG), *Recommended Principles and Guidelines on the Protection of the Human Rights of Migrants in Vulnerable Situations*, 2018, p. 27, https://www.ohchr.org/sites/default /files/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf; U.N. HRC, General Comment no. 36, p. 13, para. 63; see also UNHCR, *Submission in the case of S.S. and Others. v. Italy before the European Court of Human Rights*, no. 21660/18, 14 November 2019, para. 5.9.

[86] OHCHR, *Guiding Principles on Business and Human Rights*, 2011, U.N. Doc. HR/PUB/11/04, pp. 25-26, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[87] Forensic Oceanography, *The Nivin*, cit., p. 67.

[88] *Ibid*. at p. 68.

clearing the vessel and transporting the passengers to nearby detention facilities[89]. In light of these events, it can be seen that the *Nivian* neither ensured prompt disembarkation to a place of safety nor protected against the transfer of the migrant passengers to places where they would be exposed to serious rights violations, including the arbitrary deprivation of life, torture, or other CIDTP. As recalled in the UNGP, where such violations may occur or have already occurred, private vessels must seek to prevent or mitigate adverse human rights impacts, irrespective of whether they themselves contributed to those impacts. In this regard, the *Nivin* should have undertaken due diligence to prepare for adverse impacts that it could have reasonably anticipate arising from its operations. Such a process may have involved briefing the crew on the possibility of a migrant rescue, reviewing safe places for disembarkation, properly equipping the vessel with adequate provisions of food, water, and medical supplies to assist in a rescue, as well as maintaining certain channels of communication with human rights entities to prevent violations from occurring. The Nivian, which was traversing through one of the largest maritime migratory routes and could have anticipated encountering a distressed migrant boat, failed to undertake any of the above measures. Certainly, the vessel faced a difficult decision, having to choose either to comply with State instructions to violently contain the migrant pasengers or to comply with obligations set forth under international human rights law. By failing to undertake due diligence measures and by choosing to follow State instructions, however, the *Nivian* became complicit in Italy's coordination of abuses[90].

4.2. *The Dar Al Salam 1: A Case of Malta's Strategic Delegation of Migrant Rescue and Return to Private Vessels*

The government of Malta, similarly determined to prevent the disembarkation of migrant arrivals, turned to the use of private vessels,

[89] F. MANNOCCHI, *Libya forcibly removes migrants from ship after 12-day standoff,* Middle East Eye, 20 November 2018, https://www.middleeasteye.net/news/ libya-forcibly-removes-migrants-ship-after-12-day-standoff.

[90] Forensic Oceanography, *The Nivin*, cit., p. 15.

including fishing and ferry boats not generally equipped to engage in search-and-rescue operations. The *Dar Al Salam 1*, as one of these vessels, was contracted by the government to rescue a migrant boat in distress in its search-and-rescue region. This private vessel, which was a Libyan-flagged fishing vessel routinely docked in Maltese waters, was deployed five days after Maltese authorities received notice of the distressed boat containing 63 migrant passengers aboard[91]. This lag time, which left the migrant boat stranded and unassisted for a considerable period, resulted in a report of seven passengers missing at sea[92]. Following the boat's later arrival in Malta's search-and-rescue region, State authorities coordinated the pushback operation through the Malta Rescue and Coordination Centre (Malta RCC). As confirmed in a government statement, this Centre, along with the Armed Forces of Malta (AFM), pinpointed the migrant boat's position and called nearby private vessels, including the *Dar Al Salam 1*, to proceed to its location[93]. The private vessel then transferred migrants onboard, five of whom were unconscious and later died in transit, and proceeded towards Libya[94]. On arrival, the migrant passengers were then disembarked and placed in the Trik-al-Sikka detention facility[95]. Thus, of the reportedly 63-person migrant group, five were reported dead, seven missing at sea, and 51 placed in detention where instances of torture

[91] See Alarm Phone, *Press Release: Twelve deaths and a secret push-back to Libya*, 16 April 2020, www.alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/; Government of Malta, *Press Release: PR200673en*, 15 April 2020, https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/April/15/pr200673en.aspx (confirming that the EU had notice that the migrant boat was in distress for several days in the Libyan search-and-rescue region).

[92] See, e.g., Amnesty International, *Malta: Waves of Impunity, Malta's Human Rights Violations and Europe's Responsibilities in the Central Mediterranean*, cit., p. 7.

[93] Government of Malta, *Press Release: PR200673en*, 15 April 2020, https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/April/15/pr200673en.aspx; P. KINGSLEY, K. WILLIS, *Latest Tactic to Push Migrants from Europe?*, cit. (citing how a Maltese military helicopter guided the *Dar Al Salam 1* to the distressed migrant boat's location).

[94] See, e.g., Amnesty International, *Malta: Waves of Impunity, Malta's Human Rights Violations and Europe's Responsibilities in the Central Mediterranean*, 2020, cit., p. 7.

[95] *Ibid*.

and other CIDTP are well-documented, including in the form of sexual and gender-based violence, extortion, slavery, forced labor, and physical violence[96]. Among other violations, this pushback contravenes the principle of non-refoulement, the right to life, and the right to be free from torture and other CIDTP.

With regard to Malta's involvement and corresponding responsibility for the above rights violations, the government conceded to having coordinated the operation in an official statement[97]. More specifically, the government confirmed that it dispatched private vessels, including the *Dar Al Salam 1*, to the location of the migrant boat to conduct the operation under its coordination. In fact, a former Maltese official admitted that he was requested by the government to arrange for the return of this group of migrants to Libya, which was part of his broader responsibility to prevent "migrant boats from reaching the Maltese SAR region using a group of private vessels"[98]. The Prime

[96] See, e.g., Amnesty International, *Malta: Waves of Impunity, Malta's Human Rights Violations and Europe's Responsibilities in the Central Mediterranean*, cit., p. 20; OHCHR, *Shocking Cycle of Violence for migrants departing Libya to seek safety in Europe*, 2 October 2020, https://www.ohchr.org/en/press-releases/2020/10/shocking-cycle-violence-migrants-departing-libya-seek-safety-europe; see also, UNSMIL/OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 18 December 2018, https:// unsmil.unmissions.org/sites/default/files/libya-migration-report-18dec2018.pdf; UNSMIL/OHCHR, *"Detained and Dehumanized": Report on Human Rights Abuses Against Migrants in Libya*, 13 December 2016, https://unsmil.unmissions.org/sites/default/files/migrants_report-en.pdf.

[97] Government of Malta, *Press Release: PR200673en*, 15 April 2020, https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/April/15/pr200673en.aspx.

[98] Amnesty International, *Malta: Waves of Impunity, Malta's Human Rights Violations and Europe's Responsibilities in the Central Mediterranean*, cit., p. 8; see also P. KINGSLEY, K. WILLIS, *Latest Tactic to Push Migrants from Europe?*, cit.; Newsbook, *The government uses Gafa' to co-ordinate pushback*, 29 April 2020, www.newsbook.com.mt/en/the- government-uses-gafa-to-co-ordinate-pushback/#.XqnlbOvhpfA.whatsapp; Times of Malta, *Exposed: Malta's secret migrant deal with Libya*, 10 November 2019, www.timesofmalta.com/articles/view/exposed-maltas-secret-migrant- deal-with-libya.748800; Malta Today, *Neville Gafà reveals controversial secret migration pact with Libya*, 23 February 2020,

Minister of Malta even went so far as to corroborate this official's account, confirming that the official was authorized and enlisted by the State to connect with his Libyan contacts regarding the migrants aboard the *Dar Al Salam 1*[99], thereby arranging for their return. This level of direction and control exercised by the Maltese government over the private vessel clearly implicates Article 8 of the ILC Articles, attributing the conduct of the *Dar Al Salam 1* to the State of Malta. Other relevant ILC Articles applicable to this situation include Article 11, which provides that where a State acknowledges or adopts private conduct as its own, responsibility may be incurred. In view of the Maltese government's authorization and approval of the private vessel's conduct described above, and as evidenced in official press releases, such statements appear to have had a result of "fundamentally [] transform[ing] the legal situation", translating the acts of the private vessels into that of the State. Such private pushback operations at sea may thus be considered attributable to Malta under this provision. Alternatively, Article 5 of the ILC Articles, requiring a private entity to be empowered by law and to exercise elements of governmental authority, may additionally provide a basis for attribution. For such a provision to apply, however, there must be a formal, legal relationship between the *Dar Al Salam 1* and the State of Malta, which may be difficult to prove given that the vessel did not complete the requisite immigration paperwork and switched off its satellite tracking device soon after leaving port[100]. Thus, questions such as those relating to the chain of responsibility to contract the Dar Al Salam 1 therefore remain unresolved. Such information, if available, could establish the requisite legal relationship between the government of Malta and the *Dar Al Salam 1* to give rise to responsibility. At any rate, only one of the aforementioned ILC Articles need apply to hold Malta responsible.

www.maltatoday.com.mt/news/national/100529/neville_gaf_reveals_controversial_secret_migration_pact_with_libya#. XxCqgihKjIV.

[99] Amnesty International, *Malta: Waves of Impunity, Malta's Human Rights Violations and Europe's Responsibilities in the Central Mediterranean*, cit., p. 8; see also Newsbook, *Watch: PM denies Gafa coordinating rescue; says he was asked to use contacts*, 1 May 2020, https://newsbook.com.mt/en/watch-pm-denies-gafa-coordinating-rescue-says-he-was-asked-to-use-contacts/.

[100] P. KINGSLEY, K. WILLIS, *Latest Tactic to Push Migrants from Europe?*, cit.

Independent of the Maltese government, the *Dar Al Salam 1* also retains responsibility for the human rights violations committed during the course of the pushback. As outlined in the UNGP, private entities must neither cause nor contribute to human rights violations. Relatedly, such entities must seek to mitigate or prevent such violations from occurring. The *Dar Al Salam 1*, when boarding the migrants onto the vessel, was reported to have hoisted five unconscious migrants aboard without rendering medical assistance nor requesting such assistance be provided by Maltese authorities[101]. In this regard, the *Dar Al Salam 1* should have undertaken due diligence to prepare for adverse human rights impacts arising from rescue operations. To be more specific, the diligence process could have involved properly equipping the boat with first aid and other medical supplies, maintaining channels of communication with government authorities and humanitarian entities who have capacity to provide medical assistance, supplying crew members with a migrant rescue protocol, maintaining active satellite tracking systems, and reviewing safe places for disembarkation. Most critically, the *Dar Al Salam 1* should have avoided contracting with the Maltese government for purposes of conducting pushbacks on its behalf. As reports have indicated, the *Dar Al Salam 1* was one of several private vessels "working at sea for Malta"[102], decisively choosing to engage in these State-sanctioned operations and having what appears to be a pre-existing relationship with the government. Guided by this consideration, the *Dar Al Salam 1* is but another complicit party in this system of refoulement and other abuses.

5. *Conclusion*

With the *Nivin* and the *Dar Al Salam 1* as pushbacks in profile, it

[101] Amnesty International, *Malta: Waves of Impunity, Malta's Human Rights Violations and Europe's Responsibilities in the Central Mediterranean*, cit., p. 7.

[102] L. TODO, *Exclusive: 12 die as Malta uses private ships to push migrants back to Libya*, The Guardian, 19 May 2020, https://www.theguardian.com/global-development/2020/may/19/exclusive-12-die-as-malta-uses-private-ships-to-push-migrants-back-to-libya.

is apparent that Italy, Malta, and the identified private vessels are complicit in both the conduct of such operations and the human rights violations committed therein. Although their methods of involvement differ – with States initiating and coordinating pushbacks in contrast to private vessels effecting such operations – both actors incur responsibility under international human rights law and standards. In particular, these State-led practices, whereby Italy and Malta enhanced coordination to direct vessels to interdict and return migrants to Libya, violate, among other rights, the principle of non-refoulement, the right to life, and the right to be free from torture and other inhuman treatment. As States continue to use private vessels as a form of proxy and to deny the catalogue of human rights abuses occurring at sea, their international obligations therefore need to be adhered to and elevated. First, States, such as Italy and Malta, must endeavor to refrain from engaging in, or knowingly contributing to, the above violations and transparently investigating reports of such violations where they occur. These States must also urgently reform their search-and-rescue practices, funding, and cooperation to ensure more principled and effective migration governance that is consistent with the rights of migrants at sea. Private vessels, in equal measure, must implement due diligence processes that establish operational guidelines for the search-and-rescue of migrants in distress; identify and address risks arising from such operations; maintain records of all rescues at sea; ensure adequate life-saving equipment, medical supplies, and tracking and communication devices are onboard; as well as facilitate cooperation with relevant State authorities and human rights entities with a view towards protecting migrant rights. Such vessels may also consider leveraging their private, collective bargaining power to pressure States to better regulate search-and-rescue operations. Accordingly, this conceptualization of the responsibilities of States and private vessels provides a starting point that may assist in mitigating the accountability deficit that has come to characterize the privatized pushback of migrants at sea.

SISTEMI DI RICONOSCIMENTO DELLE EMOZIONI, GESTIONE DELLE FRONTIERE E OBBLIGHI DI TUTELA DEI DIRITTI FONDAMENTALI TRA ORDINAMENTO DELL'UNIONE EUROPEA E CONVENZIONE EUROPEA DEI DIRITTI DELL'UOMO

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1. *Introduzione*

Una gestione efficace ed efficiente delle frontiere mira al tempo stesso a favorire il flusso dei viaggiatori regolari e a impedire l'ingresso di quelli irregolari[1].

Anche con riferimento a questo ambito può ritenersi che la tecnologia abbia assunto una funzione servente rispetto alle priorità di ordine politico[2]. È in effetti innegabile che la gestione delle frontiere si stia confrontando con cambiamenti significativi, dovuti agli avanzamenti registratisi sul piano tecnologico. Si pensi, per esempio, al ricorso agli aeromobili a pilotaggio remoto – spesso detti droni –, ai software che si utilizzano per esaminare le domande di visto o di permesso di sog-

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[1] E. BROUWER, *Large-Scale Databases and Interoperability in Migration and Border Policies: The Non-Discriminatory Approach of Data Protection*, in *Eur. Public Law*, 2020, p. 71 ss.

[2] P. BONDITTI, *From Territorial Spaces to Networks: A Foucauldian Approach to the Implementation of Biometry*, in *Alternatives: Global, Local, Political*, 2004, p. 465.

giorno o alle tecnologie che permettono di monitorare e prevedere i flussi migratori[3].

Alle frontiere tradizionali se ne sono aggiunte di nuove, di carattere digitale, sotto forma di sistemi informatici su larga scala che si concentrano principalmente, nel caso dell'Unione europea e dei suoi Stati membri, sui movimenti dei cittadini di Stati terzi[4], ridimensionando il ruolo svolto dall'aspetto – per così dire – fisico, materiale, dei controlli[5].

Questi e altri sviluppi permettono di parlare di una *migration technology*[6] e di una digitalizzazione della politica migratoria europea[7], funzionale a rendere più sicure le frontiere dell'Unione[8]. In particolar modo, va notato che, nel corso del tempo, è diventato sempre più frequente il ricorso ai dati biometrici (ossia, relativi alle caratteristiche fisiche, fisiologiche o comportamentali di una persona), usati per permettere l'individuazione di coloro che intendono attraversare le frontiere in seguito assumere una decisione quanto alla loro situazione.

Al riguardo, deve anche considerarsi il ruolo progressivamente assunto dall'intelligenza artificiale, la quale può essere utilizzata in rela-

[3] P. HANKE, D. VITIELLO, *High-Tech Migration Control in the EU and Beyond: The Legal Challenges of "Enhanced Interoperability"*, in E. CARPANELLI, N. LAZZERINI (eds.), *Use and Misuse of New Technologies. Contemporary Challenges in International and European Law*, Cham, 2019, p. 4. Per un'ampia panoramica quanto ai sistemi utilizzati, si veda J. CRUZ ÁNGELES, *Tecnologias emergentes para mejorar la gestion de las fronteras europeas: ¿Quo vadis, Frontex?*, in *Rivista OIDU*, 2022, p. 280 ss.

[4] G. GONZÁLEZ FUSTER, S. GUTWIRTH, *When 'Digital Borders' Meet 'Surveilled Geographical Borders': Why the Future of EU Border Management Is a Problem*, in J.P. BURGESS, S. GUTWIRTH (eds.), *A Threat against Europe. Security, Migration and Integration*, Bruxelles, 2011, p. 171 ss.

[5] B. THOLEN, *The Changing Border: Developments and Risks in Border Control Management of Western Countries*, in *International Review of Administrative Sciences*, 2010, p. 259 ss.

[6] Così H. DIJSTELBLOEM, A. MEIJER, M. BESTERS, *The Migration Machine*, in H. DIJSTELBLOEM, A. MEIJER (eds.), *Migration and the New Technological Borders of Europe*, Cham, 2011, p. 1 ss.

[7] L'espressione è di M. BESTERS, F. BROM, *"Greedy" Information Technology: The Digitalization of the European Migration Policy*, in *Eur. J. Migr. Law*, 2010, p. 455 ss.

[8] P. LEHTONEN, P. AALTO, *Smart and Secure Borders through Automated Border Control Systems in the EU? The Views of Political Stakeholders in the Member States*, in *European Security*, 2017, p. 207 ss.

zione all'intero ciclo migratorio, ossia: prima dell'ingresso, per esempio per decidere sulle domande di visto; durante l'ingresso, tra l'altro, per verificare l'identità dei viaggiatori; successivamente all'ingresso, per quanto riguarda le domande di regolarizzazione del soggiorno e il riconoscimento facciale dei migranti irregolari; ai fini del rimpatrio, assumendo decisioni fondate sull'apprendimento automatico[9].

Va detto che i sistemi di intelligenza artificiale operano sulla base di grandi quantità di dati, inclusi i cd. *Big Data*[10], per imparare e fare deduzioni circa i modelli di comportamento futuro[11]. Ci si trova dunque a confrontarsi con sistemi fondati su complessi meccanismi di apprendimento automatico, i quali permettono di prendere decisioni non prevedibili neppure da chi li abbia programmati e che, pertanto, si contraddistinguono per un «notevole tasso di opacità»[12]. Si capisce allora perché si parli di sistemi *black box*, visto che i suddetti meccanismi di apprendimento rendono estremamente difficile, quando non impossibile, comprendere che cosa quei sistemi stiano facendo quando imparano e come possano arrivare alle loro decisioni o previsioni[13].

[9] A. SZWED, *The use of artificial intelligence in migration-related procedures in the European Union – threats and opportunities*, in *Procedia Computer Science*, 2022, p. 3641-3642.

[10] Come noto, i *Big Data* sono raccolte di dati che si contraddistinguono per la loro peculiare estensione in termini di volume, velocità e varietà, tanto da imporre il ricorso a particolari tecnologie e metodi analitici per estrarre valore da essi. Sul tema, per quanto riguarda le implicazioni di carattere giuridico, V. ZENO ZENCOVICH, *Big data e epistemologia giuridica*, in S. FARO, T.E. FROSINI, G. PERUGINELLI (a cura di), *Dati e algoritmi. Diritto e diritti nella società digitale*, Bologna, 2020, p. 13 ss.

[11] Per delle prime indicazioni, S. WACHTER, B. MITTELSTADT, C. RUSSELL, *Counterfactual Explanations without Opening the Black Box: Automated Decisions and the GDPR*, in *Harvard Journal of Law & Technology*, 2018, p. 842 ss. e L. MCGREGOR, D. MURRAY, V. NG, *International Human Rights Law as a Framework for Algorithmic Accountability*, in *ICLQ*, 2019, n. 2, p. 309 ss.

[12] Nei termini ora riferiti, F. DONATI, *Diritti fondamentali e algoritmi nella proposta di regolamento sull'intelligenza artificiale*, in *DUE*, 2021, p. 454.

[13] Y. BATHAEE, *The AI Black Box and the failure of intent and causation*, in *Harvard Journal of Law & Technology*, 2018, p. 905 e A. VORRAS, L. MITROU, *Unboxing the Black Box of Artificial Intelligence: Algorithmic Transparency and/or a Right to Functional Explainability*, in T.-E. SYNODINOU ET AL. (eds.), *EU Internet Law in the Digital Single Market*, Cham, 2021, p. 249-250.

A causa di ciò, può essere molto complicato identificare e dimostrare eventuali violazioni dei diritti fondamentali e, di conseguenza, accertare eventuali responsabilità al riguardo. Si comprende quindi l'iniziativa assunta dalla Commissione europea attraverso l'elaborazione di una Proposta di Regolamento recante regole armonizzate sull'intelligenza artificiale, pubblicata nel 2021[14].

Dunque, l'utilizzo delle tecnologie di riconoscimento biometrico e la diffusione progressiva di sistemi di intelligenza artificiale – non solo per quel che riguarda la gestione delle frontiere – sollevano questioni rilevanti per il mondo del diritto, visto che impongono di identificare un quadro giuridico di riferimento che possa validamente applicarsi a tali fenomeni[15]. Al riguardo, è indubbio che, ogni volta che una nuova tecnologia si sviluppa, a ciò si accompagna la richiesta di introdurre una regolamentazione[16]. Per quanto questo appaia comprensibile, va tuttavia notato che la disciplina esistente può risultare sufficiente ad affrontare almeno alcuni dei temi posti dalle evoluzioni in parola[17].

Pertanto, il presente scritto intende confrontarsi con il tema della gestione delle frontiere tenendo conto dell'impatto avuto su di esso dai dati biometrici e dall'intelligenza artificiale, concentrandosi su di uno sviluppo particolare: quello derivante dai sistemi di riconoscimento delle emozioni. Trattandosi di meccanismi di nuova concezione fondati comunque sul ricorso a elementi di natura biometrica, si ritiene di affrontare le questioni da essi sollevati richiamando per via analogica quanto risultante dall'esperienza maturata grazie ai sistemi di riconoscimento facciale, considerando le implicazioni da questi sollevate circa la tutela di diritti fondamentali quali il diritto al rispetto della vita privata e familiare, il diritto alla protezione dei dati personali e il divieto di discriminazione.

[14] Proposta di Regolamento del Parlamento europeo e del Consiglio che stabilisce regole armonizzate sull'intelligenza artificiale (legge sull'intelligenza artificiale) e modifica alcuni atti legislativi dell'Unione, COM(2021) 206 final.

[15] A. PAJNO ET AL, *Intelligenza Artificiale: criticità emergenti e sfide per il giurista*, in *BioLaw Journal – Rivista di BioDiritto*, 2019, p. 215.

[16] R. LEENES, *Regulating New Technologies in Times of Change*, in L. REINS (ed.), *Regulating New Technologies in Uncertain Times*, The Hague, 2019, p. 5-6.

[17] P. HANKE, D. VITIELLO, *op. cit.*, p. 4.

Pertanto, in primo luogo, viene offerta una panoramica relativa a quanto prevede il diritto dell'Unione in relazione al ricorso ai dati biometrici per il controllo delle frontiere (sezione 2), facendo poi specifico riferimento al caso del riconoscimento facciale (sezione 3). Successivamente, si affrontano i problemi sollevati dai sistemi di riconoscimento delle emozioni, evidenziando altresì quanto previsto al riguardo nella Proposta di Regolamento dell'Unione europea sull'intelligenza artificiale (sezione 4). Le conclusioni riassumono i ragionamenti svolti in questa sede (sezione 5).

2. *Tecnologie di riconoscimento biometrico e gestione delle frontiere: una panoramica*

Per biometria si intende la scienza che studia grandezze di natura biofisica così da permettere di stabilire i loro meccanismi di funzionamento, misurare il loro valore e indurre un comportamento desiderato in sistemi tecnologici[18]. Alla luce di ciò, le tecnologie di riconoscimento biometrico si contraddistinguono per il fatto di permettere l'elaborazione di dati inerenti ad aspetti fisici, fisiologici o comportamentali del corpo umano in modo da favorire l'identificazione di un individuo e la categorizzazione di più individui in base a caratteristiche permanenti o a lungo termine – eventualmente, anche per prevedere comportamenti futuri o rilevare condizioni temporanee o permanenti, quali paura, stanchezza o malattia[19].

L'utilizzo di tali tecnologie appare giustificato in ragione del fatto che esse ricorrono a una serie di identificatori che tendono a essere di-

[18] A. YANNOPOULOS, V. ANDRONIKOU, T. VARVARIGOU, *Behavioural Biometric Profiling and Ambient Intelligence*, in M. HILDEBRANDT, S. GUTWIRTH (eds.), *Profiling the European Citizen*, Cham, 2008, p. 89.

[19] C. WENDEHORST, Y. DULLER, *Biometric Recognition and Behavioural Detection. Assessing the ethical aspects of biometric recognition and behavioural detection techniques with a focus on their current and future use in public spaces*, European Parliament - Policy Department for Citizens' Rights and Constitutional Affairs - Directorate-General for Internal Policies, agosto 2021, p. 12.

stintivi e mantenersi tali nel corso del tempo[20]. A seconda dei casi, gli identificatori possono essere qualificati come *strong*, *weak* e *soft*. I primi portano all'identificazione univoca del soggetto considerato, come nell'ipotesi delle impronte digitali, dell'iride o della retina. I secondi ricomprendono, per esempio, la forma del corpo, i modelli comportamentali e la voce, ossia caratteri certamente distintivi, ma con una natura meno dirimente rispetto a quelli precedenti. Gli identificatori *soft* sono generici e, dunque, non possono essere associati esclusivamente a un solo soggetto: si pensi al genere o all'età[21].

Le tecnologie di riconoscimento biometrico cosiddette di prima generazione, usate a partire dagli anni Novanta del secolo scorso e, poi, soprattutto in seguito ai fatti dell'11 settembre 2001, si basano precipuamente sugli identificatori forti[22]. Da allora, esse sono andate evolvendo sempre di più, sino a ridurre in maniera significativa il tasso di falsi positivi (soprattutto nel caso dei sistemi di riconoscimento facciale, per quanto permangano le possibilità di errore, come si chiarirà nel prosieguo)[23]. Le tecnologie di seconda generazione, invece, attengono a quella che prende il nome di biometria comportamentale e analizzano il comportamento fisico e cognitivo dell'individuo anziché le sue caratteristiche statiche[24].

Nel diritto dell'Unione europea, assume rilievo in primo luogo quanto previsto sul tema dal Regolamento generale sulla protezione dei dati personali[25]. Esso definisce i dati biometrici quali dati personali ottenuti da un trattamento tecnico specifico relativi alle caratteristiche

[20] Per un'introduzione al tema, A. JAIN, R. BOLLE, S. PANKANTI (eds.), *Personal Identification in Networked Society*, New York, 1999.

[21] E. MORDINI, D. TZOVARAS, H. ASHTON, *Introduction*, in E. MORDINI, D. TZOVARAS (eds.), *Second Generation Biometrics: The Ethical, Legal and Social Context*, Cham, 2012, p. 7

[22] P. BREY, *Ethical Aspects of Facial Recognition Systems in Public Places*, in *Journal of Information, Communication and Ethics in Society*, 2004, p. 97.

[23] C. WENDEHORST, Y. DULLER, *op. cit.*, p. 13.

[24] A. BIGER-LEVIN, *What Is Behavioral Biometrics?*, in *BioCatch Blog* (https://www.biocatch.com/blog/what-is-behavioral-biometrics).

[25] Regolamento (UE) 2016/679 del Parlamento europeo e del Consiglio, del 27 aprile 2016, *relativo alla protezione delle persone fisiche con riguardo al trattamento dei dati personali, nonché alla libera circolazione di tali dati e che abroga la direttiva 95/46/CE (regolamento generale sulla protezione dei dati)*.

fisiche, fisiologiche o comportamentali di una persona fisica che ne consentono o confermano l'identificazione univoca, come l'immagine facciale o i dati dattiloscopici[26]. Se intesi a identificare in modo univoco una persona fisica, i dati biometrici rientrano tra i dati sensibili, rispetto ai quali opera un divieto di trattamento, a cui è consentito derogare solamente se si verificano determinate situazioni[27].

Sono diverse le fonti di diritto dell'Unione che riconoscono la possibilità di usare i dati biometrici per lo svolgimento di controlli alle frontiere[28]. Procedendo in ordine cronologico, si può ricordare il Regolamento 767/2008, con il quale sono state definite le condizioni, le procedure e le responsabilità del sistema di informazione visti (VIS) previsto dalla decisione 2004/512/CE[29]. Il VIS ha lo scopo di agevolare lo scambio di dati tra Stati membri quanto alle domande di visto e alle relative decisioni, facilitando le procedure relative a tali domande e i controlli ai valichi di frontiera esterni e nel territorio degli Stati membri e contribuendo all'identificazione di ogni persona che non soddisfa o non soddisfa più le condizioni di ingresso, soggiorno o residenza negli Stati membri. A seguito della riforma realizzata tramite il Regolamento 2021/1134[30], tra le categorie di dati registrati nel VIS

[26] Art. 4, n. 14 del Regolamento 2016/679. La medesima definizione si ravvisa anche, tra l'altro, all'art. 3, n. 18), del Regolamento (UE) 2018/1725 del Parlamento europeo e del Consiglio del 23 ottobre 2018 *sulla tutela delle persone fisiche in relazione al trattamento dei dati personali da parte delle istituzioni, degli organi e degli organismi dell'Unione e sulla libera circolazione di tali dati, e che abroga il regolamento (CE) n. 45/2001 e la decisione n. 1247/2002/CE*.

[27] Art. 9 del Regolamento 2016/679.

[28] Al riguardo, N. VAVOULA, *The "Puzzle" of EU Large-Scale Information Systems for Third-Country Nationals: Surveillance of Movement and Its Challenges for Privacy and Personal Data Protection*, in *ELR*, 2020, p. 348 ss.

[29] Regolamento (CE) n. 767/2008 del Parlamento europeo e del Consiglio *concernente il sistema di informazione visti (VIS) e lo scambio di dati tra Stati membri sui visti per soggiorni di breve durata (regolamento VIS)* e Decisione 2004/512/CE del Consiglio dell'8 giugno 2004 *che istituisce il sistema di informazione visti (VIS)*, del 9 luglio 2008, in GUUE L 218 del 13 agosto 2008, pp. 120-141.

[30] Regolamento 2021/1134 del Parlamento europeo e del Consiglio *che modifica i regolamenti (CE) n. 767/2008, (CE) n. 810/2009, (UE) 2016/399, (UE) 2017/2226, (UE) 2018/1240, (UE) 2018/1860, (UE) 2018/1861, (UE) 2019/817 e (EU) 2019/1896 del Parlamento europeo e del Consiglio e che abroga le decisioni 2004/512/CE e*

rientrano le fotografie del soggetto richiedente, oltre ai dati inerenti alle impronte digitali[31].

Il Regolamento 603/2013 ha istituito Eurodac[32], quale sistema idoneo a permettere la determinazione dello Stato membro competente a esaminare le domande di protezione internazionale proposte da cittadini di Stati terzi o apolidi coerentemente a quanto stabilito dal Regolamento 604/2013[33]. A tal fine, il Regolamento 603/2013 disciplina anche le condizioni per le richieste di confronto dei dati relativi alle impronte digitali con i dati conservati nel sistema centrale dell'Eurodac.

Il Regolamento 2017/2226 ha introdotto il sistema di ingressi/uscite (EES) per la registrazione dei dati di ingresso e di uscita e dei dati relativi al respingimento dei cittadini di Stati terzi che attraversano le frontiere esterne degli Stati membri[34]. Tra l'altro, ai sensi dell'art. 6 del Regolamento, il sistema EES mira a contribuire all'identificazione

2008/633/GAI del Consiglio, ai fini della riforma del sistema di informazione visti, del 7 luglio 2021, in GUUE L 248 del 13 luglio 2021, pp. 11-87.

[31] Art. 5 del Regolamento 767/2008.

[32] Regolamento (UE) n. 603/2013 del Parlamento europeo e del Consiglio *che istituisce l'«Eurodac» per il confronto delle impronte digitali per l'efficace applicazione del regolamento (UE) n. 604/2013 che stabilisce i criteri e i meccanismi di determinazione dello Stato membro competente per l'esame di una domanda di protezione internazionale presentata in uno degli Stati membri da un cittadino di un paese terzo o da un apolide e per le richieste di confronto con i dati Eurodac presentate dalle autorità di contrasto degli Stati membri e da Europol a fini di contrasto, e che modifica il regolamento (UE) n. 1077/2011 che istituisce un'agenzia europea per la gestione operativa dei sistemi IT su larga scala nello spazio di libertà, sicurezza e giustizia*, del 26 giugno 2013, in GUUE L 180 del 29 giugno 2013, pp. 1-30.

[33] Regolamento (UE) n. 604/2013 del Parlamento europeo e del Consiglio *che stabilisce i criteri e i meccanismi di determinazione dello Stato membro competente per l'esame di una domanda di protezione internazionale presentata in uno degli Stati membri da un cittadino di un paese terzo o da un apolide*, del 26 giugno 2013, in GUUE L 180 del 29 giugno 2013, pp. 31-59.

[34] Regolamento (UE) 2017/2226 del Parlamento europeo e del Consiglio *che istituisce un sistema di ingressi/uscite per la registrazione dei dati di ingresso e di uscita e dei dati relativi al respingimento dei cittadini di paesi terzi che attraversano le frontiere esterne degli Stati membri e che determina le condizioni di accesso al sistema di ingressi/uscite a fini di contrasto e che modifica la Convenzione di applicazione dell'Accordo di Schengen e i regolamenti (CE) n. 767/2008 e (UE) n. 1077/2011*, del 30 novembre 2017, in GUUE L 327 del 9 dicembre 2017, pp. 20-82.

di cittadini di Stati terzi che non soddisfano o non soddisfano più le condizioni d'ingresso o di soggiorno di breve durata nel territorio degli Stati membri, a consentire di identificare e rintracciare i soggiornanti fuori termine e a permettere alle autorità nazionali competenti degli Stati membri di prendere le opportune misure, a favorire i respingimenti e l'automatizzazione delle verifiche di frontiera sui cittadini di Stati terzi e a contrastare la frode di identità e l'abuso di documenti di viaggio. Per questo, *ex* art. 16, l'autorità di frontiera crea un fascicolo individuale relativo al cittadino di uno Stato terzo soggetto all'obbligo di visto che intenda attraversare le frontiere esterne, inserendo in esso una serie di dati, tra i quali l'immagine del volto. Con riferimento ai cittadini di Stati terzi non soggetti all'obbligo di visto, l'art. 17 impone di inserire altresì i dati relativi alle impronte digitali. Quanto all'immagine del volto, all'art. 15 è chiarito che essa deve essere rilevata sul posto, anche se, in casi eccezionali, ove le specifiche in termini di qualità e risoluzione stabilite per l'inserimento nell'EES dell'immagine del volto rilevata sul posto non possano essere rispettate, può essere estratta in formato elettronico dal chip dei documenti di viaggio elettronici a lettura ottica.

Il Regolamento 2018/1861 sul sistema d'informazione Schengen (SIS), funzionale alle verifiche di frontiera, stabilisce le condizioni e le procedure applicabili all'inserimento e al trattamento delle segnalazioni riguardanti cittadini di Stati terzi e allo scambio di informazioni supplementari e dati complementari ai fini del respingimento e del rifiuto di soggiorno nel territorio degli Stati membri[35]. Al riguardo, assumono rilievo anche i dati biometrici, definiti in maniera pressoché identica a quanto fatto dal Regolamento generale sulla protezione dei dati personali[36]. Vengono quindi dettate norme specifiche concernenti

[35] Regolamento (UE) 2018/1861 del Parlamento europeo e del Consiglio *sull'istituzione, l'esercizio e l'uso del sistema d'informazione Schengen (SIS) nel settore delle verifiche di frontiera, che modifica la convenzione di applicazione dell'accordo di Schengen e abroga il regolamento (CE) n. 1987/2006*, del 28 novembre 2018, in GUUE L 312 del 7 dicembre 2018, pp. 14-55.

[36] All'art. 3, n. 13 del Regolamento 2018/1861, si fa riferimento a dati personali ottenuti da un trattamento tecnico specifico relativi alle caratteristiche fisiche o fisiologiche di una persona fisica che ne consentono o confermano l'identificazione univoca, vale a dire fotografie, immagini del volto e dati dattiloscopici (includendo dunque an-

l'inserimento di fotografie, immagini del volto e dati dattiloscopici e la verifica o l'interrogazione del sistema tramite questi elementi al fine di confermare l'identità di un soggetto.

Al Regolamento ora ricordato si ricollega il Regolamento 2018/1860, il quale prevede che nel SIS siano inserite le segnalazioni relative ai cittadini di Stati terzi oggetto di una decisione di rimpatrio allo scopo di verificare l'adempimento dell'obbligo di rimpatrio e di essere di ausilio nell'esecuzione delle decisioni assunte al riguardo[37]. Ai sensi dell'art. 4, la segnalazione di rimpatrio deve contenere determinati dati, tra i quali le fotografie e immagini del volto e i dati dattiloscopici.

De iure condendo, si può menzionare anche la Proposta di Regolamento sugli accertamenti nei confronti di cittadini di Stati terzi alle frontiere esterne dell'Unione, la quale prefigura, *inter alia*, la registrazione dei dati biometrici di tali soggetti nelle banche dati pertinenti, nella misura in cui non sia ancora avvenuta[38].

3. *I sistemi di riconoscimento facciale: questioni aperte relative alla tutela dei diritti fondamentali*

Come è stato detto, «i dati biometrici ci mostrano come i nostri corpi siano sempre più tecnologici, nel senso che sono l'oggetto di un processo di de-composizione ove ogni aspetto viene raccolto, conser-

che le fotografie, che non sono contemplate nel Regolamento generale sulla protezione dei dati personali).

[37] Regolamento (UE) 2018/1860 del Parlamento europeo e del Consiglio *relativo all'uso del sistema d'informazione Schengen per il rimpatrio di cittadini di paesi terzi il cui soggiorno è irregolare*, del 28 novembre 2018, in GUUE L 312 del 7 dicembre 2018, pp. 1-13.

[38] Art. 6, par. 6, lett. c), della Proposta di Regolamento del Parlamento europeo e del Consiglio *che introduce accertamenti nei confronti dei cittadini di paesi terzi alle frontiere esterne e modifica i regolamenti (CE) n. 767/2008, (UE) 2017/2226, (UE) 2018/1240 e (UE) 2019/817*, del 23 settembre 2020, COM(2020) 612 final.

vato e consegnato ad una macchina con lo scopo di sottoporlo ad un raffinato processo di analisi algoritmica»[39].

Tra i dati biometrici usati nell'ambito del controllo delle frontiere dell'Unione rientrano certamente le immagini del volto, le quali presentano indubbi vantaggi, atteso il fatto che possono essere ottenute molto più facilmente rispetto a quanto non accada con le impronte digitali e che i tratti del volto non possono essere modificati, se non con estrema difficoltà. Assume allora rilievo il riconoscimento facciale, inteso come «*automatic processing of digital images which contain the faces of individuals for identification, authentication/verification or categorisation of those individuals*»[40]. Va detto che, in realtà, l'espressione "riconoscimento facciale" ricomprende una serie di tecnologie, le quali possono svolgere compiti diversi[41]. È per esempio possibile confrontare due immagini che si presume riguardino il medesimo soggetto al fine di verificarne la corrispondenza, oppure confrontare l'immagine facciale di un soggetto con le immagini memorizzate in un database, così da stabilire se l'immagine di partenza sia presente. Può inoltre ricorrersi al riconoscimento facciale per profilare un individuo, ossia per classificarlo sulla base delle sue caratteristiche personali[42].

Diversi progetti in materia sono stati finanziati dall'Unione europea. Può pensarsi, per esempio, a *UFace*, diretto a sviluppare un sistema di controllo degli accessi sicuro e di facile utilizzo nei servizi finanziari e sanitari sulla base di meccanismi di riconoscimento facciale[43], a *FER in the Wild*, mediante il quale si è voluto realizzare un sistema di rilevamento automatico delle espressioni facciali fondato su un mecca-

[39] F. PAOLUCCI, *Riconoscimento facciale e diritti fondamentali: è la sorveglianza un giusto prezzo da pagare?*, in *Media Laws*, 2021, n. 1, p. 208.

[40] Article 29 Data Protection Working Party (2012), *Opinion 02/2012 on facial recognition in online and mobile services*, 00727/12/EN, WP 192, Brussels, 22 March 2012, p. 2.

[41] Sul tema, K.A. GATES, *Our Biometric Future: Facial Recognition Technology and the Culture of Surveillance*, New York, 2011.

[42] Per queste informazioni, Fundamental Rights Agency, *Facial recognition technology: fundamental rights considerations in the context of law enforcement*, 2020, p. 7-8, disponibile in https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-facial-recognition-technology-focus-paper-1_en.pdf.

[43] https://cordis.europa.eu/project/id/IST-1999-11587.

nismo di tracciamento dei volti[44], e al *Pervasive and UseR Focused BiomeTrics BordEr ProjeCT* (PROTECT), relativo a un sistema potenziato di identificazione delle persone basato sulla biometria, da utilizzare nell'ambito dei controlli automatizzati delle frontiere, in modo da facilitare l'attraversamento da parte di cittadini extracomunitari in buona fede[45].

Alla luce di ciò e della normativa ricordata *supra*, non sembra potersi contestare l'interesse dell'Unione per questo tipo di sistemi. Va detto che, al momento, i sistemi di riconoscimento facciale non sono ancora operativi ma, entro breve, lo dovrebbero (o potrebbero, a seconda delle situazioni) essere. Si pensi al fatto che, nel caso del SIS, la Commissione dovrà fornire una relazione sulla disponibilità, la capacità e l'affidabilità di queste tecnologie prima che possano essere introdotte e il Parlamento europeo dovrà essere consultato al riguardo[46]. Quanto a Eurodac, è in discussione una proposta di riforma del Regolamento istitutivo, nella quale si dichiara che, entro tre anni dall'adozione dell'atto, eu-LISA, l'Agenzia europea per la gestione operativa dei sistemi IT su larga scala, dovrebbe condurre uno studio sulla fattibilità tecnica di aggiungere il software di riconoscimento facciale al sistema centrale[47]. Anche nel caso del VIS e dell'EES, sarà necessario attendere qualche tempo[48].

Va altresì considerato che, nella Proposta di Regolamento sull'intelligenza artificiale, si distingue tra sistemi di identificazione

[44] https://cordis.europa.eu/project/id/302836.

[45] https://cordis.europa.eu/project/id/700259.

[46] https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-information-system/what-sis-and-how-does-it-work_en.

[47] Commissione europea, *Proposta modificata di Regolamento del Parlamento europeo e del Consiglio che istituisce l'«Eurodac» per il confronto delle impronte digitali per l'efficace applicazione del regolamento (UE) XXX/XXX [regolamento sulla gestione dell'asilo e della migrazione] e del regolamento (UE) XXX/XXX [regolamento sul reinsediamento], per l'identificazione di cittadini di paesi terzi o apolidi il cui soggiorno è irregolare e per le richieste di confronto con i dati Eurodac presentate dalle autorità di contrasto degli Stati membri e da Europol a fini di contrasto, e che modifica i regolamenti (UE) 2018/1240 e (UE) 2019/818*, COM(2020) 614 final, p. 46.

[48] Si vedano, quanto al VIS, https://www.eulisa.europa.eu/Publications/Reports/2021%20VIS%20Report.pdf e, quanto all'EES, https://www.cigionline.org/articles/europe-at-a-crossroads-over-planned-use-of-biometrics/.

biometrica remota in tempo reale e *a posteriori*. I primi si caratterizzano perché il rilevamento dei dati biometrici, il confronto e l'identificazione avvengono senza ritardi significativi, ricomprendendo non solamente le identificazioni istantanee, ma anche quelle che avvengono con brevi ritardi[49]. Nel caso dei secondi, invece, i dati biometrici sono già stati rilevati e il confronto e l'identificazione avvengono con un ritardo significativo[50]. Sulla base della Proposta di Regolamento, dovrebbe essere vietato l'uso di sistemi di identificazione biometrica remota in tempo reale in spazi accessibili al pubblico a fini di attività di contrasto, a meno che e nella misura in cui tale uso sia strettamente necessario per la ricerca mirata di potenziali vittime specifiche di reato, la prevenzione di una minaccia specifica, sostanziale e imminente per la vita o l'incolumità fisica delle persone fisiche o di un attacco terroristico o il rilevamento, la localizzazione, l'identificazione o l'azione penale nei confronti di un autore o un sospettato di un reato di cui all'art. 2, par. 2, della decisione quadro sul mandato d'arresto europeo, punibile nello Stato membro interessato con una pena o una misura di sicurezza privativa della libertà della durata massima di almeno tre anni, come stabilito dalla legge di tale Stato membro[51]. Ogni singolo uso di tali sistemi dovrebbe essere subordinato a un'autorizzazione preventiva rilasciata da un'autorità giudiziaria o da un'autorità amministrativa indipendente dello Stato membro in cui deve avvenire, rilasciata su richiesta motivata e in conformità alle regole dettate dal diritto nazionale[52].

Vi sono delle indubbie implicazioni di carattere giuridico delle quali deve tenersi conto al fine dell'utilizzo dei sistemi in questione e

[49] Art. 3, n. 37), della Proposta di Regolamento.

[50] Art. 3, n. 38), della Proposta di Regolamento.

[51] Art. 5, par. 1, lett. d), della Proposta di Regolamento.

[52] Art. 5, par. 3, della Proposta di Regolamento. Va notato però che il Parlamento reputa preferibile vietare del tutto l'uso dei sistemi di identificazione biometrica remota in tempo reale negli spazi accessibili al pubblico, senza prevedere eccezioni (emendamento 220, Articolo 5 – paragrafo 1 – lettera d – parte introduttiva, negli emendamenti del Parlamento europeo, approvati il 14 giugno 2023, alla proposta di regolamento del Parlamento europeo e del Consiglio che stabilisce regole armonizzate sull'intelligenza artificiale (legge sull'intelligenza artificiale) e modifica alcuni atti legislativi dell'Unione (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)).

che attengono alla tutela dei diritti fondamentali, *in primis* per quel che riguarda il rispetto della vita privata e familiare e la protezione dei dati di carattere personale[53]. Si è già ricordato che i dati biometrici, tra cui le immagini del volto, rientrano tra i dati ai quali si applica la disciplina del Regolamento generale sulla protezione dei dati personali. Si impone, dunque, il rispetto di tale normativa che prevede che il trattamento dei dati debba essere coerente con i principi di liceità, correttezza e trasparenza, di limitazione della finalità, di minimizzazione, di esattezza, di limitazione della conservazione, di integrità e riservatezza e di responsabilizzazione[54].

A questo deve aggiungersi quanto già ricordato *supra* con riferimento al fatto che i dati biometrici si possono configurare come dati sensibili. Pertanto, il trattamento deve essere svolto sulla base di un fondamento normativo valido e nel rispetto delle garanzie particolari relative a tale categoria.

Ulteriormente, si deve considerare che il Regolamento generale sulla protezione dei dati personali stabilisce che l'interessato ha il diritto di non essere sottoposto a una decisione basata unicamente sul trattamento automatizzato, compresa la profilazione, che produca effetti giuridici che lo riguardano o che incida in modo analogo significativamente sulla sua persona, a meno che non ricorrano alcune eccezioni[55]. Ne consegue che le eventuali corrispondenze identificate dalle tecnologie di riconoscimento facciale devono essere segnalate a un essere umano, il quale provvede a una valutazione e, sulla base di essa, adotta i necessari provvedimenti[56].

[53] Rispettivamente, art. 7 e art. 8 della Carta dei diritti fondamentali dell'Unione europea.

[54] Art. 5 del Regolamento 2016/679. Sul punto, si veda F. DI MATTEO, *La riservatezza dei dati biometrici nello Spazio europeo dei diritti fondamentali: sui limiti all'utilizzo delle tecnologie di riconoscimento facciale*, in *FSJ*, 2023, p. 89-95.

[55] Art. 22, par. 1 e 2, del Regolamento 2016/679.

[56] Si segnalano comunque alcuni problemi che possono verificarsi nel momento in cui si tenta di tradurre le previsioni sopra riferite in garanzie concrete. Può darsi che l'intervento umano si riduca a una semplice firma, a convalida dei risultati presentati dal sistema di riconoscimento facciale, come può anche verificarsi l'ipotesi di un controllore che annulla a prescindere i risultati in parola, ritenendo di confermare solamente quelli che sono coerenti con i suoi stereotipi (al riguardo, M. VEALE, L. ED-

Nel sistema del Consiglio d'Europa, deve considerarsi la Convenzione sulla protezione delle persone rispetto al trattamento automatizzato di dati a carattere personale, firmata a Strasburgo il 28 gennaio 1981 al fine di assicurare a chiunque, a prescindere dalla nazionalità e dalla residenza, il rispetto dei suoi diritti e delle sue libertà fondamentali, e in particolare del diritto alla vita privata, in relazione all'elaborazione automatica dei dati a carattere personale che la riguardano. La Convenzione è stata aggiornata il 18 maggio 2018 per tenere conto dei cambiamenti registratisi in materia. Essa prevede, *inter alia*, che i dati a carattere personale oggetto di elaborazione automatica devono essere ottenuti ed elaborati lealmente e legalmente, registrati per fini determinati e legittimi, senza poter essere utilizzati in modo incompatibile con tali fini, adeguati, pertinenti e non eccessivi in rapporto agli scopi per i quali sono registrati, esatti e, se necessario, aggiornati, nonché conservati sotto una forma che permetta l'identificazione delle persone interessate per un periodo non superiore a quello necessario per le finalità per le quali essi sono registrati[57]. Il trattamento dei dati biometrici idonei a identificare una persona in maniera univoca può essere realizzato soltanto in presenza di adeguate garanzie previste dalla legge, in aggiunta a quelle definite dalla Convenzione[58]. Ogni individuo ha il diritto, *inter alia*, di non essere sottoposto a una decisione che lo riguardi in modo significativo la quale sia basata esclusivamente su di un trattamento automatizzato di dati, senza che il suo punto di vista sia preso in considerazione[59].

Con specifico riferimento al tema del riconoscimento facciale, il Consiglio d'Europa ha adottato linee guida dirette a indirizzare l'azione di legislatori, decisori politici, sviluppatori, prestatori di servizi e utilizzatori. Tra l'altro, viene sottolineata l'importanza del dovere di trasparenza, il cui rispetto deve essere valutato tenendo conto, per

WARDS, *Clarity, surprises, and further questions in the Article 29 Working Party draft guidance on automated decision-making and profiling*, in *Computer Law & Security Review*, 2018, p. 398 ss.).

[57] Art. 5 della Convenzione sulla protezione delle persone rispetto al trattamento automatizzato di dati a carattere personale, come aggiornata nel 2018 (cd. Convenzione 108+).

[58] Art. 6 della Convenzione 108+.

[59] Art. 9, par. 1, lett. a), della Convenzione 108+.

esempio, delle informazioni fornite ai soggetti interessati, del contesto della raccolta e delle ragionevoli aspettative sull'uso dei dati. I soggetti interessati devono anche essere informati di come la raccolta, l'uso o la condivisione dei dati di riconoscimento facciale possa avere un impatto su di loro e dei diritti e rimedi di cui possano avvalersi[60].

Dalla giurisprudenza della Corte europea dei diritti dell'uomo risulta che la tutela assicurata dall'art. 8 della Convenzione europea dei diritti dell'uomo (CEDU) quanto alla vita privata riguarda altresì i dati personali, rispetto ai quali il singolo gode di un diritto all'autodeterminazione informativa[61], compresi i dati di natura biometrica, come nel caso delle impronte digitali[62]. La nozione di vita privata ricomprende anche elementi relativi al diritto di un soggetto alla propria immagine[63]. Operano pertanto i limiti posti da tale articolo, ove si prevede che non possa esservi ingerenza di una autorità pubblica nell'esercizio del diritto al rispetto della vita privata e familiare a meno che tale ingerenza sia prevista dalla legge e costituisca una misura che, in una società democratica, è necessaria alla sicurezza nazionale, alla pubblica sicurezza, al benessere economico del Paese, alla difesa dell'ordine e alla prevenzione dei reati, alla protezione della salute o della morale, o alla protezione dei diritti e delle libertà altrui. Si impone quindi un bilanciamento tra interessi pubblici e privati contrastanti, che non può ritenersi raggiunto, per esempio, nell'ipotesi di una normativa nazionale che preveda la conservazione per una durata indeterminata dei dati biometrici, incluse le fotografie, di un soggetto in precedenza condannato per un reato e la possibilità di applicare siste-

[60] Consultative Committee of the Convention for the protection of individuals with regard to automatic processing of personal data, *Guidelines on facial recognition*, giugno 2021, p. 20.

[61] Corte europea dei diritti dell'uomo, Grande Sezione, sentenza del 27 giugno 2017, ricorso n. 931/13, *Satakunnan Markkinapörssi Oy and Satamedia Oy c. Finlandia*, par. 137.

[62] Si vedano, per esempio, Corte europea dei diritti dell'uomo, Quinta Sezione, sentenza del 10 maggio 2011, ricorso n. 11379/03, *Dimitrov-Kazakov c. Bulgaria*, par. 30 e Quinta Sezione, sentenza dell'11 giugno 2020, ricorso n. 74440/17, *P.N. c. Germania*, par. 57.

[63] Si veda, per esempio, Corte europea dei diritti dell'uomo, Quarta Sezione, sentenza dell'11 gennaio 2005, ricorso n. 50774/99, *Sciacca c. Italia*, punto 29.

mi di riconoscimento facciale a quelle immagini[64], o dell'uso di una tecnologia altamente intrusiva di riconoscimento facciale nell'ambito di un procedimento per un illecito amministrativo al fine di identificare, localizzare e arrestare un soggetto[65].

Va detto che, nel corso degli anni, i sistemi di riconoscimento facciale sono progrediti notevolmente ma, in assenza di immagini di alta qualità, rimangono soggetti alla possibilità di riscontri errati in misura superiore a quanto non accada con altri dati biometrici[66]. La prassi conferma la possibilità di falsi positivi (i sistemi individuano come volto qualcosa che non lo è), falsi negativi (i sistemi non rilevano volti nelle immagini prese in considerazione) e situazioni che sfuggono all'alternativa tra *zero matches* e *true matches*: si può pensare alle ipotesi in cui vengono combinati volti appartenenti a più persone o in cui i sistemi non riescono a riconoscere la stessa persona per via della minore nitidezza di una delle immagini o della distanza di tempo tra l'acquisizione dell'una e dell'altra immagine[67]. Risulta poi da vari studi che i sistemi di riconoscimento facciale producono falsi positivi in misura maggiore con riferimento a persone di colore, soprattutto ove si tratti di donne[68].

In effetti, è stato notato che un'importante causa di discriminazione è la qualità dei dati utilizzati per sviluppare algoritmi e software[69]. Per essere efficace e preciso, il sistema di riconoscimento facciale deve

[64] Corte europea dei diritti dell'uomo, Prima Sezione, sentenza del 13 giugno 2020, ricorso n. 45245/15, *Gaughran c. Regno Unito*.

[65] Corte europea dei diritti dell'uomo, Terza Sezione, sentenza del 4 luglio 2023, ricorso n. 11519/20, *Glukhin c. Russia*.

[66] N. VAVOULA, *Artificial Intelligence (AI) at Schengen Borders: Automated Processing, Algorithmic Profiling and Facial Recognition in the Era of Techno-Solutionism*, in *Eur. J. Migr. Law*, 2021, p. 457.

[67] European Parliamentary Research Service, *Regulating facial recognition in the EU*, settembre 2021, disponibile in https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/698021/EPRS_IDA(2021)698021_EN.pdf.

[68] Si vedano per esempio A. NAJIBI, *Racial Discrimination in Face Recognition Technology*, in *Harvard University Science Policy Blog*, 24 ottobre 2020 e P. DROZDOWSKI ET AL, *Demographic Bias in Biometrics: A Survey on an Emerging Challenge*, in *IEEE Transactions on Technology and Society*, 2020, p. 89 ss.

[69] Fundamental Rights Agency, *Data quality and artificial intelligence – mitigating bias and error to protect fundamental rights*, giugno 2019, p. 8.

potersi basare su grandi quantità di immagini del volto, che rappresentino diversi gruppi di persone. A oggi, le immagini utilizzate nel mondo occidentale per sviluppare gli algoritmi spesso sono in numero significativo di uomini bianchi, mentre le immagini di donne o di individui di altre etnie sono considerate in percentuali ridotte. Ne consegue che i sistemi di riconoscimento facciale funzionano bene per gli uomini bianchi, ma non per le donne di colore[70].

Perciò, possono porsi questioni che attengono al rispetto del diritto a non essere discriminati, riconosciuto sia dalla Carta dei diritti fondamentali dell'Unione europea[71], sia dalla CEDU[72]. Ai fini del diritto dell'Unione europea, giova rinviare nuovamente al Regolamento generale sulla protezione dei dati personali e sottolineare che, nel preambolo, in relazione ai processi decisionali automatizzati relativi alle persone fisiche, è chiarito che è opportuno che il titolare del trattamento utilizzi procedure matematiche o statistiche appropriate per la profilazione, metta in atto misure tecniche e organizzative adeguate in modo da garantire, in particolare, che siano rettificati i fattori che comportano inesattezze dei dati e sia minimizzato il rischio di errori e da assicurare la sicurezza dei dati personali secondo una modalità che tenga conto dei potenziali rischi esistenti per gli interessi e i diritti dell'interessato e che impedisca tra l'altro effetti discriminatori nei confronti di persone fisiche sulla base della razza o dell'origine etnica, delle opinioni politiche, della religione o delle convinzioni personali, dell'appartenenza sindacale, dello *status* genetico, dello stato di salute o dell'orientamento sessuale, ovvero che comportano misure aventi tali effetti[73].

Va poi richiamata, per analogia, la giurisprudenza della Corte di giustizia in materia di dati del codice di prenotazione (PNR) e di trattamento dei dati personali nel settore delle comunicazioni elettroniche, ove è stato riconosciuto che la portata dell'ingerenza che questi stru-

[70] J. BUOLAMWINI, T. GEBRU, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, in *Conference on Fairness, Accountability, and Transparency*, 2018, p. 1 ss. Inoltre, S.U. NOBLE, *Algorithms of Oppression: How Search Engines Reinforce Racism*, New York, 2018.

[71] Art. 21 della Carta dei diritti fondamentali.

[72] Art. 14 della CEDU e art. 1 del Protocollo n. 12 alla CEDU.

[73] Considerando n. 71 del Regolamento 2016/679.

menti possono determinare quanto ai diritti fondamentali dipende dai modelli e criteri prestabiliti e dalle banche dati su cui si fonda il trattamento dei dati. Pertanto, modelli e criteri dovrebbero essere specifici e affidabili, consentendo di raggiungere risultati che abbiano come obiettivo gli individui sui quali potrebbe gravare un sospetto ragionevole, senza essere discriminatori. Dunque, l'affidabilità e l'aggiornamento di tali modelli e criteri, nonché delle banche dati utilizzate, devono essere oggetto di regolari verifiche. Posto che le analisi automatizzate comportano un certo tasso d'errore, qualsiasi risultato ottenuto a seguito di un trattamento automatizzato deve essere sottoposto a un riesame individuale con strumenti non automatizzati prima che una decisione che potrebbe produrre effetti pregiudizievoli sia presa[74].

Va altresì ricordato che, ai sensi della direttiva che attua il principio della parità di trattamento fra le persone indipendentemente dalla razza e dall'origine etnica, sono vietate non solo le discriminazioni dirette, ossia consistenti in un trattamento meno favorevole riservato a un soggetto per via della sua razza od origine etnica[75], ma anche le discriminazioni indirette, che si verificano quando una disposizione, un criterio o una prassi apparentemente neutri possono mettere persone di una determinata razza od origine etnica in una posizione di particolare svantaggio rispetto ad altre, a meno che tale disposizione, criterio o prassi sia oggettivamente giustificato da una finalità legittima e i mezzi impiegati per il suo conseguimento siano appropriati e necessari[76].

Per quel che riguarda la giurisprudenza della Corte europea dei diritti dell'uomo, può farsi riferimento a quelle affermazioni di ordine generale secondo le quali la discriminazione fondata sull'origine etnica

[74] Si vedano Corte di giustizia, Grande Sezione, parere del 26 luglio 2017, *avis* 1/15, *Accord PNR UE-Canada*, parr. 172-173, ECLI:EU:C:2017:592; Grande Sezione, sentenza del 6 ottobre 2020, cause riunite C-511/18, C-512/18 e C-520/18, *La Quadrature du Net e a.*, parr. 181-182, ECLI:EU:C:2020:791; Grande Sezione, sentenza del 21 giugno 2022, causa C-817/19, *Ligue des droits humains*, par. 106, ECLI:EU:C:2022:491.

[75] Art. 2, par. 2, lett. a) della Direttiva 2000/43/CE del Consiglio *che attua il principio della parità di trattamento fra le persone indipendentemente dalla razza e dall'origine etnica*, del 29 giugno 2000, in GUCE L 180 del 19 luglio 2000, pp. 22-26.

[76] Art. 2, par. 2, lett. b), della Direttiva 2000/43.

di una persona è una forma di discriminazione razziale, ossia un tipo di discriminazione particolarmente grave, che richiede da parte delle autorità una particolare vigilanza e una reazione vigorosa. Le autorità devono utilizzare tutti i mezzi disponibili per combattere il razzismo, rafforzando così la visione democratica di una società in cui la diversità non è percepita come una minaccia, ma come una fonte di arricchimento. Ove una differenza di trattamento sia basata sulla razza o sull'etnia, deve sussistere una giustificazione obiettiva e ragionevole ma nessuna differenza di trattamento basata esclusivamente o in misura determinante sull'origine etnica di una persona può essere oggettivamente giustificata in una società democratica contemporanea costruita sui principi del pluralismo e del rispetto delle diverse culture[77].

In termini più specifici, sembra potersi richiamare la giurisprudenza in materia di discriminazioni indirette, le quali integrano una differenza di trattamento nella forma di effetti esageratamente pregiudizievoli di una politica o di una misura generale che, pur essendo formulata in termini neutri, discrimina un gruppo, senza che sia richiesto necessariamente un intento discriminatorio e purché non sussista una giustificazione oggettiva e ragionevole[78]. Di conseguenza, chi discrimina non può eludere il divieto di discriminazione indiretta dimostrando che non intendeva discriminare, salva la sussistenza di una ragione idonea[79].

4. *I sistemi di riconoscimento delle emozioni: sguardo su un futuro sempre più prossimo*

Le emozioni attengono al mondo interiore degli esseri umani; pertanto, esse richiedono parole, gesti, comportamenti per essere comuni-

[77] Corte europea dei diritti dell'uomo, Grande Sezione, sentenza del 22 dicembre 2009, ricorsi n. 27996/06 e 34836/06, *Sejdić e Finci c. Bosnia-Erzegovina*, parr. 43-44 e giurisprudenza ivi citata.

[78] Si veda, *ex multis*, Corte europea dei diritti dell'uomo, Grande Sezione, sentenza del 24 maggio 2016, ricorso n. 38590/10, *Biao c. Danimarca*, parr. 90-92, 103.

[79] F.J. ZUIDERVEEN BORGESIUS, *Strengthening legal protection against discrimination by algorithms and artificial intelligence*, in *International Journal of Human Rights*, 2020, p. 1577.

cate ad altri. La comunicazione può avvenire in forma volontaria o involontaria, ossia può essere controllata o verificarsi inconsapevolmente, mediante espressioni che possono essere percepite da chiunque (per esempio, un sorriso) o soltanto da chi è a stretto contatto con il soggetto che sta comunicando (si pensi al caso di chi stringa la mano di una persona agitata e la senta umida). Dunque, attraverso varie modalità comunicative, vengono trasmessi schemi di informazioni che potrebbero essere rappresentati attraverso un computer[80].

A questo si collega lo sviluppo dell'*affective computing* quale scienza che studia e predispone i metodi che permettono ai computer non soltanto di replicare, ma anche di processare, identificare e comprendere le emozioni umane[81]. Propriamente, possono essere individuati quattro ambiti di applicazione, i quali attengono alla realizzazione di sistemi capaci di riconoscere le emozioni dell'utente (riconoscimento emotivo), influenzarne lo stato emotivo (manipolazione emotiva), riprodurre (espressione emotiva) o provare emozioni (sintesi emotiva)[82].

Con riferimento ai sistemi di riconoscimento delle emozioni, i metodi elaborati in modo da permettere ciò sono differenti e si ricollegano, essenzialmente, alla considerazione di determinati punti di riferimento facciali (come le sopracciglia, gli occhi, la punta del naso, la bocca) o all'analisi della contrazione dei muscoli del volto, delle variazioni nel tono della voce, di un testo scritto o anche dell'attività online di un soggetto[83].

[80] R.W. PICARD, *Affective Computing*, Cambridge, 2000, p. 165.

[81] J. TAO, T. TAN, *Affective Computing: A Review*, in J. TAO, T. TAN, R.W. PICARD (eds.), *Affective Computing and Intelligent Interaction*, Cham, 2005, p. 981 e S.B. DAILY ET AL, *Affective Computing: Historical Foundations, Current Applications, and Future Trends*, in M. JEON (ed.), *Emotions and Affect in Human Factors and Human-Computer Interaction*, Cambridge, 2017, p. 213 ss.

[82] Per un'introduzione a questi temi, R.A. CALVO, S. D'MELLO, J. GRATCH, A. KAPPAS (eds.), *The Oxford Handbook of Affective Computing*, Oxford, 2014 e J. KAPLAN, *Intelligenza artificiale. Guida al prossimo futuro*, Roma, 2017, p. 209 ss.

[83] J.M. HARLEY, *Measuring Emotions: A Survey of Cutting Edge Methodologies Used in Computer-Based Learning Environment Research*, in S.Y. TETTEGAH, M. GARTMEIER (eds.), *Emotions, Technology, Design, and Learning*, Cambridge, 2016, p. 89 ss. e A. SAXENA, A. KHANNA, D. GUPTA, *Emotion Recognition and Detection Methods: A Comprehensive Survey*, in *Journal of Artificial Intelligence and Systems*, 2020, p. 53 ss.

Nonostante siano stati avanzati dubbi significativi quanto al ricorso ai sistemi di riconoscimento delle emozioni, in ragione dell'affidabilità limitata di questi e della mancata considerazione degli effetti che il contesto e la cultura possono determinare sul modo con cui vengono espresse e percepite le emozioni[84], alcuni progetti in materia sono stati finanziati dall'Unione europea. Può richiamarsi *Automatic Sentiment Estimation in the Wild* (SEWA), finanziato da Horizon 2020 con poco più di tre milioni e duecentomila euro, attraverso il quale si è cercato di creare modelli computazionali per l'analisi automatica del comportamento facciale, vocale e verbale da utilizzare in seguito sia per strumenti di analisi del mercato di massa, sia per sviluppare un'app[85]. Può farsi riferimento anche a *Predicting Response to Depression Treatment* (PReDicT), che ha ricevuto poco più di quattro milioni di euro da Horizon 2020 e il cui obiettivo consisteva nel realizzare un test quale nuovo dispositivo medico per migliorare il trattamento e la gestione della depressione nella pratica clinica. Partendo dal presupposto che sono necessarie dalle quattro alle sei settimane dopo l'inizio di un trattamento antidepressivo prima che un medico possa rilevare se esso sta funzionando, che la maggior parte dei pazienti non risponde al primo trattamento e che possono passare diversi mesi prima che ne venga individuato uno efficace, il test, basato sul rilevamento della risposta emotiva dei pazienti, permette di verificare entro una settimana dall'inizio del trattamento se un antidepressivo sta dando i risultati sperati o meno, riducendo il tempo necessario per individuare una cura efficace e i costi sanitari ed economico-sociali legati alla depressione[86].

Ai fini del presente scritto, il progetto che risulta di maggiore interesse è *Intelligent Portable Border Control System* (iBorderCtrl), che ha ottenuto quattro milioni e mezzo di euro da Horizon 2020 ed è stato implementato tra il 2016 e il 2019 con lo scopo di agevolare i controlli

[84] L. FELDMAN BARRETT ET AL, *Emotional Expressions Reconsidered: Challenges to Inferring Emotion From Human Facial Movements*, in *Psychological Science in the Public Interest*, 2019, p. 5.

[85] https://cordis.europa.eu/project/id/645094.

[86] https://cordis.europa.eu/project/id/696802. Al riguardo, J. KINGSLAKE ET AL, *The effects of using the PReDicT Test to guide the antidepressant treatment of depressed patients: study protocol for a randomised controlled trial*, in *Trials*, 2017, p. 1 ss.

di frontiera nei confronti di cittadini di Stati non membri dell'Unione europea, tra l'altro, riducendo il carico di lavoro degli operatori umani e aumentando le verifiche svolte mediante mezzi automatizzati[87]. Nell'ambito di tale progetto, si è sperimentato in valichi di frontiera in Grecia, Lettonia e Ungheria il *silent talker*, un sistema di analisi capace di identificare le emozioni di una persona, in modo da capire se essa mentisse e da stabilire se rappresentasse un pericolo o meno. I cittadini di Stati terzi hanno dovuto rispondere a sedici domande poste da un *avatar*, il quale ha registrato e in seguito analizzato i cosiddetti biomarcatori dell'inganno, ossia micromovimenti del volto, microespressioni facciali non verbali, quali battiti di ciglia, arrossamento e movimenti della testa, da cui dovrebbe essere possibile capire se una persona stia mentendo. Alle persone reputate sincere è stato permesso di attraversare il confine, mentre quelle ritenute sospette hanno dovuto fornire informazioni aggiuntive. È stato rilevato un tasso di accuratezza del 73-75%[88].

Ulteriormente, può ricordarsi che Frontex ha collaborato con il *US National Center for Border Security and Immigration* (BORDERS) dell'Università dell'Arizona in relazione a un progetto denominato *Automated Virtual Agent for Truth Assessments in Real-Time* (AVATAR), mirato a sviluppare un sistema di riconoscimento delle menzogne attraverso l'analisi delle espressioni del volto, della voce, dei movimenti degli occhi e del corpo[89].

[87] https://cordis.europa.eu/project/id/700626. Con riferimento al progetto in questione, si segnala una controversia relativa all'accesso ad alcuni atti dell'Agenzia europea per la ricerca e, più precisamente, ai documenti relativi all'autorizzazione del progetto, che è stata portata dinnanzi agli organi giurisdizionali dell'Unione europea (Corte di giustizia, sentenza del 7 settembre 2023, causa C-135/22 P, *Breyer/REA*, ECLI:EU:C:2023:640).

[88] J. O'SHEA ET AL, *Intelligent Deception Detection through Machine Based Interviewing*, disponibile in https://ieeexplore.ieee.org/xpl/conhome/8465565/proceeding e N. VAVOULA, *Unpacking the EU Proposal for an AI Act: Implications for AI Systems Used in the Context of Migration, Asylum and Border Control Management*, in *Transatlantic Policy Quarterly*, 4 marzo 2022.

[89] Al riguardo, European Parliamentary Research Service, *Artificial intelligence at EU borders. Overview of applications and key issues*, luglio 2021, p. 18 e https://eller.arizona.edu/departments-research/centers-labs/border-security-immigration.

È evidente, allora, che ci si sta confrontando con tecnologie ancora in via di sperimentazione, non utilizzate dall'Unione europea e dagli Stati membri. È altresì chiaro, però, che vi è un forte interesse al riguardo e che questo potrebbe condurre, in futuro, a ricorrere effettivamente a tali strumenti. Sul punto, del resto, va considerato che diversi sistemi di riconoscimento delle emozioni hanno raggiunto percentuali di accuratezza superiori al 90% e, in alcuni casi, al 98%[90].

Dunque, sembra opportuno interrogarsi con riferimento alle implicazioni concernenti la tutela dei diritti fondamentali derivanti da questi sistemi, *in primis* per quel che riguarda il rispetto della vita privata e la protezione dei dati di carattere personale. Preliminarmente, però, si tratta di stabilire se i dati trattati attraverso i sistemi di riconoscimento delle emozioni rientrino nel novero dei dati personali. La risposta dipende dal tipo di sistema preso in considerazione. Se esso opera attraverso l'analisi di immagini del volto, è da ritenersi che i dati acquisiti siano dati di natura biometrica, in quanto relativi alle caratteristiche fisiche, fisiologiche o comportamentali di una persona fisica che ne possono consentire l'identificazione[91]. Lo stesso sembra potersi affermare nell'ipotesi in cui il sistema valuti le emozioni a partire dalla voce del singolo soggetto, considerato che anch'essa può portare all'identificazione, pur configurandosi come un identificatore *weak*. Dunque, in tali ipotesi, trattandosi di dati biometrici, dovrebbero operare sicuramente le garanzie di ordine generale previste con riferimento ai dati personali, comprese quelle relative ai processi decisionali automatizzati.

Ci si può domandare se possano trovare applicazione anche le tutele concernenti i dati sensibili. Le difficoltà al riguardo si collegano al fatto che il Regolamento generale sulla protezione dei dati personali ricomprende tra i dati sensibili non semplicemente i dati biometrici, ma i dati biometrici intesi a identificare in modo univoco una persona fisica[92], individuandosi così una fattispecie *purpose-based*, la quale mira a definire un'eccezione in modo da evitare che si determini

[90] A. SAXENA, A. KHANNA, D. GUPTA, *op. cit*.

[91] Per una conferma, si veda *infra* la Proposta di Regolamento sull'intelligenza artificiale.

[92] Art. 9, par. 1, del Regolamento 2016/679.

un'automatica sovrapposizione tra dati sensibili e dati quali fotografie o immagini di persone fisiche anche quando esse sono state ottenute senza che vi fosse l'intenzione di procedere a un'identificazione[93]. I sistemi di riconoscimento delle emozioni non mirano a identificare in modo univoco un soggetto, ma a stabilire quali emozioni stia provando il soggetto in questione. Pertanto, la riconducibilità dei dati trattati dai sistemi di riconoscimento delle emozioni tra i dati sensibili può essere ragionevolmente esclusa.

Nel caso in cui il riconoscimento delle emozioni passi attraverso l'analisi di testi scritti, non pare invece possibile ritenere applicabili neppure le garanzie di ordine generale, atteso che non si tratta di informazioni che identificano o rendono identificabile una persona fisica.

Allo stesso modo, è da ritenersi che le garanzie derivanti dalla CEDU valgano nell'ipotesi in cui vengano in rilievo elementi relativi al diritto di un soggetto alla propria immagine, ma non ove il riconoscimento delle emozioni passi per testi scritti.

Infine, occorre ricordare che l'analisi delle emozioni basata sulle espressioni facciali può non risultare accurata, visto che tali espressioni tendono a variare leggermente da individuo a individuo, mescolano vari stati emotivi provati nello stesso momento (per esempio, paura e rabbia) o possono anche non veicolare alcuna emozione. Inoltre, certe emozioni possono non trasparire dal volto di una persona o possono essere interpretate in maniera errata in ragione del contesto (si pensi a una battuta sarcastica)[94]. A ciò si aggiunga che uno studio relativo agli algoritmi di riconoscimento delle emozioni facciali ha dimostrato che questi tendevano ad assegnare emozioni negative (come la rabbia) ai

[93] In questi termini, P. QUINN, G. MALGIERI, *The Difficulty of Defining Sensitive Data – The Concept of Sensitive Data in the EU Data Protection Framework*, in *Ger. Law J.*, 2021, p. 1594. Si veda inoltre C. JASSERAND, *Legal Nature of Biometric Data: From 'Generic' Personal Data to Sensitive Data*, in *European Data Protection Law Review*, 2016, p. 297 ss.

[94] Per le considerazioni ora riassunte, M. SIDDAPPA, P. KUMAR GB, *EEG Based Emotion Recognition: A State of the Art Review of Current Trends*, in *International Journal of Research Publication and Reviews*, 2022, p. 1303.

volti di persone di origine africana più che ad altri volti e, in caso di ambiguità, i primi sono stati classificati come più arrabbiati[95].

Si pone quindi anche in questo caso il problema del rischio di discriminazione, con la conseguenza che assumono rilievo le tutele scaturenti dalla Carta dei diritti fondamentali, dal Regolamento generale sulla protezione dei dati personali, dalla giurisprudenza della Corte di giustizia in materia di PNR e di trattamento dei dati personali nel settore delle comunicazioni elettroniche, dalla CEDU e dalla giurisprudenza della Corte europea dei diritti dell'uomo in tema di discriminazione.

Per quel che attiene alla Proposta di Regolamento sull'intelligenza artificiale, quanto ai sistemi di riconoscimento delle emozioni, in essa vengono definiti come tali i sistemi finalizzati all'identificazione o alla deduzione di emozioni o intenzioni di persone fisiche sulla base dei loro dati biometrici, ossia di dati personali ottenuti da un trattamento tecnico specifico relativi alle caratteristiche fisiche, fisiologiche o comportamentali di una persona fisica che ne consentono o confermano l'identificazione univoca, quali l'immagine facciale o i dati dattiloscopici[96]. Sul punto, occorre ricordare che tra gli obiettivi perseguiti dalla Proposta di Regolamento rientra la predisposizione di regole di trasparenza armonizzate per i sistemi di intelligenza artificiale, tra i quali i sistemi di riconoscimento delle emozioni, e che è pertanto previsto che gli utenti di un sistema di riconoscimento delle emozioni sono tenuti a informare le persone fisiche che vi sono esposte in merito al funzionamento del sistema[97].

Orbene, la Proposta di Regolamento individua alcuni sistemi di intelligenza artificiale come ad alto rischio[98]. Tali sistemi non sono vietati ma, con riferimento a essi, deve operare una serie di garanzie. Si delinea dunque un approccio alla materia basato sul livello di pericolo per i diritti fondamentali – nonché per altri interessi – risultante dal tipo di

[95] L. RHUE, *Racial Influence on Automated Perceptions of Emotions*, 2018, in https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3281765.

[96] Art. 3, n. 33) e n. 34) della Proposta di Regolamento.

[97] Art 1 e art. 52, par. 2, della Proposta di Regolamento.

[98] Art. 6 della Proposta di Regolamento.

sistema considerato[99]. Tra le garanzie relative ai sistemi ad alto rischio rientrano la predisposizione di un sistema di gestione dei rischi basato su identificazione e analisi dei rischi noti e prevedibili, stima e valutazione dei rischi che possono emergere quando il sistema è usato conformemente alla sua finalità prevista e in condizioni di uso improprio ragionevolmente prevedibile, la valutazione di altri eventuali rischi derivanti dall'analisi dei dati raccolti dal sistema di monitoraggio successivo all'immissione sul mercato e l'adozione di adeguate misure di gestione dei rischi[100]. Inoltre, tali sistemi devono essere progettati e sviluppati in modo da potere essere efficacemente supervisionati da persone fisiche durante il periodo in cui essi siano in uso, permettendo così alla sorveglianza umana di prevenire o ridurre al minimo i pericoli per la salute, la sicurezza o i diritti fondamentali[101]. Infine, i set di dati di addestramento, convalida e prova devono essere pertinenti, rappresentativi, esenti da errori e completi. Essi devono possedere le proprietà statistiche appropriate, anche, ove applicabile, per quanto riguarda le persone o i gruppi di persone sui quali il sistema di intelligenza artificiale è destinato a essere usato[102].

Secondo quanto previsto dall'Allegato III alla Proposta di Regolamento, si configurano come sistemi ad alto rischio, tra gli altri, quelli utilizzati al fine della gestione delle migrazioni, dell'asilo e del controllo delle frontiere, quali sistemi usati dalle autorità pubbliche compe-

[99] F. DONATI, *Diritti fondamentali e algoritmi nella Proposta di Regolamento sull'intelligenza artificiale*, in A. PAJNO, F. DONATI, A. PERRUCCI (a cura di), *Intelligenza artificiale e diritto: una rivoluzione? Volume 1. Diritti fondamentali, dati personali e regolazione*, Bologna, 2022, p. 117. Come affermato in J. CHAMBERLAIN, *The Risk-Based Approach of the European Union's Proposed Artificial Intelligence Regulation: Some Comments from a Tort Law Perspective*, in *European Journal of Risk Regulation*, 2023, p. 1, sulla base della Proposta di Regolamento risulta possibile individuare una «*pyramid of criticality*». Gli obblighi diventano via via più significativi a mano a mano che si alza il livello di rischio, individuandosi tra l'altro pratiche di intelligenza artificiale vietate (art. 5 della Proposta di Regolamento).

[100] Art. 9 della Proposta di Regolamento.

[101] Art. 14 della Proposta di Regolamento.

[102] Art. 10, par. 3, della Proposta di Regolamento.

tenti, come poligrafi e strumenti analoghi, per rilevare lo stato emotivo di una persona fisica[103].

Al riguardo, nel preambolo della Proposta di Regolamento, si afferma che la ragione alla base di tale classificazione è da ricondurre al fatto che i sistemi in questione hanno effetti su persone che si trovano spesso in una posizione particolarmente vulnerabile e il cui futuro dipende dall'esito delle azioni delle autorità competenti. Dunque, l'accuratezza, la natura non discriminatoria e la trasparenza dei sistemi di intelligenza artificiale utilizzati in tali contesti sono particolarmente importanti per garantire il rispetto dei diritti fondamentali delle persone interessate, in particolare i loro diritti alla libera circolazione, alla non discriminazione, alla protezione della vita privata e dei dati personali, alla protezione internazionale e alla buona amministrazione[104].

Sul punto, si ricorda che il Comitato economico e sociale europeo ha chiesto una modifica della Proposta di Regolamento, al fine di vietare l'impiego dell'intelligenza artificiale «per dedurre le emozioni, il comportamento, le intenzioni o le caratteristiche di una persona fisica, tranne in casi molto specifici, come ad esempio per alcuni scopi sanitari, in cui è importante il riconoscimento delle emozioni del paziente»[105]. A maggior ragione, deve farsi presente che mentre il Consiglio dell'Unione europea ha fatto propria l'impostazione della Commissione europea, reputando quindi che i sistemi di riconoscimento delle emozioni si configurino come ad alto rischio solo quando utilizzati per fini di gestione della migrazione, dell'asilo e del controllo delle frontiere[106], non lo stesso può dirsi con riferimento al Parlamento europeo il

[103] Da notare che l'allegato III pone tra i sistemi ad alto rischio anche quelli usati nell'ambito di attività di contrasto per rilevare lo stato emotivo di una persona fisica, oltre che poligrafi e strumenti analoghi e che, al di fuori dei casi ora ricordati, i sistemi di riconoscimento delle emozioni non si configurano come ad alto rischio.

[104] Considerando n. 39 della Proposta di Regolamento.

[105] *Parere del Comitato economico e sociale europeo sulla proposta di regolamento del Parlamento europeo e del Consiglio che stabilisce regole armonizzate sull'intelligenza artificiale (legge sull'intelligenza artificiale) e modifica alcuni atti legislativi dell'Unione*, 2021/C 517/09, punto 4.8.

[106] O per attività di contrasto. Si veda Consiglio dell'Unione europea, *Proposta di regolamento del Parlamento europeo e del Consiglio che stabilisce regole armonizzate*

quale, il 14 giugno 2023, ha approvato una serie di emendamenti alla Proposta di Regolamento[107]. In relazione a ciò che qui interessa, il Parlamento europeo reputa opportuno tenere conto delle preoccupazioni circa la base scientifica dei sistemi di riconoscimento delle emozioni[108] – oltre che di quelli diretti a rilevare le caratteristiche fisiche o fisiologiche come le espressioni facciali, i movimenti, la frequenza cardiaca o la voce – visto che le emozioni o la loro espressione e percezione sono fortemente influenzate da considerazioni di carattere culturale, nonché dalle singole situazioni, e variano da persona a persona[109]. Dunque, posto che le tecnologie esistenti non sembrano essere affidabili e potrebbero dare luogo ad abusi, il Parlamento europeo ritiene preferibile vietare l'immissione sul mercato, la messa in servizio o l'uso di sistemi di riconoscimento delle emozioni destinati a essere utilizzati nell'ambito della gestione delle frontiere, oltre che per attività di contrasto, sul luogo di lavoro e negli istituti di istruzione[110]. Ulteriormente, il Parlamento europeo sostiene l'esigenza di classificare come ad alto rischio i sistemi di intelligenza artificiale funzionali all'identificazione delle persone fisiche e quelli utilizzati per trarre conclusioni sulle caratteristiche personali delle persone fisiche sulla base di dati biometrici o elementi biometrici, compresi i sistemi di riconoscimento delle emo-

sull'intelligenza artificiale (legge sull'intelligenza artificiale) e modifica alcuni atti legislativi dell'Unione - Orientamento generale (6 dicembre 2022).

[107] Si tratta dei già menzionati emendamenti del Parlamento europeo, approvati il 14 giugno 2023, alla proposta di regolamento del Parlamento europeo e del Consiglio che stabilisce regole armonizzate sull'intelligenza artificiale (legge sull'intelligenza artificiale) e modifica alcuni atti legislativi dell'Unione (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)).

[108] Si noti che la nozione di sistema di riconoscimento delle emozioni individuata dal Parlamento europeo è leggermente diversa rispetto a quella avanzata dalla Commissione europea. Come tale si dovrebbe infatti intendere un sistema di intelligenza artificiale finalizzato all'identificazione o alla deduzione di emozioni, pensieri, stati d'animo o intenzioni di individui o gruppi sulla base dei loro dati biometrici e basati su elementi biometrici (emendamento 191, Articolo 3 – punto 34).

[109] Emendamento 52, Considerando 26 quater (nuovo).

[110] *Ibidem* ed emendamento 226, Articolo 5 – paragrafo 1 – lettera d) quater (nuova).

zioni, eccezion fatta per i sistemi rientranti tra quelli vietati[111]. Si tratterà ora di vedere se dal confronto tra Commissione europea, Consiglio dell'Unione e Parlamento emergerà una posizione di compromesso su questi punti, che sembrano configurarsi come estremamente controversi.

5. *Conclusioni*

I controlli alle frontiere si fondano su tecnologie sempre più sofisticate, tanto che sembra possibile descrivere gli Stati occidentali, sotto questo punto di vista, come vere e proprie fortezze *high-tech*[112]. Al riguardo, non manca chi fa riferimento a una tendenza al *techno-solutionism*, la quale si contraddistingue per il fatto di riporre una fiducia notevole negli strumenti tecnologici realizzati per gestire le frontiere[113] e chi, in maniera più specifica, parla di *datafication of migration management*[114].

Considerate in termini astratti, le tecnologie in questione non si configurano come aprioristicamente buone rispetto alla tutela dei diritti fondamentali; sono neutre e, dunque, devono essere orientate per risultare coerenti con quella finalità[115]. La loro progettazione, se non

[111] Emendamento 63, Considerando 33 bis (nuovo) ed emendamento 712, Allegato III – punto 1 – lettera a) bis (nuova).

[112] Così, per quanto riguarda l'Unione europea, L. MARIN, *Is Europe Turning into a "Technological Fortress"? Innovation and Technology for the Management of EU's External Borders. Reflections on Frontex and EUROSUR*, in M.A. HELDEWEG, E. KICA (eds.), *Regulating Technological Innovation: Legal and Economic Regulation of Technological Innovation*, Basingstoke, 2011, p. 131 ss.

[113] N. VAVOULA, *Artificial Intelligence (AI) at Schengen Borders*, cit., p. 457.

[114] D. BROEDERS, H. DIJSTELBLOEM, *The Datafication of Mobility and Migration Management. The Mediating State and its Consequences*, in I. VAN DER PLOEG, J. PRIDMORE (eds.), *Digitizing Identity: Doing Identity in a Networked World*, London, 2016, p. 242.

[115] Così, in relazione all'intelligenza artificiale, A. ODDENNINO, *Intelligenza artificiale e tutela dei diritti fondamentali: alcune notazioni critiche sulla recente Proposta di Regolamento della UE, con particolare riferimento all'approccio basato sul rischio e al pericolo di discriminazione algoritmica*, in A. PAJNO, F. DONATI, A. PERRUCCI (a cura di), *op. cit.*, p. 169.

basata su una verifica attenta delle informazioni fornite, può determinare effetti discriminatori nei confronti di determinate etnie e il loro utilizzo può essere lesivo del diritto al rispetto della vita privata e della protezione dei dati personali.

Questo vale, in generale, con riferimento ai vari meccanismi già in uso alle frontiere dell'Unione europea e diventa a maggior ragione essenziale esserne consapevoli per quel che riguarda i sistemi in via di sperimentazione, come quelli di riconoscimento delle emozioni, affinché essi possano essere sviluppati e applicati in maniera coerente con l'assetto assiologico dell'Unione come risultante dall'art. 2 del Trattato sull'Unione europea.

Quanto appreso in precedenza – per esempio, con i sistemi di riconoscimenti facciale – può fornire una guida per affrontare le questioni sollevate da tali sistemi, di modo che le garanzie già emerse possano valere anche per queste nuove realtà.

OUTSOURCED ILLEGALITY: EUROPE'S ROLE IN UNLAWFUL MIGRANT PUSHBACKS

Zénó Suller[*]

SUMMARY: 1. Introduction. – PART I. The legal background. – 1. The right to migrate or a right to individual assessment. – 2. Why pushbacks are illegal - the principle of non-refoulment and collective expulsion. – 3. Pushbacks – exception from unlawfulness. – PART II. The facts of the chosen European practices. – 1. Hungary's safe third countries list. – 2. Frontex's illegal practices on sea. – 3. The Spanish Moroccan border incident. – PART III. Legal analysis and conclusion. – 1. Are these practices illegal pushbacks?

1. *Introduction*

Migration has always been around. However, once the highly regulated, strong State occurred, border control became stronger and more vigilant. Since then, the majority of the migration movements are carried out in a regular, orderly manner[1]. This way States can control who may enter and stay in their territories, they can check the background of the migrants and they can carefully assess their claims on their legal ground for entrance. Accordingly, regular migration does not threat the safety and security of States. On the other hand, especially as a result of this thorough control and monitoring, some migrants decide to skip the legal procedure and bypass the official border crossings either by entering through the "green border" or by hiding in obscure vans and trucks, risking their lives and hoping for the best. Evidently, the result is illegal border crossing and ungrounded residence[2]. Not to

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[1] UN General Assembly: In Safety and Dignity: Addressing Large Movements of Refugees and Migrants. Report of the Secretary-General, 21 April 2016, A/70/59 (hereinafter: UN Safety and Dignity) para. 87.

[2] E. KAROLINY, Á. MOHAY, *A nemzetközi migráció jogi keretei*, p. 25, available at: http://publikon.hu/application/essay/455_1.pdf-.

mention that most of the times these people are exposed to participate in organized crimes such as human trafficking or smuggling[3]. Such scenarios are unsafe for both the migrants and the States. To avoid these risky and dangerous practices, the main rule in both domestic and international law is still that entry to a State shall be realized in a regular, hence in an authorised and orderly way[4]. Of course, there are situations when this is simply not a realistic and fair expectation. When one is forced to flee from persecution, international refugee law provides that such person may enter the State directly escaping from danger in an unauthorised and unorderly way and for that, one cannot be punished by law as per the 1951 Geneva Convention[5].

In real life, contemporary problems create a more complex environment where migration is not always straight forward. Today, the causes of migration are mixed. Sometimes it is difficult to decide whether the aim is to seek refuge or to search for a better life in economic terms, or the combination of the two[6]. This tendency challenges the migration policies of the host States which is even more aggravated by the fact that this happens in a large scale with mass migration[7]. However, there are some legal standards which are to be respected regardless of the motives of migration and the scale of the influx of people. Principles like the prohibition of collective expulsion or non-refoulment derive from the right to individual assessment of the refugee status. These principles result that the European attempts to exclude migrants *en masse* through pushbacks cannot be but unlawful. This paper will aim to discover the legal status of pushbacks in Europe and will highlight the legal aspects of the tendency within which Frontex and European States tend to outsource pushbacks and other

[3] Ibid., p. 26.

[4] T. V. Ádány, *Nemzetközi jogi szempontok a migrációs válság értelmezéséhez*, Iustum Aequum Salutare, XII, 2016, no. 2, pp. 237-249, at p. 240.

[5] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951 and its 1967 Protocol (hereinafter as: Geneva Convention), Art. 31.

[6] Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1 (hereinafter: RSD Handbook) para. 63.

[7] T. V. Ádány, cit., p. 243.

measures which are unlawful under the common European legal understanding as per the applicable conventions and the decisions of the European Court of Human rights.

For that end, the study first elaborates the legal background of the right to asylum also covering its standards including individual assessment, the principle of non-refoulment, the prohibition of collective expulsion and the definition of pushbacks (Part I). Then, the paper presents the factual components of the issue. Hence it will describe three practices from the past where European States or agencies tried to outsource illegal migration control practices in order to avoid responsibility for them. These three practices are Hungary's safe third country concept, the covert Frontex operations on the sea to send back migrants without individual assessment of their refugee status, and the deadly incident in the Spanish Moroccan border in Africa on 24 June 2022 (Part II). Finally, the paper provides a legal analysis by connecting the dots together, hence by applying the legal elements to the factual ones. The study aims to assess whether the above practices are indeed pushbacks, and whether they are illegal practices (Part II).

Part I. The legal background

1. *The right to migrate or a right to individual assessment*

There are some criticisms about the progressive development of migration law especially regarding the human rights attaching to movement of people. Some claim, and some fear that a right to movement or a right to migrate may exist. The question has a huge relevance in case of pushbacks too. If the right to migrate exists, this gives very little space for the States to control who may enter their territories. But is it really the case? This section shows that respecting human rights does not equal to accepting the right to migrate, and understanding the reasoning behind it may also help understanding the legal evaluation of pushbacks too.

The axiom of international law and the law of migration is that the right to asylum is a fundamental human right[8]. Asylum of course relates to refugee status; therefore, it may be confusing whether it is applicable to all migrants or only to refugees. In short, the right to asylum is a broad definition and it entitles all migrants as per the following logic.

Being a refugee is a question of facts. If the person meets the criteria of the refugee status, he is a refugee[9] and his status shall be *acknowledged* by the host State[10]. Hence the State does not *give* the refugee status, it only acknowledges it, therefore it has a declarative role when the refugee status is determined[11]. But it does not mean that the State can be left out from the equation[12]. The protection, ensured by – *inter alia* – the Geneva Convention can only be provided by States[13]. It derives from State sovereignty. States are responsible to

[8] The Universal Declaration of Human Rights, United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) Art. 14.; Charter of Fundamental Rights of the European Union Art. 18; Resolution 2299 (2019) of the Parliamentary Assembly of the Council of Europe, adopted on 28 June 2019: Pushback policies and practice in Council of Europe member States (hereinafter: Pushback Resolution) para. 6.; UN General Assembly: New York Declaration for Refugees and Migrants: Resolution/Adopted by the General Assembly, 3 October 2016, A/RES/71/1 (hereinafter: New York Declaration) paras. 27 and 67.

[9] Court of Justice, Grand Chamber, judgment of 14 May 2019, *M.* v. *Ministerstvo vnitra and Others*, joined cases C-391/16, C-77/17, C-78/17, ECLI:EU:C:2019:403, para. 90.

[10] RSD Handbook para. II, para. 28.; UNHCR: refugee status determination. Available at: https://www.unhcr.org/refugee-status-determination.html.

[11] D. K. PEDRYC, *A menekült státusz meghatározása az 1951. évi Genfi Egyezmény szerint*, Pázmány Law Working Papers,2017/5, p. 4.

[12] T. MOLNÁR, *Amigráció nemzetközijogi szabályozása*, in A. JAKAB, M. KÖNCZÖL, A. MENYHÁRD, G. SULYOK (eds.), *Internetes Jogtudományi Enciklopédia* (Nemzetközi jog rovat, rovatszerkesztő: G. SULYOK), 2019, para. 3, available at: http://ijoten.hu/szocikk/a-migracio-nemzetkozi-jogi- szabalyozasa.

[13] Except the protection provided by the UNHCR itself, however even this solution is reliant upon State cooperation. These are the mandate refugees. See: RSD Handbook, para. 16; For its own RSD procedure, see: UN High Commissioner for Refugees (UNHCR), Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR's Mandate (The Glossary), 2020, available at: https://www.refworld.org/docid/5a2657e44.html.

protect their nationals and the persons living under their jurisdictions[14]. However, if the person cannot hope protection from his own State, due to the circumstances described as persecution in compliance with the Geneva Convention, then, another State shall take its place and provide protection for the refugee[15] as per its international obligations[16]. Despite this obligation, the host State still has the right to determine the rules of migration[17], and according to the Council of Europe, even has an obligation to control its borders[18]. Apart from the restrictive refugee definition of the Geneva Convention, European States usually also provide some kind and some level of other protection for forms of forced migration which may not overlap with the classic refugee definition[19]. Still, the most important common point is that States require orderly – hence regular – migration.

The problem is that there are many circumstances which may cause forced migration but does not fit into the original Geneva Convention definition. These include wars, climate change or serious economic crisis. Accordingly, the State may not be obliged to

[14] A/69/981-S/2015/500 (2015) A vital and enduring commitment: implementing the responsibility to protect: Report of the Secretary General para. 7.; A/63/677 (2009) Implementing the responsibility to protect: Report of the Secretary General para. 11. (a); International Commission on Intervention and State Sovereignty Report, 2001. Ottawa p. XI.

[15] UNHCR: The New York Declaration for Refugees and Migrants. Answers to Frequently Asked Questions (hereinafter: UNHCR FAQs) Question 4.

[16] New York Declaration para. 70., United Nations Global Compact on Refugees, New York, 2018, in: Report of the United Nations High Commissioner for Refugees Part II: Global compact on refugees (A/73/12) (hereinafter: Global Compact on Refugees) para. 61.

[17] European Court of Human Rights, *N.D. and N.T.* v. *Spain*, applications nos. 8675/15 and 8697/15, para. 167; New York Declaration, para. 42.

[18] Council of Europe: Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return, adopted on 4 May 2005 at the 925th meeting of the Ministers' Deputies, Preamble; ECtHR, *N.D. and N.T.* v. *Spain*, cit., para. 172.

[19] R. ZETTER, *Protection des migrants forcés Etat des lieux des concepts, défis et nouvelles pistes*, in *Documentation sur la politique de migration*, December 2014, para. 6.2., pp. 90-91.

acknowledge the refugee status[20]. National or regional protections may be applicable to these situations[21], but lacking that, granting the protection would remain in the sovereign, hence discretional decision of the State[22]. The elongated migration routes also pose significant challenges. This phenomenon contradicts the traditional approach to refugee law. The refugee only seeks protection the earliest and nearest way. He is not picking between host States as per their economic prosperity of welfare systems. The aim is to save his life as soon as possible. That is the difference between forced migration and voluntary migration[23].

So, the question is whether international law, and especially, the Geneva Convention provides a right to asylum for all individuals who enter a State. In short, the answer is yes. The right to asylum does not mean the right to refugee status. Right to asylum means that the individual has the right to submit a request for a refugee status determination (RSD)[24]. This also means that for an RSD, the request of the alien is a prerequisite[25]. The State can only decide whether the alien has the right to enter and stay in the country through the RSD[26]. As per the result, the State either acknowledges protection, or rejects the entry

[20] Court of Justice, judgment of 2 March 2010, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, joined cases C-175/08, C-176/08, C-178/08, C-179/08, ECLI:EU:C:2010:105, para. 69.

[21] T. HOFFMANN, T. D. ZIEGLER, *A menekültügy jogi szabályozása*, p. 4, available at: https://mta.hu/data/cikkek/106/1060/cikk-106072/_hoffmann.pdf.

[22] Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967 (Resolution 2312 (XXII)) Article 1; E. KAROLINY, Á. MOHAY, cit., p. 3.

[23] International Organization for Migration: Glossary on Migration, International Migration Law no. 34, 2019, p. 77; Conseil de L'Europe, *Diversité et cohésion: de nouveaux défis pour l'integration des immigrés et des minorités*, 2000, p. 26.

[24] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) ("the Asylum Procedures Directive") (hereinafter, Directive 2013/32/EU) Article 43.

[25] Cf. *mutatis mutandis*, ECtHR, *Khlaifia and Others v. Italy*, application no. 16483/12, para. 247.

[26] European Court of Human Rights, *Ilias and Ahmed v. Hungary*, application no. 47287/15, para. 137.

and expels the individual in lack of the necessary criteria for refugee status or other protected status[27]. Accordingly, the wide – and right – interpretation of the right to asylum does not equal with the right to migrate. The right to migrate would mean that everyone has the right to leave his State and enter and live in another one. This right does not exist. There is a right to leave the country of residence, but there is no right to enter another one without restraints[28]. Although there are scholarly attempts for progressive law development aiming the introduction of the right to migrate[29], currently, the distinction remains. The right to asylum does not mean a right to enter and stay, it only gives a right for an RSD. However, it is still an incredibly important right as it also entails the principle of non-refoulment and the prohibition of collective expulsion.

2. *Why pushbacks are illegal – the principle of non-refoulment and collective expulsion*

Non-refoulment means that even if the refugee status is out of the question due to the result of the RSD, the asylum seeker cannot be sent back to the country of origin since he would be imposed to serious danger[30]. This principle limits the rights of the States according to which they can expel those individuals who do not meet the criteria for refugee status, or those who enter the State by breaching its laws on the border control, entrance and residency[31]. The 1951 Geneva

[27] *N.D. and N.T. v. Spain*, cit., paras 167 and 179; European Court of Human Rights, *Paposhvili v. Belgium*, application no. 41738/10, para. 172.

[28] A. PÉCOUD, P. DE GUCHTENEIRE, *International Migration, Border Controls and Human Rights: Assessing the Relevance of a Right to Mobility*, in *Journal of Borderlands Studies*, 2006, no. 1, p. 75.

[29] G. DEMELEMESTRE, *Le droit cosmopolitique légitime-t-il un droit à la migration ?*, in *Droit et société*, 2016/1, no. 92, pp. 99-116.

[30] Conclusions on International Protection adopted by the Executive Committee of the UNHCR Programme 1975 – 2017, no. 6 (XXVIII), Non-refoulement (1977) – 28th Session of the Executive Committee (c).

[31] International Law Commission, Draft articles on the expulsion of aliens, with commentaries, 2014, adopted by the International Law Commission at its sixty-sixth

Convention attaches the principle to asylum seekers[32], so it does not only entitle refugees. The European Court of Human Rights interpreted the principle as applicable to all aliens[33]. Accordingly, the right to asylum and the principle of non-refoulment obliges States to carry out a double assessment. First, they have to carry out the RSD assessment, then, if there is no right to enter, the State also has to investigate if the expulsion would endanger seriously the alien[34]. Both assessments are to be made in substance and individually[35].

The prohibition of collective expulsion of aliens appears in the European Convention on Human rights very laconically[36]. The ECtHR interpreted the principle as being applicable to all aliens whether they are present legally or illegally in the given State[37]. Collective expulsion is a guarantee against unlawfully expelling aliens on a non-individualised manner[38]. Accordingly, aliens cannot be removed from the State as a group[39]. As the ECtHR held, the collective nature means the absence of reasonable and objective examination of the circumstances of all members of the given group[40]. Again, the key is: in substance and individualised assessment, hence, practically the due process of law[41]. Removing aliens from the State as a main rule, requires individual assessment[42].

session, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/69/10) (hereinafter ILC: Draft articles on expulsion) para. 3; OHCHR Discussion paper, Expulsions of aliens in international human rights law, Geneva, September 2006, p. 1; J. P. GRANT, J. CRAIG BARKER, *Parry and Grant Encyclopaedic Dictionary of International Law*, 3th ed., New York, 2009, p. 24.

[32] Geneva Convention, art. 31.

[33] *N.D. and N.T. v. Spain*, para. 188.

[34] *Ilias and Ahmed v. Hungary*, para. 134.

[35] Ibid., para. 152, 155; Global Compact on Migration, para. 37.

[36] European Convention on Human Rights, Protocol No. 4, art. 4.

[37] *N.D. and N.T. v. Spain*, para. 181.

[38] Charter of Fundamental Rights of the European Union, art. 19.1; ILC: Draft articles on expulsion Art. 9. 2.

[39] ILC: Draft articles on expulsion, art. 9. 1; *N.D. and N.T. v. Spain*, para. 192.

[40] *N.D. and N.T. v. Spain*, para. 195.

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

Despite the clear legal framework, there were lot of occasions in Europe where such individual assessments were completely lacking. This is especially true in situations where the migrants occur in the borders *en masse*. During the migrant crisis, collective refusal of migrants and their forcible return – pushbacks – were common practice in Europe[43]. The Council of Europe defines pushback as the refusal of entry and expulsion without individual assessment[44]. It is a response to illegal border crossing attempts of large groups of aliens[45]. As a main rule, even during such unprecedented cases, the principle of non-refoulment and the prohibition of collective expulsion are to be maintained[46].

The ECtHR practice shows what is expected from the States. The principles are breached if the expulsion is carried out as a routine. So, if the expulsion follows an automatic, regular pattern, a coordinated and determined policy of arrests, detentions and expulsions in the complete lack of individual assessment, it would be an illegal pushback[47]. Of course, these procedures are determined by laws and policies of the law enforcement and administrative organs of the State. But the standardization cannot result automatic returns without the possibility to seek asylum[48]. This is the case if the migrants found on the high seas are sent back without identity check[49]. The same applies

quent version: Directive 2013/32/EU of 26 June 2013] (hereinafter as: Council Directive 2005/85/EC) Art. 8 2. a).

[42] Court of Justice, judgment of 11 December 2014, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, case C-249/13, paras. 28-35; ILC: Draft articles on expulsion Article 9 (4).

[43] Council of Europe, Parlamentary Assembly, Resolution 2299 (2019), *Pushback policies and practice in Council of Europe member States* (hereinafter, Pushback Resolution) para. 2.

[44] Ibid., para. 1.

[45] Ibid., para. 3.

[46] Ibid., para. 6.

[47] European Court of Human Rights, judgment of 31 January 2019, *Georgia v. Russia*, application no. 13255/07, paras.170-78.

[48] European Court of Human Rights, judgment of 21 October 2014, *Sharifi and Others v. Italy and Greece*, application no. 16643/09, paras. 214-25.

[49] European Court of Human Rights, judgment of 23 February 2012, *Hirsi Jamaa and Others v. Italy*, application no. 27765/09, para. 185.

to practices when the migrants could submit a request for asylum but even before its result, they were expelled[50].

3. *Pushbacks – exception from unlawfulness*

It may seem that this legal system does not leave any munition for the States to control their borders and protect State territory against large groups of migrants illegally entering. However, this is not the case. There are situations where the lack of individual assessment is not the failure of the State, but the responsibility of the migrants. The milestone ECtHR case was the *Khlaifia and Others* where the Court held that only the fact that standardized refuse-of-entry orders were used only changing the names and other personal data on the documents[51] does not fall under the prohibition of collective expulsion[52] if the aliens had the chance to challenge these orders and present their arguments against them[53]. This possibility to challenge the decision does not need to be a court procedure, any real opportunity to officially indicate a plea against the decision towards the authorities may be adequate[54]. Hence, the principle is not violated if "the lack of an individual expulsion decision can be attributed to the culpable conduct of the person concerned" – as the Court held[55].

An even more important decision of the Court was the decision of the Grand Chamber in the *N.D. and N.T. v. Spain* case. The Grand Chamber changed the ruling of the Chamber which was more favourable to the migrants, but provoked several States to intervene to the case. The case involved a unauthorized border storm *en masse*[56]. The applicants who claimed that their human rights were breached, also

[50] European Court of Human Rights, judgment of 5 February 2002, *Čonka v. Belgium*, application no. 51564/99, paras. 60-63.

[51] Cf. *Khlaifia and Others v. Italy*, para. 214.

[52] Ibid., para. 251.

[53] Ibid., para. 239; *N.D. and N.T. v. Spain*, para. 199.

[54] *Khlaifia and Others v. Italy*, para. 248; Court of Justice, *Khaled Boudjlida*, paras. 55, 64-65 and 67.

[55] *Khlaifia and Others v. Italy*, para. 240.

[56] *N.D. and N.T. v. Spain*, para. 166.

took part in the attempt to cross the border fences of the Moroccan Spanish border *en masse*[57]. The Spanish border patrols arrested them and expelled them to Morocco through an immediate handover[58]. The migrants claimed that due to the lack of individual assessment, their removal was collective expulsion[59]. The Grand Chamber agreed that the practice was an expulsion[60], but maintained that since the applicants had plausible access to legal and orderly entry into Spain[61] it was the migrants' conduct which provoked the procedure[62]. They had the possibility to seek asylum and they could not justify why they opt for the illegal entry instead[63]. Accordingly, the Court came to the conclusion that should the State provide proper ways to enter legally and to seek asylum, border control is the right of the State[64]. This includes the just demand that requests for RSD should be submitted at the existing legal border crossing points[65]. Hence, the pushback is not illegal if it is an immediate measure against an *en masse* attempt to illegally and violently cross the border, provided that lawful entry and opportunity to seek asylum there was provided.

[57] Ibid. para. 24.

[58] Ibid. para. 25.

[59] Ibid. para. 123.

[60] Ibid. para. 191.

[61] Ibid., para. 212; Cf. Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), Art. 4.1. "External borders may be crossed only at border crossing points and during the fixed opening hours" and 3. "Without prejudice to the exceptions provided for in paragraph 2 or to their international protection obligations, Member States shall introduce penalties, in accordance with their national law, for the unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours. These penalties shall be effective, proportionate and dissuasive". See also Council Directive 2005/85/EC, Art. 6: "1. Member States may require that applications for asylum be made in person and/or at a designated place".

[62] Ibid., para. 200.

[63] *N.D. and N.T. v. Spain*, para. 212.

[64] Ibid., para. 167, 201.

[65] Ibid., paras. 209-210.

Part II. The facts of the chosen European practices

1. *Hungary's safe third countries list*

The first practice of outsourcing illegal migration control practices concerns Hungary and the policy of safe third States list. Practically speaking, this policy is the outsourcing of *refoulment*. The safe third country list is not a Hungarian invention, it was part of a common EU policy. But it was practically never applied since the European Court of Justice annulled the core articles of the Council Directive[66]. Hungarian government reintroduced the concept as a response to the migration crisis of 2015. Act CVI of 2015 enabled the Government to create a list of safe third countries on a national level. As per the authorization, the Government adopted Government Decree 191/2015 (VII. 21) in which Art. 2 rendered – *inter alia* – all Balkan States as safe third countries. Despite the list, the Hungarian laws did not allow for an irrebuttable presumption and required at least that the applicant could challenge the presumption, but the burden of proof was on the asylum seeker to prove that he could not have received effective protection in the entry State which constitutes as a safe third State[67]. However, in reality, the Act and the Decree were interpreted as giving possibility to reject the asylum applications of migrants entering from safe third countries without individual assessment[68].

It is not the existence of safe third States list *per se* which is problematic. States have the right to do so[69]. But while doing so, States must respect international law[70], especially the principle of non-

[66] Court of Justice, Grand Chamber judgment of 6 May 2008, *Parliament v. Council*, case C-133/06, ECLI:EU:C:2008:257.

[67] Act LXXX of 2007 on the refugee status, 51 § (5).

[68] Á. SZÉP, *A biztonságos harmadik ország elve. A menedékjoghoz való hozzáférés jogi akadálya*, in *Migráció és Rendészet, Magyar Rendészettudományi Társaság Migrációs Tagozat*, Budapest, 2015, p. 195.

[69] *Ilias and Ahmed v. Hungary*, para. 152; ECtHR, *Research Division: Articles 2, 3, 8 and 13, The concept of a "safe third country" in the case-law of the Court* (hereinafter, ECtHR, Research Division), p. 7, para. 6.

[70] Directive 2013/32/EU, Preamble, para. 46

refoulment[71]. And these lists can act as legal presumptions[72]. The aim of these lists is to make the RSD assessment easier. It basically creates a preliminary issue. It first checks if the asylum seeker entered from a safe third country. If he did, the presumption is that he should have applied for a refugee status there[73]. As Moreno-Lax phrased it:"The concept indirectly creates an obligation to seek asylum in the geographically closest safe State, punishing non-compliance with forced removal and limiting self-determination as regards the choice of the country of refuge[74]".

The problem with this is that this policy may easily lead to standardized decision-making where the sole fact of entering from a safe third country may result the automatic decision of rejection[75]. As it did so in Hungary's practice. And this is contrary to the standards of the ECHR and the ECtHR. The Court established in 2017 in the *Ilias and Ahmed v. Hungary* case that applying the safe third country policy cannot result that the asylum application, hence the RSD is disregarding the individual circumstances on why the applicant did not seek asylum there[76]. This individualised and in substance assessment must also cover the principle of *non-refoulment*[77]. It would violate the prin-

[71] Cf. Ibid., Article 38.1.

[72] European Court of Human Rights, *Research Division*, p. 7, para. 6; *Ilias and Ahmed v. Hungary*, para. 152, 163.

[73] Z. SULLER, *How the Safe Third Countries Concept Results in Prohibited Non-Refoulement and What Are the Limits of Forum Shopping in Migration?*, in *Acta Humana*, 2022, no. 3, p. 188.

[74] V. MORENO-LAX, *The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties*, in G.S. GOODWIN-GILL, P. WECKEL (eds.), *Migration and Refugee Protection in the 21st Century: Legal Aspects*, The Hague Academy of International Law Centre for Research, Leiden, 2015, pp. 665-721, p. 671.

[75] *Ilias and Ahmed v. Hungary*, para. 158; AEDH, EuroMed Rights, FIDH: "Safe" countries: A denial of the right of asylum, May 2016, p. 8. Available at: https://www.ohchr.org/Documents/Issues/MHR/ReportLargeMovements/FIDH2.pdf; J. IVÁN, *Where Do State Responsibility Begin and End? Border Expulsions and State Responsibility*, in M. O'SULLIVAN, D. STEVENS (eds.), *States, the Law and Access to Refugee Protection: Fortresses and Fairness*, Oxford and Portland, 2017, p. 61.

[76] *Ilias and Ahmed v. Hungary*, para. 134, 137, 152; *N.D. and N.T. v. Spain*, para. 188.

[77] *Ilias and Ahmed v. Hungary*, para. 138, 145.

ciple if the State sends the asylum seeker back to the entry State where non-refoulement is not respected[78]. If non-refoulement is disregarded there it can easily cause a chain of refoulments and the asylum seeker is deprived of his rights, putting his life or health at danger[79]. This unlawful practice must be avoided by ensuring to revise the presumption in every single application making sure that even in case of a rejection, the expulsion is carried out in an orderly and lawful manner[80].

2. *Frontex's illegal practices on sea*

After some vast scandals which involved Frontex and the Greek authorities in systematic pushbacks, the Chief of the EU border control agency had been replaced by Hans Leijtens[81] who claimed that pushbacks are illegal and Frontex will not be involved with them in the future[82]. What were these practices? An OLAF report indeed presented crucial evidence on the involvement of Frontex in systematic human rights violations[83]. However, the media has also reported a chain of cases where it was not Frontex who carried out the pushbacks

[78] Ibid., paras. 158-159.

[79] R. CORTINOVIS, *Research Social Platform on Migration and Asylum, Discussion Brief - The Role and Limits of the Safe Third Country Concept in EU Asylum Policy*, p. 9. Available at: https://ec.europa.eu/research/participants/documents/downloadPublic?documentIds=080166e5bdba4e1e&a ppId=PPGMS.

[80] *Ilias and Ahmed v. Hungary*, para. 161.

[81] Frontex, *Management Board appoints Hans Leijtens new Frontex Executive Director*, https://frontex.europa.eu/media-centre/management-board-updates/management-board-appoints-hans-leijtens-new-frontex-executive-director-dxiH6Y.

[82] O. BIZOT, *New Frontex chief vows to end illegal pushbacks of migrants at border*, in *Euronews*, https://www.euronews.com/my-europe/2023/01/19/new-frontex-chief-vows-to-end-illegal-pushbacks-of-migrants-at-border.

[83] OLAF, case no. OC/2021/0451/A1, Final Report (hereinafter, OLAF report), availabe at https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/.

but at least had knowledge or even provided thirds State authorities with detailed information about the individual dinghies[84].

The investigative journalism which covered the story and provided the obtained information was the so-called Lighthouse Reports in collaboration with Le Monde, Der Spiegel, SRF Rundschau and Republic. The two years investigation using Frontex's own database published the following practice of Frontex.

Data recorded in its internal Joint Operations Reporting Application (JORA) database, when cross-referenced with other sources, indicates that Frontex was involved in at least 22 verifiable cases where people were put on life rafts before being pushed back to Turkey over the course of 18 months between March 2020 and September 2021.

The estimated 957 people involved, according to JORA data, would therefore have been placed in dangerous and life-threatening situations after being spotted by Frontex assets in the Aegean. In two cases, people had reached Greek islands before being put on life rafts and left adrift on the open sea.

The real number of pushbacks undertaken with Frontex involvement, however, is likely to be much higher. In the same time period, Frontex recorded its own role in 222 incidents listed as "prevention of departure", involving 8,355 people.

The term "prevention of departure" is commonly used to report practices better known as pushbacks, illegal under Greek, EU and international law. This was confirmed in interviews with several sources within Frontex as well as the Greek authorities.

The incidents have an almost identical description: a Frontex asset (plane, helicopter, vessel, or drone) detects a migrant boat crossing from Turkey and warns the Greek Coast Guard. The Coast Guard informs the Maritime Rescue Coordination Centre in Greece and Turkey, after which the Turkish Coast Guard returns the boat to Turkey. The incidents are registered in JORA as "prevention of de-

[84] E. MICHON, *Migrants abandonnés en mer: l'agence Frontex complice?*, in *Le Monde*, https://www.lemonde.fr/podcasts/article/2022/05/19/migrants-abandonnes-en-mer-l-agence-frontex-complice_6126729_5463015.html.

parture", and include the estimated number of people stopped from entering the EU, and a tick-box to signal Frontex involvement.

They were put in life-threatening situations on the open sea, left adrift on inflatable vessels without engines until the Turkish Coast Guard picked them up[85].

In the European Parliament, an MP connected the report with another one informing about clandestine prisons in EU borders[86] and asked the Commission whether it was true that Frontex was involved in this practice and the pushbacks[87]. The Commission provided a laconic answer with no use at all, and practically only pointed to MSs as being responsible for investigating any malpractices.

The Commission is deeply concerned about all reports and allegations of pushbacks and mistreatment. Member States have an obligation under EU law to manage their borders in full respect of fundamental rights and in compliance with the Charter of Fundamental Rights of the European Union (the Charter).

The competence to investigate such allegations lies with the national authorities responsible for ensuring respect and protection of fundamental rights. The European Border and Coast Guard Agency (Frontex) is obliged to guarantee the protection of fundamental rights in the performance of its tasks[88].

[85] Lighthouse Reports: Frontex, the EU Pushback Agency, Frontex's internal data shows EU border agency involved in mass pushbacks. Published by Emmanuel Freudenthal, Bashar Deeb, Gabriele Gatti, Francesca Pierigh, Htet Aung, Eva Constantaras, Klaas van Dijken, Jack Sapoch, Giorgos Christides, Steffen Lüdke, Julia Pascual, Tomas Statius, Lukas Häuptli, Michael Zollinger, Carlos Hanimann, Keto Schumacher on 6 May 2022, available at: https://www.lighthousereports.com/investigation/frontex-the-eu-pushback-agency/.

[86] Liselotte Mas, Lighthouse Reports and Marceau Bretonnier, *Refugees held in cage on EU's border as Frontex agents watched*, in *Le Monde*, 8 December 2022, available at https://www.lemonde.fr/en/international/article/2022/12/08/refugees-held-in-cage-on-eu-s-border-as-frontex-agents-watched_6006987_4.html.

[87] Question for written answer E-004030/2022 to the Commission, Rule 138, Peter van Dalen (PPE), *Reports on clandestine prisons and pushbacks at EU external borders*, 8 December 2022.

[88] Answer given by Ms Johansson on behalf of the European Commission, E-004030/2022(ASW) 20 February 2023.

However, it was not true that investigation is only the responsibility of the MSs. The OLAF already made a report in 2021. The OLAF report of course concentrated on the accountability aspects and the possible frauds relating to the obscure practices of Frontex, however, the report has a role of officially establishing facts crucially linked to the pushbacks and human rights violations.

OLAF received information via post on 8 October 2020 with detailed information and a wide range of pieces of evidence on possible witnessing by FRONTEX-deployed assets (Multipurpose Aerial Surveillance – MAS) of illegal pushbacks involving the Hellenic Coast Guard (HCG).

Some of the allegations, in particular those referring to FRONTEX covering or being involved in illegal pushbacks of migrants, received wide coverage, with articles being published during 2020 on several online media outlets (EU Observer, Bellingcat, De Spiegel, Respond, and others)[89].

The OLAF report recalled the report of Frontex's Fundamental Rights Office which stated that pushback is not a legal term, and it is not defined in EU law. But OLAF also stated that the *terminus* refers to "the controversial practice of intercepting third country migrants as they cross the land borders of a State or enter the territorial waters, and pushing them back into another jurisdiction" and it is illegal under EU law and the ECHR "firstly, when it breaches the principle of «non-refoulement» and, secondly, when it is inconsistent with the international law of the sea"[90].

Consequently, the legal assessment did not cover pushbacks as such, but "Evidence collected" and the "Facts established" chapters of the report gathered information and evidence thereon. The report referred to the fact-finding investigation of the European Parliament[91] which found no conclusive evidence on the *direct* performance of pushbacks or collective expulsion by Frontex, but found evidence of fundamental rights violations in Member States with which it had a joint operation, but failed to address and follow-up on these violations

[89] OLAF Report 1. 1. p. 9.
[90] Ibid. 1. 5. 4. p. 15.
[91] Ibid. 1. 1. p. 10.

promptly, vigilantly and effectively. As a result, FRONTEX did not prevent these violations, nor reduced the risk of future fundamental rights violations[92].

As for the own investigation and assessment of OLAF, the following facts were established in the report[93].

Frontex did not ensure compliance with the applicable Standard Operating Procedures on Serious Incident Reporting while dealing with some incidents involving Frontex[94]. Decision-makers decided to relocate a Frontex aerial asset to a different operational area of activity. One reason for doing so appears to have been to avoid witnessing incidents in the Aegean Sea with a potential FR [fundamental rights] component[95].

Frontex received conclusive information about the potential violation of fundamental rights in the context of operations coordinated by Frontex itself, but decision-makers decided not to share these relevant pieces of information and date with the Fundamental Rights Office. This affected the capacity of FRONTEX to fully comply with its tasks of contributing to the uniform application of the Union law on fundamental rights, including the Charter of Fundamental Rights of the EU, and ensure the compliance with, the respect for, and the protection of, the fundamental right in all of its activities at the external borders[96].

As a conclusion, it can be stated that in light of the media investigation and the OLAF report, there are substantial evidence for the involvement of Frontex in *indirect* pushbacks. In other words, Frontex knowingly outsourced pushbacks to MSs and especially to third states, in this particular case, to Turkey.

[92] European Parliament, LIBE Committee on Civil Liberties, Justice and Home Affairs, Frontex Scrutiny Working Group: Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations (Rapporteur: Tineke Strik) Working Document, 14 July 2021. p. 5.

[93] NB. the report concentrated on persons, decision-makers and not Frontex *per se*. Here, however, I present them as the acts of Frontex, as in reality it is the case.

[94] OLAF Report. 2. 3. (1) p. 103.

[95] Ibid. 2. 3. (2) p. 103.

[96] Ibid. 2. 3. (5) p. 104.

3. *The Spanish Moroccan border incident*

A similar tragedy occurred at the deadly mass attack of the Spanish border fence in Africa on 24 June 2022[97]. That day a large group of angry migrants decided to storm the fenced of the Spanish border in Melilla by force. The response of the Moroccan authorities, with the alleged involvement of the Spanish Guardia Civil was brutal and deadly. The article published by the Lighthouse report depicts a tragic scene:

Spanish and Moroccan authorities collaborated in approximately 470 pushbacks. In Spain, Guardia Civil officers shot rubber bullets at asylum seekers. In total, 65 rubber bullets were shot by Spanish authorities and at least 85 gas canisters were used, according to Guardia Civil sources.

After hundreds were returned from Spain, our analysis shows that people were left for at least three hours under the sun in Moroccan territory. Several interviewees describe seeing dead bodies on the Moroccan side of the border post.

Despite the many injuries sustained on the day – some of them fatal – medical assistance was not mobilised in time to help people in Morocco or Spain. In Melilla, an ambulance was parked 100 metres from the border, but officials said they couldn't get closer for safety reasons. In Morocco, ambulances were present throughout the day, but they were reportedly used predominantly to remove dead bodies[98].

[97] *Morts de dizaines de migrants à Melilla : ce qu'il s'est vraiment passé à la frontière entre l'Espagne et le Maroc*, in *Le Monde*, available at: https://www.lemonde.fr/international/video/2022/11/29/morts-de-dizaines-de-migrants-a-melilla-ce-qu-il-s-est-vraiment-passe-a-la-frontiere-entre-l-espagne-et-le-maroc_6152186_3210.html.

[98] Lighthouse Reports: Reconstructing the Melilla Massacre, Visual evidence, testimony, ground reporting reveal Spain and Morocco lies. Published by Jack Sapoch, Beatriz Ramalho da Silva, Bashar Deeb, Maud Jullien, Klaas van Dijken Arthur Weil-Rabaud, Aziz Alnour, Alison Killing, Javier Bauluz, José Bautista, Javier Bernardo, Maud Jullien, Salaheddine Lemaizi, Steffen Lüdke, María Martín, Georgia Bempelou, Stefanos Bertakis, Javier G. Angosto, porCausa on 29 November 2022, available at:

The background of the situation involves a security cooperation agreement between Spain and Morocco which practically connected irregular migration and organized crimes[99]. With the normative munition of the agreement, daily attacks on the migrants camping in the near hills became everyday practice. These riots resulted in clashes and ultimately one of the migrant camps caught fire which only stir up the frustration. This happened just a day before the border incident. The next day, around 1,500 people decided to go to the border and storm it. The Moroccan authorities did not intervene the march and let them reach the fence.[100] There were very little information available due to the chaotic scenes, but it was obvious that this is not only a Spanish or Moroccan issue. It had a huge relevance to Europe, and the EU especially. As an EU MP pointed out summarizing the know events: "According to witnesses, the victims, who were trapped in the massive human crush, were forcibly herded together and assaulted. For hours, dozens of them were left to lie injured and dying, with no assistance from the authorities, a tragic situation that should have been avoided, resulting in the death of at least 37 people who had been seeking a better life".

This incident at the border between Spain and Morocco, which cannot be dissociated from the 'Fortress Europe' mentality and EU migration policy in general, claimed one of the heaviest tolls in terms of death and injury. It was not, however a unique or isolated example but merely the latest in an innumerable series of tragedies along land and sea borders with third countries[101].

https://www.lighthousereports.com/investigation/reconstructing-the-melilla-massacre/.

[99] Statewatch: Spain and Morocco renew security cooperation agreement linking organised crime and "irregular" immigration, 28 April 2022, available at: https://www.statewatch.org/news/2022/april/spain-and-morocco-renew-security-cooperation-agreement-linking-organised-crime-and-irregular-immigration/.

[100] Statewatch: The Melilla border deaths represent a new phase in the bloody story of Fortress Europe, 14 September 2022, available at: https://www.statewatch.org/analyses/2022/the-melilla-border-deaths-represent-a-new-phase-in-the-bloody-story-of-fortress-europe/.

[101] Parlimentary Question for written answer E-002358/2022 to the Commission, Rule 138, Sandra Pereira (The Left), 30 June 2022.

The Commission deplored the loss of lives but did not take any responsibility for the tragedy, instead pointed to Morocco and Spain and their promise to investigate[102]. However, such investigation was not visible at all, even after a year. It seems that the authorities tried to cover up the whole issue[103].

Amnesty International prepared a detailed and thorough report on the events which revealed what happened factually, and it also provided a legal analysis on the breached international rules. The report found that the migrants attempted to open the main gate and to climb the border fences. The two-hours long Spanish and Moroccan response resulted around 30 deaths and hundreds of injuries[104]. These figures were the result of the extensive use of force including tear-gas, rubber bullets and even rocks, especially after cornering the migrants into tight spaces.

The danger was compounded when people began falling from the top of the barriers they were climbing, either because of difficulty breathing due to tear gas, due to the force of being hit by stones, or to the pressure of trying to cross the border quickly and escape the attacks. Moroccan border forces continued to fire tear gas at those attempting to climb the wall, and later chased them and hit them with sticks[105].

Spanish security forces in Melilla used force unlawfully, including at times with punitive intent or effect, and misused a range of less-lethal weapons at their disposal such as rubber balls fired in the direction of Barrio Chino's enclosure and at people on the fences, smoke canisters and tear gas. Spanish security officers repeatedly used pepper spray at close distance to prevent the entry into Melilla of people who were trapped and were being attacked by Moroccan and Spanish authorities inside the Barrio Chino's enclosure and that they also repeatedly shot tear gas in the direction of the enclosed space of Barrio Chi-

[102] Answer given by Ms Johansson on behalf of the European Commission to Parliamentary question - E-002358/2022(ASW), 30 September 2022.

[103] Human Rights Watch: Spain/Morocco: No Justice for Deaths at Melilla Border Families Still Seeking Loved Ones 'Disappeared' Entering Spanish Enclave, 22 June 2023.

[104] Ibid., p. 29.

[105] Ibid., pp. 30-1.

no over a two hour period, where they knew or should have known that the gas would affect people who were trapped there with no possibility to escape[106].

The report showed that despite the desperate need, the injured did not receive medical helps neither by the nearby Moroccan ambulance, nor the Spanish ones[107]. The fact that a large number of migrants were returned immediately without due process of law was reaffirmed by the Spanish Ombudsman[108]. Despite the involvement of both Spanish territory, hence Spanish jurisdiction and the role of the Spanish forces, Spain's prosecutor claimed that no criminal activities of the Spanish forces were found and the migrants were hostile and violent towards them. Accordingly, no procedures were initiated[109].

Part III. Legal analysis and conclusion

1. *Are these practices illegal pushbacks?*

This part will assess whether the presented practices constitute pushback, and if so, whether they are permissible under the ECtHR system. It is worth highlighting again that pushbacks are expulsions without an individualized, in substance assessment of the refugee status. It is regarded as an unlawful practice since international law determines the right to asylum as the right of all aliens who cross the border. And if the necessary RSD is not performed, or not carried out in an individualised way, it constitutes a breach of law. The practice of the ECtHR on the other hand established that should the State resort

[106] Ibid., p. 32.

[107] Ibid., pp. 35-6.

[108] Defensor del Pueblo, Comunicación Incidentes del pasado 24 de junio, *El Defensor avanza sus primeras conclusiones sobre lo sucedido en el perímetro fronterizo de Melilla*, 14 October 2022, available at: https://www.defensordelpueblo.es/noticias/sucesos-melilla/.

[109] *Prosecutor clears Spanish forces over Melilla deaths*, in *Le Monde*, 26 September 2023, available at: https://www.lemonde.fr/en/europe/article/2022/12/23/prosecutor-clears-spanish-forces-over-melilla-deaths_6008863_143.html.

to pushbacks as an immediate measure in case of the illegal and violent entry of a large group of migrants who otherwise had the opportunity to enter lawfully and seek asylum, the State does not violate the law. At the end of this short assessment, a simplified table may help to highlight the underlying logic behind the analysis.

As for the first policy, the safe third State concept, it may not seem like a practice fitting to pushbacks, simply because in the ordinary meaning, one tends to imagine that pushback is always a response to a storm against the border. However, it is not necessarily the case. Pushback refers to collectivized refuse-entry orders without individual assessments. Accordingly, and perhaps surprisingly, the safe third country list and the policy it entails fits under the definition of pushbacks. There is the element of expulsion, as the applicants face automatic refuse-entry and expulsion, and indeed, due to the presumption, which in practice were rather absolute than rebuttable, the individual circumstances were not regarded. The refuse-orders were not only automatic but standardized. The exceptions which would render the practice nevertheless lawful, are missing. Although it may be the result of illegal entry, in case of Hungary it was not necessarily the case, and especially, there was no attempt for *en masse* and violent storms. Hence, the concept is a pushback, and no exception can be accepted, it remains to be an illegal one. However, apart from the human rights violations naturally being part of an illegal pushback, no other systematic human rights violations were present as part of the safe third State concept.

The described, mostly covert Frontex policy is also a tricky one as it rather seems like an indirect pushback or outsourced pushback. In the particular case, it was outsourced to Greece, and especially, to Turkey. Nevertheless, the above simplified definition can be easily applied to Frontex, especially knowing that Frontex did not only had knowledge on the Greek and Turkish operations, but it practically coordinated or at least assisted to these practices which makes Frontex at least a complicit to the internationally wrongful acts. The first element, expulsion needs some explanation. In this case, formal rejection of entry may not have been present, the whole idea was that instead the official procedures of Frontex and Greece, it should be Turkish authorities who "find" and turn back the migrants on the sea. In this case,

expulsion practically means turning the migrant back, and doing so without any identification and any RSD. Although these instances always involve illegal entry through the sea, and in most cases by large number of migrants in crowded boats, the last element of a lawful pushback is missing. That is the violent part. These attempts were not violent, hence there is no need for an immediate measure. Accordingly, the practice is an illegal (outsourced) pushback. Due to the highly dangerous practice to leave migrants on their own on the sea, that form of the operation also entails other human rights violations.

The Melilla tragedy is *prima facie* an evident example of an illegal pushback. However, careful attention reveals, that *stricto sensu*, it was actually a lawful pushback under the exception of the ECtHR standards. But it certainly does not make the whole operation lawful. Grave and heinous human rights violations escorted the incident. Hence, going through the elements of the definition, indeed expulsion was there, migrants were refused to enter and they have been returned to Morocco. *Sine dubio*, these returns were made in a collective manner, absolutely lacking any individual assessment. However, the elements of exception also check out. There was indeed an attempt for illegal border crossing, a storm was prepared. It was violent, migrants aimed to use force and their sheer numbers to siege the gates and the fences. And undoubtedly, more than a thousand participants make the *en masse* character undeniable. Therefore, pushback, as an immediate response and measure against such an indeed dangerous attempt would have been lawful. It would have been lawful to reject entry and return these migrants in a *quasi*-collective way without individual RSDs. But anything else above that were grave violations of international law, especially human rights and quite possibly even international crimes were committed.

PART III

Detention of Migrants and Vulnerable Situations as (also) a Rule of Law Concern

ADMINISTRATIVE IMMIGRATION DETENTION AS A PUNITIVE MEASURE: IS IT TIME FOR A NEW STANDPOINT?

Lorenzo Bernardini [*]

1. *Setting the scene*

The utilization of immigration detention as a mechanism for managing migration flows has been a topic of intense discourse and contention within the European Union (EU) in recent years[1]. Driven by the imperative to implement robust border control strategies, the EU Member States have progressively established an *ad hoc* framework of regulations explicitly targeting third-country nationals (TCNs), whether deemed irregular migrants or applicants for international protection. Among other legal tools, the administrative deprivation of personal liberty has emerged as a deemed flawless, and notably effective,

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[1] See, among others, R. PALLADINO, *Il trattenimento ai fini dell'allontanamento: evoluzioni giurisprudenziali e normative a confronto*, in http://www.aisdue.eu/, 25 January 2023, pp. 146-165 and C. COSTELLO, *Immigration Detention: The Grounds Beneath Our Feet*, in *Current Legal Problems*, 2015, no. 1, pp. 143-177.

measure in ensuring a streamlined control over migration flows[2]. This is particularly evident in the extensive physical oversight that national authorities are thereby authorized to exercise over against TCNs[3].

The context within which the forthcoming analysis will be conducted revolves around a juxtaposition – or, rather, a clash – of two traditional and old-fashioned paradigms. Firstly, the coercive authority of States to detain foreign nationals, that is, "non-citizens", whose presence within their territory is not in keeping with the domestic immigration law framework, a power directly derived from the State's customary prerogative to control its borders[4]. The latter authority epitomizes *per se* a prominent manifestation of a State's sovereign power[5]. Secondly, the paramount necessity of upholding universal fundamental rights, with a primary focus on the right to personal liberty, as enshrined in various European and international legal instruments[6], including (but not limited to) Article 5 of the European Convention on Human Rights (ECHR), Article 6 of the Charter of Fundamental Rights of the European Union (CFREU), Article 7 of the American Convention on Human Rights (ACHR), and Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

Central to this clash is the assertion by States of their inherent right to exercise control over their own territory. I have argued elsewhere that it is precisely this prerogative that provides the domestic justifica-

[2] L. BERNARDINI, *Detained, criminalised and then (perhaps) returned: the future of administrative detention in EU law*, in M.G. COPPETTA (ed.), *Immigration, personal liberty, fundamental rights*, Milano, 2023, pp. 59-73.

[3] See, among others, R. PALLADINO, *La detenzione dei migranti. Regime europeo, competenze statali, diritti umani*, Napoli, 2018, *passim*, and G. CORNELISSE, *Immigration Detention and Human Rights*, Leiden, 2010, *passim*.

[4] M. FLYNN, *Immigration Detention and Proportionality*, Global Detention Project Working Paper No. 4, 2011, p. 10 ff.

[5] See M. PICHOU, *«Crimmigration» and Human Rights: Immigration Detention at the European Court of Human Rights*, in V. FRANSENN, C. HARDING (eds.), *Criminal and Quasi-Criminal Enforcement Mechanisms in Europe: Origins, Concepts, Future*, London, 2022, p. 251.

[6] For a broad analysis, see C. COSTELLO, *The Human Rights of Migrants and Refugees in European Law*, Oxford, 2015, pp. 279-314.

tion for taking criminal or administrative measures against foreign individuals[7].

Against this background, it is worth recalling that, typically, the deprivation of personal liberty serves as the traditional, albeit exceptional, means by which justice systems enforce criminal law. Notably, detention may serve as both a precautionary measure (e.g., pre-trial detention) and a punitive measure (i.e., imprisonment *stricto sensu*), depending on whether the individual is still a suspect/accused person or has already been served with a final conviction, respectively. When criminal detention is employed as a means of deterrence against migrants (e.g., criminalizing irregular entry or stay of TCNs), it can lead to an overlap between criminal law and immigration policies, commonly referred to as the «crimmigration» phenomenon[8].

In that context, the deprivation of liberty is applied within the established framework of criminal law to penalize the individual for a violation of specific provisions[9]. Importantly, this entails *inter alia* that the individual is entitled to various robust safeguards that are recognized at the European level, including fair trial rights as enshrined in

[7] L. BERNARDINI, *The protection of the fundamental rights of migrants within the ECHR legal framework. From universalism of guarantees to legal particularism*, in M.G. COPPETTA (ed.), *Immigration, Personal Liberty, Fundamental Rights*, cit., pp. 18-21.

[8] This is the well-known expression coined by J. STUMPF, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, in *American University Review*, 2006, no. 2, pp. 367-419. On the employment of criminal law as «a mere façade designed to cover with the criminal law's legitimating mantle a system of administrative measures aimed at reducing illegal immigrants to the dehumanized condition of non-persons at the mercy of the state», see A. SPENA, Iniuria Migrandi*: Criminalization of Immigrants and the Basic Principle of the Criminal Law*, in *Criminal Law and Philosophy*, 2014, no. 8, pp. 635-657, spec. p. 654.

[9] This includes, among other measures, the implementation of brand-new criminal offenses specifically targeted to TCNs. This approach aligns with the concept theorized by Günther Jakobs several years ago, known as the «criminal law of the enemy» (*Feindstrafrecht*). In the interpretation put forth by the German jurist, the "foreigner" may easily be embodied in the notion of "enemy" – displaced from their homeland, devoid of a precise identity, culturally identifiable as "other", and susceptible to various labels, predominantly that of a "criminal". For further references, see L. BERNARDINI, *La detenzione degli stranieri tra "restrizione" e "privazione" di libertà: la CEDU alla ricerca di Godot*, in *Dir. Imm. e Cittad.*, 2022, no. 1, pp. 75-95.

Article 6 ECHR and in the EU so-called "Stockholm Directives", addressing procedural safeguards in the context of criminal proceedings[10], such as the right to interpretation and translation[11], the right to be informed about the case[12], the right to silence, to be present at trial and to be presumed innocent until a final conviction[13], the right to access to a lawyer[14], the right to legal aid[15].

However, it is a prevailing practice that TCNs are routinely subjected to the deprivation of their personal liberty *outside criminal proceedings*. Administrative detention – a mechanism for migration control whose legitimacy has rarely been questioned at the international level – has conventionally been employed by Member States *vis-à-vis* both irregular third-country nationals (i.e., detention for the purpose of return, or pre-removal detention) and applicants for international protection while awaiting the outcome of their asylum applications (i.e., asylum detention)[16]. Hence, the primary aspect that demands our scrutiny pertains to the utilization of a conventional criminal law tool

[10] For a comprehensive analysis, see S. ALLEGREZZA, *Toward a European constitutional framework for defence rights*, in S. ALLEGREZZA, V. COVOLO (eds.), *Effective Defence Rights in Criminal Proceedings*, Milano, 2018, pp. 3-34.

[11] Directive 2010/64/EU of the European Parliament and of the Council *on the right to interpretation and translation in criminal proceedings*, 20 October 2010, OJ L 280, 26 October 2010.

[12] Directive 2012/13/EU of the European Parliament and of the Council *on the right to information in criminal proceedings*, 22 May 2012, OJ L 142, 1 June 2012.

[13] Directive (EU) 2016/343 of the European Parliament and of the Council *on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings*, 9 March 2016, OJ L 65, 11 March 2016.

[14] Directive 2013/48/EU of the European Parliament and of the Council *on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*, 22 October 2013, OJ L 294, 6 November 2013.

[15] Directive (EU) 2016/1919 of the European Parliament and of the Council *on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings*, 26 October 2016, OJ L 297, 4 November 2016.

[16] See, among others, I. MAJCHER, M. FLYNN, M. GRANGE, *Immigration Detention in the European Union. In the Shadow of the "Crisis"*, Cham, 2020, p. 453.

(i.e., detention) for immigration purposes, which inherently fall within the administrative law realm[17].

As evidence of the complex nature of administrative detention, several definitions of the latter have been embraced over the years. These encompass the concept of «the deprivation of liberty of non-citizens because of their status»[18] or «the deprivation of an individual's liberty, usually of an administrative character, for an alleged breach of the conditions of entry, stay or residence in the receiving country»[19]. Furthermore, administrative detention has been characterized as «a tool employed to exercise state authority over immigration control»[20], and lastly, it has been described as «a substantial instrument, *almost punitive in nature*, explicitly targeting specific categories of individuals with the aim of safeguarding borders from "undesirable" immigration»[21].

Formally, the purpose of this measure can be traced back to the State's imperative to assert control over its territory and, should it be the case, to prevent abusive, ill-founded or unsubstantiated asylum applications. In the EU legal framework, detention for the purpose of return is expressly allowed by Articles 15-17 of the so-called "Return Directive"[22], whereas asylum detention is expressly allowed by Articles 8-11 of the so-called "Reception Directive"[23] and Article 18 of the Dublin III Regulation[24]. By analogy, Article 5(1)(f) ECHR permits

[17] See, with specific regard to asylum detention, C. BOITEUX-PICHERAL, *L'équation liberté, securité, justice au prisme de la rétention des demandeurs d'asile*, in V. BEAUGRAND, D. MAS, M. VIEUX (eds.), *Sa justice. L'Espace de Liberté, de Sécurité et de Justice*, Bruxelles, 2022, pp. 605-629.

[18] M. FLYNN, *Immigration Detention*, cit., p. 7.

[19] UNHCR, *Monitoring Immigration Detention: Practical Manual*, 2014, p. 20.

[20] R. PALLADINO, *La detenzione*, cit., p. 14.

[21] G. CORNELISSE, *Immigration Detention*, cit., p. 24, emphasis added.

[22] 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 December 2008, OJ L 348, 24 December 2008.

[23] Directive 2013/33/EU of the European Parliament and of the Council *laying down standards for the reception of applicants for international protection (recast)*, 26 June 2013, OJ L 180, 29 June 2016.

[24] Regulation (EU) No 604/2013 of the European Parliament and of the Council *establishing the criteria and mechanisms for determining the Member State responsible*

Member States to employ non-criminal detention measures for immigration purposes, namely, «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». The adoption of multiple pieces of legislation addressing this issue has facilitated – and, to some extent, fostered – a systematic trend in this regard[25], normalizing the employment of administrative detention across the EU[26].

It is difficult to ignore that such a trend has likely been embraced by national authorities, as it has allowed them, in the context of implementing immigration detention measures, to circumvent significant procedural and substantive safeguards inherent in criminal justice systems[27]. Indeed, in contrast to criminal law realm – evocatively referred to as «the privileged place of guarantees»[28] – the more administrative detention is framed and regulated under the framework of administrative law, the fewer protections are afforded to TCNs.

Nevertheless, the perception that this may entail the imposition of

for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 26 June 2013, OJ L 180, 29 June 2013.

[25] See, in this regard, L. ARBOGAST, *La détention des migrants dans l'Union européenne: un business florissant. Sous-traitance et privatisation de l'enfermement des étrangers*, Migreurope, 2016. Indeed, this trend has already been observed by O. CLOCHARD, S. LAACHER, *Vers une banalisation de l'enfermement des étrangers dans l'Union européenne*, in *Bulletin de l'association de géographes français*, 2006, no. 1, pp. 121-136.

[26] R. CHERCHI, *Il trattenimento dello straniero nei centri di identificazione e di espulsione*, in *Quest. giust.*, 2014, no. 3, pp. 50-51.

[27] See, in this critical vein, D. LOPRIENO, *"Trattenere e punire". La detenzione amministrativa dello straniero*, Napoli, 2018, p. 213; M. BONFIGLIOLI, *Non delitto e castigo. Il trattenimento degli stranieri irregolari nei CIE tra istanze di effettività dei rimpatri e negazione dell'*habeas corpus, in *Sicurezza e Scienze Sociali*, 2013, no. 1, pp. 190-191; A. CAPUTO, *La detenzione amministrativa degli stranieri e la Costituzione: interrogativi sul* diritto speciale *degli stranieri*, in *Dir. Imm. e Cittad.*, 2000, no. 1, p. 53 and further references cited therein.

[28] L. FERRAJOLI, *Principia iuris. Teoría del derecho y de la democracia*, vol. II, *Teoría de la democracia*, Madrid, 2013, p. 347: «el derecho penal, sustancial y procesal es, al menos en su modelo axiológico, el lugar privilegiado de las garantías, primarias y secundarias, de los derechos fundamentales individuales de inmunidad y de libertad».

a «detention without a crime»[29] or, more precisely, a «punishment without a definite crime»[30] which implies a concealed form of penalty against the individuals involved appears to be more than a mere unsupported stance. Instead, it has been aptly observed that administrative detention *de facto* aligns with the punitive rationale of criminal measures[31]. Besides, it is essential to point up that there are several procedural guarantees accompanying criminal proceedings do not extend to administrative detention procedures[32].

In this regard, it has additionally been argued that the "demarcation line" between administrative and criminal measures becomes extremely blurred when administrative deprivation of liberty is in question[33]. This standpoint is unsurprising, given that, at the international level, it has been consistently emphasized that «detention is a tool that characterizes criminal law as opposite to administrative law which, by nature, should resort to alternative interim measures to detention»[34].

The misalignment between the ostensibly non-punitive formal character of administrative detention and its effectively punitive implementation is the cornerstone of the proposed analysis. The content of this chapter will pivot around the proposition that even though administrative detention is presented as a non-punitive measure, it, in fact, shall trigger a spectrum of procedural safeguards for the individual involved, due to its inherently punitive characterization. These

[29] G. CAMPESI, G. FABINI, *La detenzione della «pericolosità migrante»*, in *Materiali per una storia della cultura giuridica*, 2017, n. 2, p. 516.

[30] D. WILSHER, *Immigration Detention: Law, History, Politics*, Cambridge, 2012, p. 153.

[31] See, among others, C. COSTELLO, *Immigration Detention*, cit., p. 146; G. CAMPESI, G. FABINI, *Immigration Detention as Social Defence: Policing 'Dangeours Mobility' in Italy*, in *Theoretical Criminology*, 2020, no. 1, p. 66; M. PIERDONATI, *La restrizione della libertà personale nel "carcere amministrativo" dei C.I.E.: tradimento e riaffermazione del principio di legalità*, in R. DEL COCO, E. PISTOIA (eds.), *Stranieri e giustizia penale*, Bari, 2014, p. 243.

[32] I. MAJCHER, *The Effectiveness of the EU Return Policy at All Costs: The Punitive Use of Administrative Pre-removal Detention*, in N. KOGOVŠEK ŠALAMON (ed.), *Causes and Consequences of Migrant Criminalization*, Cham, 2020, pp. 120-124.

[33] R. PALLADINO, *La detenzione dei migranti*, cit., p. 12.

[34] UN GENERAL ASSEMBLY, *Report of the Special Rapporteur on the human rights of migrants, Mr. Jorge Bustamante*, 65th Section, 3 August 2010, A/65/2022, para. 27.

safeguards – traditionally associated only with criminal proceedings – are presently not applicable in the context of administrative detention, preventing the ability of the individual in question from invoking and benefiting from these guarantees, despite the punitive nature of the measure at stake.

2. *Unveiling the tangible nature of administrative detention – a punishment in disguise?*

The premise of this Section is straightforward, namely, that «there is a dissonance between the administrative form of pre-removal detention and its punitive use in practice»[35]. By analogy, I would maintain that a similar dissonance exists concerning asylum detention. Essentially, all forms of administrative detention, due to their inherent features, tend to exhibit an underlying punitive nature.

I have illustrated elsewhere that this is not a novel approach to administrative detention. In the Inter-American Human Rights System (IAHRS), for instance, the punitive nature of administrative deprivation of liberty for immigration purposes has been plainly established in the well-settled case law of the Inter-American Court of Human Rights (IACtHR)[36]. Significantly, the IACtHR not only dubbed administrative detention as a «punitive custodial measure» or a «punitive penalty» but also categorized it as an «administrative measure with punitive characteristics»[37]. This label, suggesting that the measure may function as a criminal tool "in disguise", appears to be acknowledged within the IAHRS based solely on the occurrence of a deprivation of liberty in the material case, regardless of whether such a measure is connected to a criminal offence.

[35] I. MAJCHER, *The Effectiveness of the EU Return Policy at All Costs*, cit., p. 120.

[36] See L. BERNARDINI, *"Criminal or nay?" Migrants' administrative detention within the IAHRS: lessons (not) learned by Europe*, in *Revista Brasileira de Direito Processual Penal*, 2022, no. 3, pp. 1559-1564 for further references.

[37] See Inter-American Court of Human Rights, judgment of 23 November 2010, *Vélez Loor v. Panama. Excepciones Preliminares, Fondo, Reparaciones y Costas*, paras. 167, 163 and 172, and 170 respectively.

Is it possible to achieve a similar outcome within the European legal framework?

Despite the growing attention paid to this subject, not only in academic legal circles but also in political discussions, there remains a shortage of empirical evidence regarding the very nature of administrative detention measures in Europe. These tools display a complex and multifaceted character to the extent that it has been aptly noted that, alongside non-punitive administrative functions, immigration detention laid down in EU law may also fulfill the traditional objectives of the criminal justice system[38].

Against this background, this Section aims at exploring an alternative perspective on administrative detention, with the purpose of revealing the numerous *de facto* punitive elements embedded within its normative framework[39]. As a consequence, it will be finally argued that TCNs deprived of their liberty for immigration purposes should be entitled to enjoy the full range of procedural safeguards traditionally associated with criminal proceedings, as enshrined in Article 6 ECHR and Article 47 and 48 CFREU.

2.1. *Of (nuanced) boundaries of* matière pénale *in the European legal framework*

Both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) have developed an extensive and well-established body of case law concerning the concept of «criminal charge» or «accusation en matière pénale», which forms the kernel of both Article 6 ECHR and Articles 47 and 48 CFREU. The substantial and procedural guarantees enshrined in the former provision – fundamentally applicable only when the existence of a criminal charge is established against a suspect and/or an accused person – set

[38] Specifically, detention «may also amount to a punitive instrument for crime control», according to I. MAJCHER, C. DE SENARCLENS, *Discipline and Punish? Analysis of the Purposes of Immigration Detention in Europe*, in *AmeriQuest*, 2014, no. 2, p. 11.

[39] See, for a broad analysis, A. CAVALIERE, *Le vite dei migranti e il diritto punitivo*, in *Sistema Penale*, 2022, no. 4, pp. 43-71.

the benchmark for minimum substantial and procedural guarantees safeguarded by the latter provisions, as per Article 52(3) CFREU.

The analysis will thus begin by delving into the florid ECtHR's case law, aiming to define the minimum boundaries of the concept of a «criminal charge» as per Article 6 ECHR. The Strasbourg Court has identified several principles to delineate these boundaries, which, for the purpose of the present study, will subsequently be employed to the essential characteristics of immigration detention outlined by both European frameworks. This assessment aims to unveil the punitive nature of immigration detention.

Since the seminal *Engel* judgment, the ECtHR has developed a tripartite test designed to meticulously depict the criminal nature of a legal instrument under scrutiny: (i) initially, due consideration is accorded to the formal definition provided by domestic law; (ii) subsequently, an in-depth analysis is undertaken regarding the intrinsic nature of the offense and the accompanying sanction; (iii) finally, the level of severity inherent in the measure in question takes center stage[40]. These criteria are, notably, alternative and not cumulative[41]. It is also worth noting that indications from domestic law have a relative value, as it is not sufficient to exclude the penal nature of a sanction merely because it is not defined as such by domestic law[42]. Furthermore, the purpose pursued by the measure in question should be examined – if it involves the general interests of society normally protected by criminal law, this aspect should be taken into consideration[43]. Finally, regarding

[40] European Court of Human Rights, Plenary, judgement of 8 June 1976, application nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, *Engel and Others v. the Netherlands*, para. 82.

[41] European Court of Human Rights, Grand Chamber, judgement of 21 November 2006, application no. 73053/01, *Jussila v. Finland*, paras. 30-31.

[42] European Court of Human Rights, judgment of 27 November 2011, application no. 43509/08, *A. Menarini Diagnostics s.r.l. v. Italy*, para. 39.

[43] This aspect has been emphasized since European Commission of Human Rights, Admissibility, decision of 10 July 1981, application no. 9208/80, *Saraiva De Carvalho v. Portugal*, para. 5 and European Commission of Human Rights, Admissibility, decision of 2 September 1993, application no. 17571/90, *Borrelli v. Switzerland*. See, more recently, European Court of Human Rights, *A. Menarini Diagnostics s.r.l.*, cit., para. 40.

the severity of the measure at stake, the ECtHR has considered in *Grande Stevens* that the additional consequences that the application of the sanction might produce could be relevant in this respect (e.g., the temporary loss of reputation of the representatives of companies affected by the measures issued by market regulation authorities)[44].

As has been rightly noted, the *Engel* criteria, subsequently developed in successive case-law, were first established to acknowledge the criminal law guarantees *vis-à-vis* individuals subjected to an (allegedly) administrative measure – i.e., a disciplinary measure –, for which the Court denied the predominant punitive purpose but which, as it affected personal liberty, was nevertheless considered within the scope of applicability of criminal law guarantees[45]. The consideration that a specific legal instrument may encroach upon the personal liberty of individuals – safeguarded by both Articles 5 ECHR and 6 CFREU – is, therefore, a crucial factor that, while not inherently decisive according to the ECtHR, holds paramount significance in determining whether a measure may be characterized as having a criminal nature. Certainly, when it comes to a legal tool that impinges upon the right to personal liberty, the level of severity of measure at stake, that is, the third of the *Engel* criteria, may be undeniably brought into question.

In light of Article 52(3) CFREU[46], the same *Engel*-oriented stance has been shared by the CJEU. For instance, in *DB*, the latter has maintained that the right to silence as per Article 6 ECHR is «intended to apply in the context of proceedings which may lead to the imposition of administrative sanctions of a criminal nature. Three criteria are relevant to assess whether penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty that the person concerned is liable to incur»[47]. Extending this argument, the examination of whether a par-

[44] See, in this regard, European Court of Human Rights, judgement of 4 March 2014, application no. 18640/10, *Grande Stevens and Others v. Italy*, para. 97.

[45] See L. MASERA, *La nozione costituzionale di materia penale*, Turin, 2018, p. 219.

[46] See the Opinion of AG Kokott delivered on 15 December 2011 in Court of Justice, *Bonda*, case C-489/10, para. 43, ECLI:EU:C:2011:845.

[47] See Court of Justice, judgment of 2 February 2021, *DB v Commissione Nazionale per le Società e la Borsa (Consob)*, case C-481/19, para. 42, ECLI:EU:C:2021:84, which

ticular penalty possesses a criminal character should be conducted in accordance with the *Engel* criteria even within the EU legal framework. As a consequence, if such an evaluation establishes that such a tool holds a criminal nature, the fair trial safeguards outlined in Article 47 and 48 CFREU become applicable.

2.2. *Unveiling the punitive purpose of administrative detention*

Turning back to administrative detention, it is noteworthy that none of the European Courts has ever applied *Engel* criteria in this field. The ECtHR has consistently regarded administrative detention as distinct from the criminal sphere. This latter interpretation can arguably be attributed to the phrasing of Article 5(1)(f) ECHR, which outlines a specific type of deprivation of liberty that markedly differs from the other forms of detention applicable within criminal proceedings (e.g., Article 5(1)(c) ECHR with regard pre-trial detention measures). At present, the ECtHR has not rendered any judgments explicitly endorsing these conclusions[48].

On the contrary, the CJEU has recently found in *Landkreis Gifhorn* that «when ordered for the purpose of removal, the detention of an illegally staying third-country national is intended only to ensure the effectiveness of the return procedure and *does not pursue any punitive purpose*»[49]. In the eyes of the CJEU, it would probably be maintained *mutatis mutandis* that even asylum detention does not pursue any punitive purpose, being devoted to preventing the applicant from absconding or to assessing their right to enter to the territory while waiting for the outcome of the application.

To sum up, the CJEU has rejected categorizing administrative detention as criminal by relying on a *teleological argument*, asserting that such a measure does not serve punitive purposes.

recalls EU Court of Justice, judgment of 20 March 2018, *Garlsson Real Estate and Others*, case C-537/16, para. 28, ECLI:EU:C:2018:193.

[48] In simpler terms, there is no judgment rendered by the Strasbourg Court in which the applicability of Article 6 ECHR has been acknowledged in this context.

[49] Court of Justice, judgment of 10 March 2022, *Landkreis Gifhorn*, case C-519/20, para. 38, ECLI:EU:C:2022:178, emphasis added.

Nevertheless, if the trigger factor for the (allegedly non-criminal) deprivation of liberty is the hampering conduct exhibited by the TCN concerned – who hinders the relevant return or asylum proceedings –, I believe that it might be demanding to disclaim the punitive rationale behind the measure. In this regard, it is worth recalling that the second *Engel* criterion («the very nature of the offence, considered also in relation to the nature of the corresponding penalty»)[50] attaches paramount importance to the *punitive purpose of the measure under scrutiny*[51].

Against this background, it appears that administrative detention aims at punishing the TCN who did not behave "properly", thereby preventing the State from carrying out the relevant proceedings – it essentially acts as a *reaction* against the individual concerned.

This is clearly the case of pre-removal detention, as regulated by Article 15 of the Return Directive, which can be issued against the TCN at stake on the grounds that, in the material case, either «there is a risk of absconding» or «the third-country national concerned avoids or hampers the preparation of return or the removal process»[52]. According to some scholars, this unequivocally demonstrates that the primary objective of the measure is associated with compelling the migrant to collaborate with the authorities and punishing TCNs for their reluctance in cooperating with the State – these characteristics would make plain the tangible punitive nature of the deprivation of liberty imposed upon them[53]. To put it simpler, it is challenging to disregard the fact that «any detention imposed because of deliberate hampering looks like a sanction»[54]. Hence, if this reading is correct, pre-removal

[50] European Court of Human Rights, Plenary, judgement of 21 February 1984, application no. 8544/79, *Öztürk v. Germany*, para. 50.

[51] See, for further references, L. MASERA, *La nozione costituzionale*, cit., pp. 57-80. Interestingly, the ECtHR pointed out that «there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, *inter alia*, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty» (European Court of Human Rights, Plenary, *Öztürk*, cit., para. 53).

[52] Article 15(1)(a) and (b) of the Directive 2008/115/EC.

[53] I. MAJCHER, *«Crimmigration» in the European Union through the Lens of Immigration Detention*, Global Detention Project Working Paper No. 6, p. 14.

[54] D. WILSHER, *Immigration Detention*, cit., p. 153.

detention depicts a punitive character, rooted in its deterrent purposes[55]. Accordingly, it may be subsumed within the concept of a «criminal charge» as per Article 6 ECHR and Articles 47 and 48 CFREU.

Regarding asylum detention, the situation bears some similarities, although they are less overt[56].

Within the EU law legal framework, asylum detention measures can be imposed on an applicant for international protection for the purpose of establishing essential elements upon which the application for international protection relies, especially when obtaining such information is unfeasible in the absence of detention, particularly in cases where there is a risk of absconding of the applicant[57]. Besides, applicants may be detained «in order to decide, in the context of a pro-

[55] As was aptly observed by C. MAZZA, *La prigione degli stranieri*, Rome, 2013, pp. 128-131, «administrative detention centers serve a distinct deterrent function for individuals seeking to enter the national territory […] they act as a deterrent for new illegal arrivals and […] can also be instrumental in prompting migrants to disclose their identities […] The stated purpose of the centers – i.e., enforcing return proceedings against irregular TCNs – is consistently disregarded since there is no direct correlation between detention (which is a restrictive measure) and the ability to carry out the returns (which depends on specific procedures and prerequisites). So, what is the actual function of these centers? […] Their primary function is predominantly deterrent in nature».

[56] See *contra* C. BOITEUX-PICHERAL, *L'équation liberté, securité, justice*, cit., pp. 605-606, where the Author recalls the Opinion of AG Bot delivered on 30 April 2014 in EU Court of Justice, *Bero and Bouzalmate*, joined cases C-473/13 and C-514/13, para. 92, ECLI:EU:C:2014:336: «detention does not constitute a penalty imposed following the commission of a criminal offence and its objective is not to correct the behaviour of the person concerned so that he can, in due course, be reintegrated into society. Any idea of penalising behaviour is, moreover, missing from the rationale forming the legal basis of the detention measure».

[57] Article 8(3)(b) of Directive 2013/33/EU. See, by analogy, the ground laid down in Article 8(3)(f) of Directive 2013/33/EU concerning the detention of the applicant to be transferred to another Member States, as per Article 28 of Regulation (EU) 604/2013. According to the latter provision, an applicant may be detained for the purpose of transfer when «there is a significant risk of absconding». Hence, for the purpose of the present analysis, the grounds listed down in Article 8(3)(b) and (f) of the Directive are equivalent: in both cases, the TCN is detained on the basis of their hampering behavior, that is, their absconding.

cedure, on the applicant's right to enter the territory»[58] or «in order to determine or verify his or her identity or nationality»[59]. In all these instances, the issuance of a detention order against TCNs is, once again, prompted by their allegedly obstructive behavior[60]. Likewise, the punitive justification behind the measure is subtly apparent.

Still, applicants can be deprived of their liberty even in circumstances where their conduct is not *directly* impeding the asylum process. This is the case of deprivation of liberty ordered where «protection of national security or public order so requires»[61] or where the applicant was previously involved in return proceedings and is deemed to have lodged an application for international protection «merely in order to delay or frustrate the enforcement of the return decision»[62]. While the TCN's behavior in this context is not expressly aimed at obstructing the smooth progression of asylum procedures, the imposition of deprivation of liberty is nevertheless employed as a means to reprimand the individual for their dangerous or abusive (and, therefore, non-cooperative) conduct, thus unveiling its underlying objectives – discouraging individuals from seeking asylum or residing irregularly

[58] Article 8(3)(c) of Directive 2013/33/EU.

[59] Article 8(3)(a) of Directive 2013/33/EU.

[60] In the first scenario, detention serves a repressive purpose, as it is evident that its primary aim is to compel the TCN in question to provide the authorities with the pertinent information underpinning the asylum application. In the second scenario, detention is ordered when authorities harbor uncertainty regarding the applicant's admissibility to the territory. Thus, applicants face detention due to their irregular status (otherwise they would have been granted entry), and the encroachment upon their personal liberty serves as a punitive measure in response to undesirable behavior, thus demonstrating both repressive and deterrent aims. In the third scenario, the TCN is subjected to detention due to their reluctance to disclose or specify their nationality or identity. It is worth noting that detention can also be employed for the purpose of «determining» these elements, not solely for their «verification». In each of these scenarios, TCNs' personal freedom is curtailed by national authorities in response to their hampering conduct.

[61] Article 8(3)(e) of Directive 2013/33/EU.

[62] Article 8(3)(d) of Directive 2013/33/EU.

within the territory (deterrence), and if this fails to dissuade, penalizing them for their actions (retribution)[63].

Conclusively, the nature of administrative detention measures, as conceptualized by EU law, is inherently punitive[64]. Whether in the context of pre-removal or asylum-related deprivation of liberty, these measures are reactive responses to individuals perceived as «somewhat irresponsible and untrustworthy»[65], due to their irregular entry and/or stay. A parallel observation can be made regarding Article 5(1)(f) ECHR, which, as anticipated, permits the detention of a TCN «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». In my understanding, the foundation for this atypical deprivation of liberty remains *the blameworthy conduct of the migrant concerned*, who either attempted illegal entry into a specific country or is slated for return, thereby warranting detention due to their irregular status.

In light of the foregoing, administrative detention ought not to be characterized solely as an administrative instrument for immigration control. Instead, it should be viewed as a *de facto* punitive tool with «deterrent purposes that are traditionally restricted to (punitive) criminal sanctions» while, concurrently, it appears to be designed to «shape the conduct of a category of migrants in terms of both immigration and crime control objectives»[66].

[63] In this regard, see I. MAJCHER, *«Crimmigration» in the European Union*, cit., pp. 15-17.

[64] With regard to pre-removal detention (though the reasoning is applicable to asylum detention as well), it has been observed that, as evidence of the punitive nature of the measure, the deprivation of liberty inherently carries a «disvalue» (*disvalore*) even greater than the ultimate objective sought to be achieved (i.e., the return of the TCN). Moreover, the migrant, detained until deportation becomes feasible (or, respectively, until the asylum procedure has ended), effectively bears the inefficiency of the domestic expulsion system, being deprived of personal liberty for reasons beyond their responsibility. See, in this vein, R. BARTOLI, *Il diritto penale dell'immigrazione: strumento di tutela dei flussi immigratori o mezzo di esclusione e di indebolimento dello straniero?*, in *Quest. giust.*, 2011, no. 2, p. 26.

[65] G. CAMPESI, G. FABINI, *Immigration Detention as Social Defence*, cit., p. 66.

[66] I. MAJCHER, C. DE SENARCLENS, *Discipline and Punish?*, cit., p. 15.

2.3. *The harsh degree of severity of administrative detention – is deprivation of personal liberty serious enough?*

In addition to its punitive intent, administrative detention should be regarded as a tool *de facto* rooted in criminal law, due to its harsh degree of severity. Indeed, it significantly encroaches upon personal liberty, a fundamental right of paramount importance, according to the ECtHR which dubbed it as a prerogative which holds a position, together with Articles 2, 3 and 4 ECHR, «in the first rank of the fundamental rights that protect the physical security of the individual»[67].

As mentioned earlier, the degree of severity constitutes the third criterion within the *Engel* criteria. Although it is a crucial factor in evaluating the criminal nature of a legal instrument, *the ECtHR has never acknowledged that deprivation of liberty inherently renders certain tool criminal in nature*[68]. In the eyes of the Strasbourg Court, for a detention measure to be regarded as a criminal instrument, it must possess at least a certain level of punitive purpose[69].

I have already argued that, in my understanding, administrative detention pursues punitive purposes. Nevertheless, even if this assertion might be challenged on the grounds that such a measure is unrelated to any criminal offense, I would underscore that its level of severity imparts a criminal character to it. Consequently, I align with those who have stressed that the concept of *matière pénale*, as per Article 6 ECHR, should be contingent upon the *gravity of the measure in question*, to the extent that deprivation of liberty should never be categorized as an administrative measure – when applied, it thus inherently possesses a criminal nature[70].

[67] European Court of Human Rights, Grand Chamber, judgment of 1 June 2021, application nos. 62819/17 and 63921/17, *Denis and Irvine v. Belgium*, para. 123.

[68] See, for further references, see L. MASERA, *La nozione costituzionale di materia penale*, cit., pp. 86-89.

[69] This stems from the wording of European Court of Human Rights, Plenary, *Engel*, cit., para. 82, emphasis added: «[…] there belong to the "criminal" sphere deprivations of liberty liable to be *imposed as a punishment*, except those which by their nature, duration or manner of execution cannot be appreciably detrimental».

[70] A. CAVALIERE, *Osservazioni intorno al concetto di "matière pénale", tra Costituzione e CEDU*, in *Archivio Penale*, 2023, no. 2, pp. 53-56.

Accordingly, administrative detention – beyond its punitive objectives (which, in any case, I content do exist) –, by impinging upon the personal liberty of individuals, should always be regarded fundamentally as a criminal measure, irrespective of any further attempts to mislabel it as a merely bureaucratic tool.

Against this background, it can be easily demonstrated that both pre-removal and asylum detention, as conceived by the EU legislator and in the ECHR legal framework, hold a harsh degree of severity *vis-à-vis* the individual concerned. At least three indicators can be identified in this regard: (i) the measure encroaches upon personal liberty in a manner equivalent to penal detention; (ii) the TCN concerned may be detained even in penitentiary facilities under prison-like conditions; (iii) the periods of detention can extend for a considerable duration.

2.3.1. *Administrative detention amounts to a deprivation of personal liberty*

Across the EU, administrative detention stands as the sole protracted deprivation of liberty that can be imposed irrespective of any prior criminal law violations, and its legitimacy has been upheld on the grounds of its formal non-punitive character[71]. Yet, as detention is «something closer to punishment»[72], there exists no *practical* distinction in the deprivation of liberty imposed upon a suspect or accused person and a TCN, as both individuals undergo a comparable degree of deprivation of personal liberty[73].

In this context, it was noted that «administrative regimes are, with increasing prevalence, imposing sanctions akin to punishment but denying the protections of criminal process»[74]. Detention is, certainly, among these sanctions. As a result, detained migrants, despite the tan-

[71] E. RIGO, *Spazi di trattenimento e spazi di giurisdizione*, in *Materiali per una Storia della Cultura Giuridica*, 2017, no. 2, pp. 475-478.

[72] D. WILSHER, *Immigration Detention*, cit., p. 40.

[73] See, for an Italian perspective, L. PEPINO, *Centri di detenzione ed espulsioni (Irrazionalità del sistema e alternative possibili)*, in *Dir. Imm. e Cittad.*, 2000, no. 2, pp. 11-25.

[74] J. PARKIN, *The Criminalisation of Migration in Europe*, CEPS Papers in Liberty and Security in Europe, No. 61, October 2013, p. 17.

gible severity of the measure in question, are treated less favourably compared to suspects or accused individuals placed in pre-trial detention – a paradoxical situation[75].

Besides, the «increasing relevance of immigration detention may be read as an example of the expansion of penal logic and practices into migration control policies»[76], to the point that administrative detention ends in «a contrivance, strategically employed to circumvent the principles of criminal law by means of measures that inflict severe distress and have a profound impact on the individual's personal freedom and dignity»[77]. Challenging the viewpoint that administrative deprivation of liberty is nearly *interchangeable* with "penal" detention scenarios is very difficult. Although its administrative formal definition may give the perception of a more lenient *façade* to coercion, it conceals lower levels of protection, fostering a deceptive illusion of reduced severity[78].

Numerous rulings rendered by the two European courts have acknowledged that pre-removal or asylum detention measures inflicted upon TCNs constitute a deprivation of liberty under Article 5 ECHR and Article 6 CFREU, despite the efforts of the Member States to characterize administrative detention as merely a bureaucratic restriction on the freedom of movement[79]. It is therefore indisputable that the level of severity experienced by TCNs due to administrative detention measures is *materially equivalent* to that experienced by suspects and accused persons subjected to criminal detention measures.

[75] D. LOPRIENO, *"Trattenere e punire"*, cit., p. 217.

[76] G. CAMPESI, G. FABINI, *Immigration Detention as Social Defence*, cit., p. 66.

[77] A. CAVALIERE, *Le vite dei migranti*, cit., pp. 68-69.

[78] See, in this regard, L. PARLATO, *L'assistenza linguistica come presupposto delle garanzie dello straniero*, in V. MILITELLO, A. SPENA (eds.), *Il traffico di migranti. Diritti, tutele, criminalizzazione*, Torino, 2015, pp. 96-98.

[79] In this regard, see L. BERNARDINI, *La detenzione degli stranieri tra "restrizione" e "privazione" di libertà*, cit., pp. 75-95. With regard to detention occurring in transit zones at the borders of EU Member States, see Court of Justice, Grand Chamber, judgement of 14 May 2020, joined cases C-924/19 PPU and C-925/19 PPU, *Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, paras. 215-231, ECLI:EU:C:2020:367.

2.3.2. *Administrative detention is enforced under prison-like conditions of detention*

The assumption that the deprivation of liberty experienced by TCNs in the context of pre-removal or asylum detention is comparable to that suffered by a suspect or an accused person in the context of criminal proceedings brings us to the second point – TCNs are detained in conditions akin to those in prison facilities. This stems from two considerations.

On the one hand, both Article 16 of the Return Directive and Article 10 of the Reception Directive foresee the possibility for migrants to be detained within penitentiary premises if a Member State is unable to furnish accommodation in a specialized detention facility. This can happen only where such Member State can ensure that, in the context of pre-removal detention, «the third-country nationals in detention [are] kept separated from ordinary prisoners»[80], whereas, in case of «detained applicants», they shall *additionally* be kept «separately from other third-country nationals who have not lodged an application for international protection»[81].

The CJEU has stressed that this requirement «is more than just a specific procedural rule for carrying out the detention of third-country nationals in prison accommodation and *constitutes a substantive condition for that detention*, without observance of which the latter would, in principle, not be consistent with the directive»[82]. Hence, detention within *ad hoc* centers is the norm, confinement within penitentiary facilities is the exception. Nevertheless, this latter possibility is deemed legitimate and is precluded neither by the EU legislator[83], neither, indeed, within the ECHR legal framework. Hence, it is common that Member States employ their penitentiary facilities for the purpose of

[80] Article 16(1) of Directive 2008/115/EC.

[81] Article 10(1), second subparagraph, Directive 2013/33/EU.

[82] EU Court of Justice, judgment of 17 July 2014, *Thi Ly Pham*, case C-474/13, para. 21, ECLI:EU:C:2014:2096.

[83] K. PARROT, C. SANTULLI, *La «Directive Retour», l'Union européenne contre les étrangers*, in *Revue critique de droit international privé*, 2009, n. 2, pp. 229-231. The Authors cited the case of Germany and Ireland as countries where TCNs are «couramment retenus dans le locaux pénitentiaires».

detaining TCNs[84]. In turn, if migrants are detained in the same facilities as suspects or accused persons, this implies, from a practical standpoint, that both administrative and criminal detention exhibit the same level of severity.

On the other hand, even *ad hoc* facilities bear a fundamental resemblance to prisons. It has been emphasized that, across European countries, TCNs are, in practice, subjected to a deprivation of liberty for immigration purposes within these aforementioned *ad hoc* facilities[85]. Besides, Ferrajoli rightly pointed out that immigration detention centers function as places of detention and segregation where *conditions are even worse than those provided within prison facilities*[86] – this is because, as detained TCNs fall outside the criminal law framework, all the safeguards afforded to suspects or accused persons do not apply to them. In this regard, since 2010, the Parliamentary Assembly of the Council of Europe (PACE) has worryingly emphasized that[87]: «conditions can be appalling (dirty, unsanitary, lack of beds, clothing and food, lack of sufficient health care, etc.) and the detention regime is often inappropriate or almost entirely absent (activities, education, access to the outside and fresh air). Furthermore, provision for the needs of vulnerable persons is often insufficient and allegations of ill-treatment, violence and abuse by officials persist. This all has a negative impact on the mental and physical well-being of persons detained both during and after detention».

In conclusion, the blending of administrative and criminal law

[84] See, with regard to the German legal framework, Court of Justice, judgment of 2 July 2020, *WM*, case C-18/19, ECLI:EU:C:2020:511, and Court of Justice, *Landkreis Gifhorn*, cit.

[85] See, among others, M. PICHOU, *Reception or Detention Centres? The detention of migrants and the EU 'Hotspot' Approach in the light of the European Convention on Human Rights*, in *Critical Quarterly for Legislation and Law*, 2016, n. 2, pp. 114-131, and J.N. STEFANELLI, *Detention as a Tool of Immigration and Asylum Enforcement in the EU*, in G.L. GATTA, V. MITSILEGAS, S. ZIRULIA (eds.), *Controlling Immigration Through Criminal Law*, Oxford-New York, 2020, pp. 211-231.

[86] L. FERRAJOLI, *La criminalizzazione degli immigrati*, in *Quest. giust.*, 2009, n. 5, pp. 16-17.

[87] PACE, Resolution 1707 (2010), *Detention of asylum seekers and irregular migrants in Europe*, Text adopted by the Assembly on 28 January 2010 (7th Sitting), para. 4.

arises once more. Since the TCNs in question have not committed a criminal offense, nor are they under suspicion in this regard, why should they be detained within facilities typically designated for suspects or convicted individuals or, in any case, in detrimental conditions of detention? This circumstance reinforces the perspective that the methods and functions of criminal law have gradually become integrated into immigration law and that the severity of administrative detention measures is equivalent to that of criminal detention measures.

2.3.3. *Towards endless administrative detention measures?*

There is at least a last factor to be briefly considered, that is, the duration of detention. Under the ECHR legal framework, there is no indication of a time-limit for the deprivation of liberty to be carried out as per Article 5(1)(f) ECHR. From the case-law of the Strasbourg Court it can be inferred that, on a case-by-case basis, detention should not be excessive, and the duration of the deprivation of liberty must be reasonably justified in relation to the objective pursued by such detention measures. Still, there is no fixed numerical threshold beyond which detention becomes inherently arbitrary[88]. The ECtHR has indeed specified that «the question of whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features […] and that the arguments for and against release must not be "general and abstract" […], but contain references to the specific facts and the applicant's personal circumstances justifying his detention»[89]. This has led the ECtHR to conclude, for instance, that a six-month period of detention during the assessment of an applicant's international protection request was not arbitrary *per se*[90].

[88] A. GÜNDOĞDU, *Rightlessness in an Age of Rights. Hannah Arendt and the Contemporary Struggles of Migrants*, Oxford, 2015, p. 121.

[89] European Court of Human Rights, judgment of 24 September 2019, application no. 45852/17, *Ismailov v. Russia*, para. 21.

[90] European Court of Human Rights, judgement of 14 January 2021, application no. 73700/13, *E.K. v. Greece*, para. 96.

In contrast, within the EU legal framework, there are two distinct regimes. Regarding pre-removal detention, in accordance with Article 15 of the Return Directive, irregular TCNs may be detained for a maximum period of eighteen months, a time limit that is evidently not of negligible significance[91]. Differently, in the context of asylum detention, Article 8 of the Reception Directive does not stipulate any specific time limit concerning applicants for international protection. This aspect has rightly been deemed «indefensible», as the lack of a time limit clearly disregard the importance of the right to personal liberty of the individuals concerned[92], that is, «persons who have not committed criminal offences but who, often fearing for their lives, have fled from their own country»[93]. To sum up, it is apparent that deprivation of liberty for immigration purposes, in the context of both pre-removal or asylum detention, is typically enforced for *exceedingly protracted periods*.

This assumption can also be substantiated by examining the relevant ECtHR case-law – the Court analysed several cases where periods of detention were defined as «unusually long»[94], «excessive»[95], «par-

[91] Specifically, irregular TCNs may be detained, as a rule, for a maximum of six months (Article 15(5) of the Return Directive). However, pre-removal detention may be extended for a further period no exceeding twelve months where «regardless of all their reasonable efforts the removal operation is likely to last longer owing to: (a) a lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries». Hence, either the non-cooperative behavior of the migrant in question or procedural deficiencies (which cannot, of course, be attributed to the TCN) may provide national authorities with grounds to extend the deprivation of liberty experienced by the TCN concerned.

[92] S. PEERS, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law*, Oxford, 2016, p. 313. It is notable that, while irregular TCNs may be subject to a defined, albeit extended, time limit, the same does not surprisingly apply to the applicant.

[93] European Court of Human Rights, judgment of 23 July 2013, application no. 42337/12, *Suso Musa v. Malta*, para. 101.

[94] It was the case, *inter alia*, of European Court of Human Rights, judgment of 24 September 1992, application no. 11613/85, *Kolompar v. Belgium*, para. 40, and European Court of Human Rights, judgment of 22 March 1995, application no. 18580/91, *Quinn v. France*, para. 48. The applicants were detained, respectively, for over two years and eight months and for almost two years.

ticularly long»[96], «extraordinarily long»[97], «considerable»[98] or «extremely long»[99] as per Article 5(1)(f) ECHR.

It seems not speculative to contemplate that, within this context, TCNs may undergo detention periods that surpass even the time limits observed in pre-trial detention within the realm of domestic criminal proceedings[100].

As Majcher aptly observed, «detention that is exclusively prolonged in relation to its non-punitive purpose or that subjects detainees to prison-like conditions would have punitive effect»[101]. Thus, the longer the TCN is detained, the more extensive the infringement upon their personal freedom becomes, thereby intensifying the punitive characterization of detention itself.

Taken together, the interplay of these three factors – the prejudice against personal liberty, the prison-like conditions of detention and the broad time-limits of the measure – may lead to the conclusion that the administrative deprivation of liberty of TCNs functions as a severly detrimental measure against the individual who is subjected to it, thus depicting its *de facto* criminal nature.

[95] See, very recently, European Court of Human Rights, judgment of 13 June 2023, application no. 53114/20, *Khokhlov v. Cyprus*, para. 98. The applicant was detained for a period of two years, one month and fifteen days (ibid., para. 96).

[96] European Court of Human Rights, judgement of 13 December 2011, application no. 15297/09, *Kanagaratnam and Others v. Belgium*, para. 94. The applicants, a family of Sri Lanka nationals, were detained for almost four months.

[97] European Court of Human Rights, judgment of 8 October 2009, application of 10664/05, *Mikolenko v. Estonia*, para. 64. The applicant was deprived of his liberty for more than three years and eleven months.

[98] European Court of Human Rights, Grand Chamber, judgment of 21 November 2019, application nos. 61411/15, 61420/15, 61427/15, 3028/16, *Z.A. and Others v. Russia*, para. 169. The applicants were detained for a period ranging from five months to over a year and nine months.

[99] European Court of Human Rights, Grand Chamber, judgment of 15 November 1996, application no. 22414/93, *Chahal v. the United Kingdom*, para. 119. The applicant was detained for almost six years.

[100] For instance, this may happen in Italy (cfr. the time limits foreseen in Article 303 of the Italian Code of Criminal Procedure which, as a rule, are considerably less than eighteen months).

[101] I. MAJCHER, *«Crimmigration» in the European Union*, cit., p. 10.

3. *A punitive measure shall deserve adequate guarantees – some concluding remarks*

In this contribution, I have contended that both pre-removal and asylum detention – despite being categorized as administrative and merely bureaucratic measures –, effectively serve punitive objectives. Besides, it has been asserted that, due to their inherent level of severity, administrative detention measures, regardless of their stated purposes (which I argue to be punitive, in any event), possess a punitive characterization *per se*. In this vein, I have shared the view that administrative detention measures «must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections»[102].

This aligns with what was acknowledged by the Inter-American Court of Human Rights in a seminal judgment, which is worth quoting at some length[103]: «administrative sanctions, as well as penal sanctions, constitute an expression of the State's punitive power and, […] on occasions, the nature of the former is similar to that of the latter. Both, the former and the latter, imply reduction, deprivation or alteration of the rights of individuals, as a consequence of unlawful conduct. Therefore, in a democratic system it is necessary to intensify precautions in order for such measures to be adopted with absolute respect for the basic rights of individuals, and subject to a careful verification of whether or not there was unlawful conduct».

Following this line of reasoning, there could be several implications. The most significant is that a set of additional, robust guarantees should be provided to those TCNs deprived of their liberty for immigration purposes. As previously noted, the comprehensive set of fair trial guarantees enshrined in Article 6 ECHR come to the fore. Among these, I will briefly delve into the right to remain silent and not to incriminate oneself, whose implications on the issue under investigation could be of particular interest.

[102] HRC, *General Comment No. 35*, *Article 9 (Liberty and Security in person)*, CCPR/C/GC/35, 16 December 2014, para. 14.

[103] Inter-American Court of Human Rights, judgment of 2 February 2001, *Baena-Ricardo et al. v. Panama (Merits, Reparations and Costs)*, para. 106.

In fact, it has been showed that the detained TCN's non-cooperative behavior may allow national authorities to extend their detention period. Once the punitive nature of such a legal tool is acknowledged, there seems to be no more room for imposing deprivation of liberty based on such a hampering conduct. Arguably, TCNs can still be obligated to provide certain information to domestic authorities, such as their identity papers. However, a request to act (even against their self-interest) to expedite return or asylum procedures may conflict with the right to remain silent and not to incriminate oneself eventually recognized for the migrant concerned.

Whereas Article 6 ECHR does not explicitly mention the right to silence or the privilege against self-incrimination, it is a widely recognized international standard that forms a fundamental part of the concept of a fair trial. By providing the suspect or the accused person with protection against improper coercion by authorities, the ECtHR has famously held that this prerogative contributes to preventing miscarriages of justice and achieving the objectives of Article 6 ECHR[104]. Besides, it has been acknowledged that both the right to silence and the privilege against self-incrimination cannot reasonably be confined to statements admitting wrongdoing or remarks directly incriminating the person questioned; rather, it also encompasses information on matters of fact that may subsequently be used in support of the prosecution and may thus influence the conviction, or the penalty imposed on that person[105].

What is more, a range of guarantees, not currently acknowledged *vis-à-vis* the detained TCN, would come into play, including the rights of the defence as per Article 6(3) ECHR.

In this context, I am aware that recognizing and accepting the punitive nature of administrative detention may be detrimental to the interests of States. Asylum or pre-removal detention could no longer be primarily, or even solely, grounded in the undesired behavior of the TCN concerned, as such conduct would eventually be deemed legiti-

[104] European Court of Human Rights, Grand Chamber, judgment of 8 February 1996, application no. 18371/91, *John Murray v. the United Kingdom*, para. 45.

[105] European Court of Human Rights, judgment of 17 December 1996, application no. 19187/91, *Saunders v. the United Kingdom*, para. 71.

mate in light of the right to remain silent and the privilege against self-incrimination, as enshrined in Article 6 ECHR. Moreover, the implementation of pre-removal or asylum detention measures would become more challenging for Member States if the additional guarantees enshrined in Article 6 ECHR are acknowledged *vis-à-vis* the detainees.

Nevertheless, this approach may indeed be the sole means of comprehending administrative detention in its *inherently punitive essence*, thereby strengthening the guarantees for TCNs and, ultimately, averting Member States from instituting a broad detention regime instead of one aligned with the principle of *extrema ratio*.

STRUMENTI DI TUTELA DEI DIRITTI NELLA DETENZIONE AMMINISTRATIVA DEGLI STRANIERI NEGLI STATI UE: IL PROTOCOLLO OPZIONALE ALLA CONVENZIONE CONTRO LA TORTURA DELLE NAZIONI UNITE

Marilù Porchia[*]

1. *Introduzione*

La detenzione amministrativa dei migranti e dei richiedenti asilo sta assumendo un ruolo crescente nella gestione dei flussi migratori, tanto in ambito nazionale che in quello europeo, in linea con quella che è stata definita dalla dottrina statunitense «tendenza alla *crimmigration*» o «crimmigrazione»[1]. La privazione della libertà dei migranti di natura amministrativa, definita a livello internazionale «[…]arrest and detention of individuals by State authorities outside the criminal law context, […]to restrain irregular migrants»[2], corrisponde, invero, alla «sovrapposizione/intersezione (*overlap/intersection*) o, addirittura,

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[1] J. STUMPF, *The crimmigration crisis: immigrants, crime and sovereign power*, in *American University Law Review*, 2006, n. 2, pp. 367-419.

[2] Gruppo di lavoro delle Nazioni Unite sulla detenzione arbitraria, *Report of the Working Group on Arbitrary Detention: Thematic Considerations: Administrative Detention and Habeas Corpus*, A/HRC/13/30, 18 gennaio 2010, par. 77.

alla fusione (*merger*)»[3] tra il diritto penale e il diritto dell'immigrazione, ovvero alla strategia politico-criminale di «ricorso a misure privative o limitative della libertà personale di tipo penalistico, e a correlate procedure, nell'ambito del diritto dell'immigrazione»[4].

A livello europeo, la sola definizione di detenzione amministrativa degli stranieri è contenuta nella Direttiva sulle condizioni di accoglienza (Dir. 2013/33/UE)[5], la quale definisce il «trattenimento» come il «confinamento del richiedente, da parte di uno Stato membro [dell'UE], in un luogo determinato, che lo priva della libertà di circolazione»[6]. La Direttiva rimpatri (Dir. 2008/115/CE)[7] non contiene invece una definizione di «trattenimento», pur permettendo agli Stati Membri di fare ricorso a tale misura. La Corte di Giustizia dell'Unione Europea ha, in seguito, avuto modo di specificare che l'assenza di una definizione di tale istituto nella Direttiva 2008/115/CE non indica che il legislatore abbia voluto distinguerlo da quello fornito nella Direttiva 2013/33/UE, e che la nozione di «trattenimento», ai sensi di queste due Direttive, riguarda un'unica realtà[8]. Nonostante per il diritto

[3] G. L. GATTA, *La pena nell'era della "*crimmigration*": tra Europa e Stati Uniti*, in *La pena, ancora: tra attualità e tradizione – Scritti in onore di Emilio Dolcini*, Milano, 2018, pp. 987-1039, p. 990.

[4] J. STUMPF, *The crimmigration crisis*, cit., p. 381 s.; S.H. LEGOMSKY, *The new path of immigration law: asymmetric incorporation of criminal justice norms*, in *Washington and Lee Law Review*, 2007, pp. 469-528, p. 481 s.; D.A. SKLANSKY, *Crime, Immigration, and ad hoc instrumentalism*, in *New Criminal Law Review*, 2012, pp. 157-222, p. 164 s.

[5] Direttiva 2013/33/UE del Parlamento europeo e del Consiglio, del 26 giugno 2013, recante norme relative all'accoglienza dei richiedenti protezione internazionale (rifusione), OJ L 180, 29.6.2013, pp. 96-116.

[6] Direttiva 2013/33/UE, articolo 2, lett. h.

[7] Direttiva 2008/115/CE del Parlamento europeo e del Consiglio, del 16 dicembre 2008, recante norme e procedure comuni applicabili negli Stati Membri al rimpatrio di cittadini di paesi terzi il cui soggiorno è irregolare, OJ L 348, 24.12.2008, pp. 98-107.

[8] Corte di giustizia, Grande Sezione, sentenza del 14 maggio 2020, *FMS e.a. c. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság et Országos Idegenrendészeti Főigazgatóság*, cause riunite C-924/19 PPU e C-925/19 PPU, para. 220, ECLI:EU:C:2020:367. Per approfondire si veda S. BARTOLINI, T. BOMBOIS, *Immigration Detention before the CJEU: The interrelationship between the Return Directive and the Recast Reception Conditions Directive and their Impact on the Rights of Third Country Nationals*, in *European Human Rights Law Review*, 2016, pp. 518-552;

dell'Unione europea il trattenimento sia una misura applicabile, nell'ambito delle procedure di asilo e di rimpatrio, in via residuale e quando altre soluzioni meno incisive sulla libertà personale non risultino esperibili[9], negli ultimi cinque anni il ricorso alla misura detentiva è aumentato in numerosi Stati Membri, sia in esecuzione di norme europee, sia sulla base del diritto interno[10]. Inoltre, tanto sul piano nazionale che su quello europeo si assiste ad un esponenziale incremento da parte degli Stati Membri all'utilizzo di luoghi *de facto* privativi della libertà personale, quali *hotspots*[11], zone di transito aeroportuali[12], *transit zone* ai confini esterni dell'Unione[13].

Il crescente ricorso alla misura detentiva e l'incremento dei luoghi di privazione della libertà personale degli stranieri stanno portando alla progressiva centralità in materia di immigrazione dei meccanismi di prevenzione della tortura di cui al Protocollo Opzionale alla Convenzione contro la tortura delle Nazioni Unite del 2002. Invero, come evidenziato da autorevole dottrina, il sistema detentivo amministrativo prende in prestito dal diritto penale tecniche e strumenti di tutela degli interessi pubblici in gioco ma, al tempo stesso, dimentica intenzionalmente di importare le garanzie del sistema della giustizia penale[14]. In alcuni Stati Membri, tale «dimenticanza» non si limita alle garanzie procedurali e a quelle relative alla legittimità dei presupposti, ma riguarda anche le garanzie afferenti ai modi in cui la detenzione deve essere svolta. In questo contesto, l'attività di monitoraggio svolta dai meccanismi di prevenzione della tortura assume un ruolo fondamenta-

R. PALLADINO, *La detenzione dei migranti. Regime europeo, competenze statali, diritti umani*, Napoli, 2018, p. 50.

[9] Direttiva 2013/33/UE, articolo 15 co. 1.

[10] E. CELORIA, *La normalizzazione della detenzione amministrativa alle frontiere esterne dell'Unione nel Nuovo Patto sulla migrazione e l'asilo*, in *FSJ*, 2021, n. 2, pp. 43-70.

[11] Si veda Corte europea dei diritti dell'uomo, sentenza del 30 marzo 2023, ricorso n. 21329/18, *J.A. e altri c. Italia*, par. 98.

[12] Si veda Corte europea dei diritti dell'uomo, sentenza del 25 giugno 1996, ricorso n. 19776/92, *Amour c. Francia*, par. 64.

[13] Si veda Corte europea dei diritti dell'uomo, sentenza del 25 agosto 2022, ricorso n. 36896/18, *W.O. e altri c. Ungheria*, parr. 8-14.

[14] Cfr. S.H. LEGOMSKY, *The new path of immigration law*, cit., p. 472.

le, sottraendo all'arbitrarietà le modalità di privazione della libertà degli stranieri nei contesti amministrativi, a cui vengono lasciate dalle poche e scarne norme europee in materia.

2. *Il Protocollo Opzionale alla Convenzione contro la tortura delle Nazioni Unite e la previsione dei Meccanismi Nazionali di Prevenzione*

Tutti gli Stati dell'Unione Europea, ad eccezione della Slovacchia, sono firmatari del Protocollo Opzionale alla Convenzione contro la tortura delle Nazioni Unite del 2002 (di seguito OPCAT)[15]. L'obiettivo fondamentale dell'OPCAT è quello di rafforzare la protezione delle persone contro la tortura e altri maltrattamenti con mezzi non giudiziari di natura preventiva[16], attraverso l'istituzione di un sistema di visite periodiche da parte di organismi internazionali e nazionali nei luoghi in cui le persone sono private della libertà[17], compresi, quindi, i luoghi di detenzione amministrativa degli stranieri. Il meccanismo preventivo internazionale, istituito in seno al Comitato contro la tortura (CAT)[18], è il Sottocomitato contro la tortura (STP)[19]. Gli Stati sono, inoltre, vincolati ad «istituire, designare o mantenere a livello nazionale uno o più organismi di visita per la prevenzione della tortura»[20], ovvero i Meccanismi Nazionali di Prevenzione (MNP). Il ruolo svolto da ciascun MNP varia significativamente da paese a paese, e nella detenzione dei migranti è fortemente condizionato dalla geografia, dalle po-

[15] Protocollo opzionale alla Convenzione contro la tortura ed altre pene o trattamenti crudeli, inumani o degradanti (OPCAT). Adottato dall'Assemblea Generale delle Nazioni Unite con risoluzione n. 57/199 del 9 gennaio 2003. Entrata in vigore internazionale al 22 giugno 2006.

[16] Preambolo dell'OPCAT.

[17] Articolo 1 dell'OPCAT.

[18] Il Comitato contro la tortura (CAT) è l'organismo di dieci esperti indipendenti che monitora l'attuazione della Convenzione contro la tortura e altre pene o trattamenti crudeli, inumani o degradanti, adottata dall'Assemblea Generale delle Nazioni Unite con risoluzione n. 39/46 del 10 dicembre 1984. Entrato in vigore il 26 giugno 1987.

[19] Articoli da 5 a 16 dell'OPCAT.

[20] Articolo 17 dell'OPCAT.

litiche migratorie, dagli accordi di rimpatrio. Tutti gli Stati Membri dell'Unione firmatari dell'OPCAT hanno istituito il loro MNP, ad eccezione di Belgio e Irlanda. L'OPCAT riconosce, al suo articolo 19[21], dei poteri minimi ai MNP: la competenza di esaminare regolarmente i luoghi di privazione della libertà, la competenza di formulare raccomandazioni alle autorità competenti, e quella di presentare proposte e osservazioni relative alla legislazione in vigore e ai progetti di legge. Nel formulare raccomandazioni, proposte e osservazioni, i MNP devono prendere «in considerazione le norme pertinenti delle Nazioni Unite»[22], e secondo quanto previsto dalla Convenzione contro la tortura ed altre pene o trattamenti crudeli, inumani o degradanti, «riflettere, tra l'altro, le norme e le pratiche internazionali pertinenti»[23]. Ai poteri dei MNP corrisponde, in capo agli Stati, l'obbligo di porre i MNP in condizione di espletare il loro mandato, attraverso una serie di garanzie indicate nell'art. 20[24]. Esse consistono nello scegliere liberamen-

[21] Articolo 19 dell'OPCAT: «Ai meccanismi nazionali di prevenzione saranno garantiti almeno i seguenti poteri: a) sottoporre a regolare esame il trattamento di cui sono oggetto le persone private della libertà nei luoghi di detenzione, come definiti al precedente art. 4, allo scopo di rafforzare, se necessario, la protezione loro prestata verso la tortura e le altre pene o trattamenti crudeli, inumani o degradanti; b) formulare raccomandazioni alle autorità competenti al fine di migliorare il trattamento e le condizioni in cui versano e persone private della libertà e di prevenire la tortura e le altre pene o trattamenti crudeli, inumani o degradanti, tenendo nella dovuta considerazione le norme in materia adottate dalle Nazioni Unite; c) sottoporre proposte e osservazioni relativamente alla legislazione in vigore e ai progetti di legge».

[22] Assemblea Generale delle Nazioni Unite, Risoluzione 57/1999, del 18 dicembre 2002, Articolo 2 co. 2 «The Subcommittee on Prevention shall carry out its work within the framework of the Charter of the United Nations and shall be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty».

[23] M. NOWAK, M. BIRK, AND G. MONINA (eds.), *The United Nations Convention Against Torture and its Optional Protocol, A Commentary*, Second Edition, Oxford Commentaries on International Law, Oxford, 2019, p. 917.

[24] Articolo 20 dell'OPCAT «Allo scopo di mettere i meccanismi nazionali di prevenzione in condizione di espletare il loro mandato, gli Stati Parti del presente Protocollo si impegnano a garantire loro: a) accesso ad ogni informazione circa il numero di persone private della libertà nei luoghi di detenzione come definiti dall'art. 4, nonché sul numero di tali luoghi e sulla loro dislocazione; b) accesso ad ogni informazione circa il trattamento di tali persone e circa le loro condizioni di detenzione; c) accesso a

te i luoghi di privazione della libertà in cui effettuare le visite; esaminare regolarmente il trattamento delle persone private della libertà in quei luoghi; decidere la tempistica di tali visite e determinare se devono essere annunciate o non annunciate; scegliere le persone da intervistare.

L'OPCAT non prevede la forma organizzativa dei MNP, lasciando il loro formato istituzionale alla discrezione degli Stati, a condizione che questo rispetti i requisiti minimi dell'OPCAT. Tale discrezionalità è funzionale a che questi scelgano «il modello che ritengono più appropriato, tenendo conto della complessità del Paese, della sua struttura amministrativa e finanziaria e della sua geografia»[25]. La maggioranza degli Stati che ha attribuito le funzioni di MNP ad un organismo già esistente, lo ha fatto in favore un'istituzione nazionale per i diritti umani (NHRI)[26], altri Stati hanno scelto, invece, di radicare i NMP nelle *Ombudsman istitutions* già esistenti. Ad oggi, solo pochi Stati hanno creato un MNP introducendo nell'ordinamento nazionale un'istituzione completamente nuova: tra gli Stati Membri soltanto l'Italia, la Francia e la Germania.

3. *I luoghi di privazione della libertà ai sensi dell'art. 4 del Protocollo Opzionale alla Convenzione contro la tortura delle Nazioni Unite*

Per la comprensione del ruolo dei MNP nel contesto della detenzione amministrativa degli stranieri, è centrale la definizione che

tutti i luoghi di detenzione e alle relative installazioni e attrezzature; d) la possibilità di avere colloqui riservati con le persone private della libertà, senza testimoni, direttamente o tramite un interprete se ritenuto necessario, nonché con qualunque altra persona che i meccanismi nazionali di prevenzione ritengano possa fornire informazioni rilevanti; e) la libertà di scegliere i luoghi che intendono visitare e le persone con cui avere un colloquio. f) il diritto ad avere contatti con il Sottocomitato sulla prevenzione, di trasmettergli informazioni e di avere incontri con esso».

[25] Sottocomitato contro la tortura, *Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2010, UN Doc CAT/C/44/2, para. 49.

[26] E. STEINERT, R.H. MURRAY, *Same but Different? National Human Rights Commissions and Ombudsman Offices and National Preventive Mechanisms under the Optional Protocol to the UN Convention against Torture*, in *Essex Human Rights Review*, 2006 n. 6, pp. 54-72, cit. p. 77.

l'OPCAT fornisce di luogo di privazione della libertà di uno Stato. Ai sensi dell'art. 4, co. 1, rientra nella definizione «qualsiasi luogo posto sotto la sua giurisdizione e il suo controllo dove si trovino, o potrebbero trovarsi, persone private della loro libertà, sia per ordine, o dietro richiesta, di una autorità pubblica, sia con il consenso o l'acquiescenza della stessa»[27]. Di pari importanza è la definizione di cui all'art. 4, co. 2, di privazione della libertà, che comprende «qualsiasi forma di detenzione o di imprigionamento o il collocamento di una persona in un luogo di detenzione pubblico o privato, dal quale non è consentito uscire a piacimento per ordine di un'autorità giudiziaria, amministrativa o di altro tipo»[28]. I MNP hanno quindi il potere di visitare luoghi che hanno la potenzialità di limitare *de facto* il diritto alla libertà personale in relazione ad una situazione in cui lo Stato esercita, o ci si può aspettare che eserciti, una funzione di regolamentazione, estendendosi il concetto di giurisdizione a tutti i luoghi sui quali lo Stato esercita un controllo effettivo[29]. Ne consegue che rientrano nel mandato OPCAT anche le strutture di detenzione situate in luoghi sottratti all'applicazione delle leggi sull'asilo o sull'immigrazione[30], purché vi sia controllo effettivo da parte delle Stato. Nel corso del 2023, l'STP ha inoltre pubblicato un *draft* del primo *General Comment* all'art. 4 OP-

[27] Art 4. co. 1 dell'OPCAT.

[28] È una definizione ampia, alla quale molti Stati hanno espresso rimostranze. Ad esempio la delegazione egiziana si è opposta fermamente all'idea di un meccanismo internazionale con l'autorità illimitata di visitare qualsiasi struttura di detenzione all'interno di uno Stato in qualsiasi momento, sostenendo che tale autorità illimitata incontrerebbe ostacoli costituzionali. Si veda M. NOWAK, M. BIRK, AND G. MONINA (eds.), *The United Nations Convention Against Torture*, cit. p. 743.

[29] Il mandato si estende quindi anche alla detenzione di frontiera e ai centri extraterritoriali che processano le domande d'asilo. Si veda A. EDWARDS, *The Optional Protocol to the Convention against Torture and the Detention of Refugees*, in *ICLQ*, 2008, pp. 789-825, p. 816.

[30] Si veda A. EDWARDS, *Tampering with Refugee Protection: The Case of Australia*, in *Int. J. Refug. Law*, 2013, pp. 192-221, p. 192. Come sottolineato dalla dottrina, infatti, solo un'interpretazione ampia di ciò che equivale a una privazione della libertà e a un luogo di detenzione incontra i fini preventivi dell'OPCAT, si veda A. EDWARDS, *The Optional Protocol,* cit. p. 824.

CAT[31], la cui stesura si deve alle segnalazioni da parte di MNP di diversi Stati parte del Protocollo, i quali hanno riscontrato difficoltà nell'accedere a luoghi di privazione della libertà diversi da quelli penitenziari, ovvero prevalentemente nei luoghi di detenzione amministrativa degli stranieri, soprattutto al verificarsi di situazioni *de facto* privative della libertà. L'STP ha dunque invitato tutti gli interessati a commentare il *draft*, affinché la versione finale del *General Comment* possa essere strumento interpretativo efficace dell'estensione del mandato OPCAT[32].

4. *La detenzione amministrativa degli stranieri negli Stati Membri e il ruolo dei Meccanismi Nazionali di Prevenzione*

La legislazione secondaria dell'UE prevede un ampio e complesso sistema normativo che regolamenta i procedimenti amministrativi all'interno dei quali la detenzione amministrativa può essere disposta[33]. La prima finalità amministrativa che il diritto dell'Unione ha compiutamente disciplinato è il trattenimento finalizzato all'espulsione dello straniero irregolare[34], ai sensi degli artt. 15 e 16 della Direttiva 2008/115/CE (rimpatri)[35]. A questa si affiancano la Direttiva

[31] SPT, *Draft general comment No. 1 on places of deprivation of liberty (article 4)*, consultabile all'indirizzo: https://www.ohchr.org/sites/default/files/documents/hrbodies/spt-opcat/call-inputs/draft-GC1-on-art1-for-public-consultation-en.pdf.

[32] SPT, *Call for comments on the draft general comment of the Subcommittee on Prevention of Torture (SPT) on the Article 4 of the OPCAT*, CAT/OP/GC/R.1 (ohchr.org). Si veda anche SPT, *Day of general discussion on the draft general comment of the Subcommittee on Prevention of Torture (SPT) on the Article 4 of the OPCAT,* CAT/OP/GC/R.1 (ohchr.org).

[33] G. CORNELISSE, *The Constitutionalisation of Immigration Detention: Between EU LAW and the European Convention on Human Rights*, in *Global Detention Project Working Paper No. 15*, ottobre 2016.

[34] Anche autorizzato dall'articolo 5 co. 1(f) secondo periodo della Convenzione europea dei diritti dell'uomo (CEDU), firmata nel 1950 dal Consiglio d'Europa.

[35] Per un approfondimento, si veda V. MITSILEGAS, *Immigration Detention, Risk and Human Rights in the Law of the European Union. Lessons from the Returns Directive*, in M.J. GUIA, R. KOULISH, V. MITSILEGAS (eds.), *Immigration Detention, Risk and Human Rights*, Geneva, 2016, pp. 24-45; F. SPITALERI, *Il Rimpatrio e la Detenzio-*

2013/33/UE (accoglienza)[36], e la Direttiva 2013/32/UE (procedure)[37] che disciplinano modi e casi della detezione dei richiedenti protezione internazionale. Invero, la Direttiva 2013/33/UE osta a che gli Stati Membri trattengano una persona per il solo fatto di essere un richiedente protezione internazionale[38]. La stessa ammette invece il trattenimento dei richiedenti «quando lo impongono motivi di sicurezza nazionale o di ordine pubblico»[39] o nel caso in cui la persona sia già detenuta a fini espulsivi, nel caso vi siano «fondati motivi per ritenere che la persona abbia manifestato la volontà di presentare la domanda di protezione internazionale al solo scopo di ritardare o impedire l'esecuzione della decisione di rimpatrio»[40]. Pur non essendo possibile detenere un richiedente al fine esclusivo di valutare nel merito la sua domanda di protezione internazionale, la misura privativa della libertà può però essere adottata «per determinare gli elementi su cui si basa la domanda di protezione internazionale che non potrebbero ottenersi senza il trattenimento, in particolare se sussiste il rischio di fuga del ri-

ne dello Straniero tra Esercizio di Prerogative Statali e Garanzie Sovranazionali, Torino, 2017, pp. 149-184; R. PALLADINO, *La detenzione dei migranti*, cit., pp. 35-109; A. LIGUORI, *La direttiva rimpatri*, in *Rassegna di diritto pubblico europeo*, 2011, n. 2, pp. 135-154; C. FAVILLI, *La direttiva rimpatri ovvero la mancata armonizzazione dell'espulsione dei cittadini di paesi terzi*, in *Osservatorio sulle fonti*, 2009, n. 2, pp. 1-10; F. ZORZI GIUSTINIANI, *Direttiva rimpatri e politica comunitaria in materia di immigrazione*, in *Dir. um. e dir. internaz.*, 2009, n. 3, pp. 671-675.

[36] Per un approfondimento si veda L. SLINGENBERG, *The Reception of Asylum Seekers Under International Law. Between Sovereignty and Equality*, Amsterdam, 2016, pp. 65-82.

[37] Direttiva 2013/32/UE del Parlamento europeo e del Consiglio, del 26 giugno 2013, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale (rifusione), OJ L 180, 29.6.2013, p. 60-95.

[38] Articolo 8 co. 1 della Direttiva 2013/33/UE. Per un approfondimento, si veda R. PALLADINO, *La detenzione dei migranti*, cit., p. 158; D. WILSHER, *Immigration Detention and the Common European Asylum Policy*, in A. BALDACCINI, E. GUILD, H. TONER (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford, 2007, pp. 395-426.

[39] Articolo 8, co. 3, lett. e) della Direttiva 2013/33/UE.

[40] Articolo 8, co. 3, lett. d) della Direttiva 2013/33/UE. Per approfondire si veda G. STRBAN ET. AL., *Return Procedures Applicable to Rejected Asylum Seekers*, in *Refug. Surv. Q.*, 1/37, 2018, pp. 71- 95.

chiedente»[41], con la rimessione agli Stati Membri della determinazione nella normativa nazionale degli elementi fondanti il rischio di fuga[42]. Anche il Regolamento 604/2013 (Dublino III)[43], che stabilisce i criteri e i meccanismi di determinazione dello Stato membro competente per l'esame di una domanda di protezione internazionale, prevede un'ipotesi di trattenimento fondata sul notevole rischio di fuga del richiedente sottoposto alla procedura Dublino, imponendo agli Stati Membri di stabilire, nel diritto nazionale, criteri obiettivi in base ai quali definire il notevole rischio di fuga[44]. La Direttiva 2013/33/UE permette, inoltre, la detenzione al fine di determinare o verificare l'identità o la cittadinanza dei richiedenti asilo[45]. Tale ipotesi si concretizza principalmente nel trattenimento in caso di rifiuto di rilevamento delle impronte digitali, rifiuto che può, inoltre, giustificare il ricorso alla procedura di frontiera[46]. La medesima Direttiva ammette, infine, il trattenimento del richiedente asilo finalizzato a decidere «nel contesto di un procedimento, sul diritto del richiedente di entrare nel territorio»[47], parallelamente all'articolo 5 co. 1(f) primo periodo della CEDU, che attribuisce allo Stato il diritto di detenere la persona per prevenire il suo ingresso non autorizzato nel territorio[48]. La Corte di giustizia ha in seguito chiarito che l'unica ipotesi contemplata dal diritto UE che giustifica la detenzione prima di fare ingresso nel Paese è quella della procedura di frontiera[49]. La detenzione sarebbe, anche in questo caso,

[41] Articolo 8, co. 3, lett. b) della Direttiva 2013/33/UE.

[42] Per un approfondimento si veda D. THYM, *European Migration Law*, Oxford, 2023, p. 540 ss.

[43] Regolamento (UE) n. 604/2013 del Parlamento europeo e del Consiglio, del 26 giugno 2013, *che stabilisce i criteri e i meccanismi di determinazione dello Stato membro competente per l'esame di una domanda di protezione internazionale presentata in uno degli Stati membri da un cittadino di un paese terzo o da un apolide (rifusione)*, GUUE L 180, 29.6.2013, pp. 31-59.

[44] Articolo 2, lettera n), in combinato disposto con l'articolo 2, co. 2, del Regolamento (UE) n. 604/2013.

[45] Articolo 8, co. 3, lett. a) della Direttiva 2013/33/UE.

[46] Articolo 43 della Direttiva 2013/32/UE.

[47] Articolo 8, co. 3, lett. c) della Direttiva 2013/33/UE.

[48] Per un approfondiento si veda L. TSOURDI, *Asylum Detention in EU Law: Falling between Two Stools?*, in *Refugee Survey Quaterly*, 2016, n. 35, pp. 7-28.

[49] Corte di giustizia, *FMS e altri*, cit., par. 245.

finalizzata all'ammissibilità o meno della domanda accelerata e/o svolta alla frontiera o in zone di transito, ma non alla sua decisione nel merito.

In tutti questi casi, nonostante la detenzione dovrebbe costituire l'ultima *ratio*[50], si è assistito al suo utilizzo estensivo[51], e alla sua applicazione con modalità e procedure spesso non conformi alle garanzie contenute nelle Direttive[52]. In primo luogo, sia la Direttiva 2008/115/CE che la Direttiva 2013/33/UE prevedono che il trattenimento debba avere luogo, di regola, in appositi centri di trattenimento, e se ciò non è possibile ed è necessario il collocamento in un istituto penitenziario, lo straniero deve essere tenuto separato dai detenuti ordinari[53]. Le Direttive non definiscono ulteriormente cosa possa essere definito «apposito centro di detenzione», né indicano i requisiti essenziali che tali luoghi di privazione della libertà dovrebbero rispettare[54]. Il risultato è un utilizzo indiscriminato di luoghi detentivi, quali locali di frontiera o *hotspots*, le cui infrastrutture sono spesso tensostrutture, containers, prefabbricati industriali, ovvero luoghi evidentemente non idonei a svolgere una funzione detentiva. Inoltre, sebbene la legisla-

[50] Articolo 8, co. 2, della Direttiva 2013/33/UE.

[51] C. COSTELLO, M. MOUZOURAKIS, *EU Law and the Detainability of Asylum Seekers*, in *Refugee Survey Quaterly*, 2016, n. 35, pp. 47-73.

[52] G. CORNELISSE, M. RENEMAN, *Border procedures in the Member States: Legal Assessment*, European Parliament Research Service, 2020, consultabile al sito: https://doi.org/10.2861/297815, pp. 20-40, pp. 74-94 e pp. 201-205.

[53] Articolo 16, co. 1, della Direttiva 2008/115/CE e articolo 16, co. 1, della Direttiva 2013/33/UE.

[54] Corte di Giustizia, sentenza del 10 marzo 2022, *K* c. *Landkreis Gifhorn*, causa C-519/20, ECLI:EU:C:2022:178. Nella sentenza, relativa alla previsione di cui all'art. 16 della direttiva 2008/115/CE, la Corte specifica che il trattenimento in istituti penitenziari può conseguire soltanto ad un aumento inatteso del numero di cittadini di paesi terzi oggetto di una misura di trattenimento, e non essere meramente causato dalla riduzione del numero di posti disponibili in tali appositi centri di permanenza temporanea o da una mancanza di anticipazione delle autorità nazionali. Impone, inoltre, che le condizioni di trattenimento evitino quanto più possibile il richiamo ad un ambiente carcerario, e siano tali da rispettare i diritti fondamentali garantiti dalla Carta, nonché i diritti sanciti dall'articolo 16, paragrafi da 2 a 5, e dall'articolo 17 della direttiva rimpatri. Si tratta di indicazioni relative ai soli centri con finalità di rimpatrio, e che in ogni caso non sembrano utili a fornire una definizione uniforme di «apposito centro di permanenza temporanea».

zione europea non preveda altre finalità oltre a quelle sopra descritte, molteplici sono le situazioni che determinano una detenzione *de facto* dei cittadini di paesi terzi, sottratta a garanzie basilari quali una base giuridica a fondamento della detenzione e la convalida giurisdizionale della misura[55]. In questi casi gli stranieri sono trattenuti in luoghi che indubbiamente non rispondono alla definizione di «apposito centro di detenzione». Si tratta, invero, di zone di transito aeroportuali o marittime, *transit zone*[56], fino ad arrivare al trattenimento in vettori quali autobus, camionette e traghetti e navi.

A tutti questi luoghi, siano essi detentivi *de iure* o *de facto*, si estende il mandato preventivo dei MNP. Questi, attraverso un sistema di visite di monitoraggio periodiche, verificano la conformità del trattamento detentivo, non solo alle normative nazionali, se esistenti, e a quelle europee – non a caso definite dalla dottrina «minime»[57] – ma anche agli standard internazionali e regionali. Le principali norme di riferimento, in tema di detenzione amministrativa, sono le norme di *soft-law* adottate dall'ONU, quali ad esempio le Regole minime per il trattamento di detenuti, conosciute come *Nelson Mandela rules*[58], e le

[55] Per approfondire si veda A. NETHERY, S. J. SILVERMAN (eds.), *Immigration Detention, The Migration of a Policy and Its Human Impact*, Londra, 2017, p. 50.

[56] Secondo la Corte di Giustizia, l'Ungheria ha illegalmente detenuto *de facto* migliaia di stranieri a partire dal 2015. Corte di Giustizia, Grande Sezione, sentenza del 14 maggio 2020 (domanda di pronuncia pregiudiziale proposta dal Szegedi Közigazgatási és Munkaügyi Bíróság - Ungheria) – *FMS, FNZ* (C-924/19 PPU), *SA e SA junior* (C-925/19 PPU)/*Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*. Per un commento si veda N. BOLDIZSÁR, *A – pyrrhic? – victory concerning detention in transit zones and procedural rights: FMS & FMZ and the legislation adopted by Hungary in its wake*, in *EU Immigration and Asylum Law and Policy*, 5 giugno 2020 (eumigrationlawblog.eu); E. COLOMBO, *Trattenimento nelle zone di transito e inammissibilità delle domande di asilo. La Corte di giustizia e le procedure di frontiera*, in *Dir. Imm. e Cittad.*, 2020, n. 3. pp. 212-238; S. ZIRULIA, *Per Lussemburgo è "detenzione", per Strasburgo no: verso un duplice volto della libertà personale dello straniero nello spazio europeo?*, in *Sistema Penale*, 2020.

[57] R. PALLADINO, *La detenzione dei migranti*, cit., p. 87.

[58] Regole minime per il trattamento di detenuti, approvate dal Consiglio economico e sociale con le risoluzioni 663 C (XXIV) del 31 luglio 1957 e 2076 (LXII) del 13 maggio 1977, modificate nel 2015.

linee guida dell'UNHCR sulla detenzione dei richiedenti asilo[59]. In ambito regionale, riferimento essenziale sono le Regole penitenziarie europee adottate per la prima volta nel 1973 e modificate nel 2006 dal Comitato dei ministri del Consiglio d'Europa[60], integrate nel 2012 da una Raccomandazione sulla detenzione degli stranieri[61] e aggiornate nel 2020, e le Venti linee guida sul rimpatrio forzato adottate dal Comitato dei ministri del Consiglio d'Europa nel 2005[62], in particolare l'orientamento n. 10, rubricato «Condizioni di trattenimento in attesa dell'allontanamento». Un ruolo fondamentale è assunto anche dagli standard – elaborati a partire dalle raccomandazioni indirizzate agli Stati interessati – a livello internazionale dalla CAT e dall'SPT, e quelli elaborati a livello regionale dal Consiglio d'Europa, tanto dal suo organo giurisdizionale (Corte europea dei diritti dell'uomo) che da quello di monitoraggio e prevenzione (Comitato europeo per la prevenzione della tortura e delle pene o trattamenti inumani o degradanti)[63]. Per quel che riguarda gli Stati Membri, tali norme e standard costituiscono il parametro sulla base del quale valutare il rispetto dei diritti garantiti dalla Direttiva 2008/115/CE al suo art. 16, nel caso di detenzione a fini espulsivi, e della Direttiva 2013/33/UE nel caso di detenzione dei richiedenti asilo, al suo art. 10. Si tratta, in particolare, della valutazione relativa alle condizioni materiali dei luoghi di detenzione (idoneità della struttura, presenza di finestre, di servizi igienici e docce, di letti e di spazi aperti; fornitura di cibo e acqua potabile); del rispetto del diritto di informazione – tra cui i diritti e i doveri correlati alla detenzio-

[59] UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* del 2012, che hanno sostituito le *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* del 1999.

[60] Raccomandazione CM/Rec(2006)2 del Comitato dei Ministri agli Stati Membri.

[61] Raccomandazione CM/Rec(2012)12 del Comitato dei Ministri agli Stati Membri e Raccomandazione CM/Rec(2006)2-rev del Comitato dei Ministri agli Stati Membri.

[62] Venti linee guida su tutti gli stadi del procedimento di rimpatrio forzato adottate dal Comitato dei Ministri del Consiglio d'Europa il 9 maggio 2005.

[63] Il CPT è stato istituito in virtù della Convenzione europea per la prevenzione della tortura e delle pene o trattamenti inumani o degradanti, entrata in vigore nel 1989. Come standard applicabili alla detenzione amministrativa si vedano le «Norme del CPT», documento CPT/Inf/E (2002) 1 - Rev. 2013.

ne e l'informativa relativa al diritto di richiedere protezione internazionale – e all'assistenza legale; del diritto a mantenere contatti con l'esterno; del rispetto del diritto alla salute.

Come risulta dalla consultazione delle loro Relazioni Annuali, diversi sono stati gli interventi dei MNP instituiti negli Stati Membri a tutela dei suddetti diritti in ambito di privazione della libertà degli stranieri[64], specialmente in relazione alle condizioni materiali e al diritto alla salute[65]. Invero, mentre i governi appaiono molto più resistenti ad accettare l'ingerenza dei meccanismi preventivi al di fuori del contesto penitenziario[66], i MNP della maggior parte degli Stati Membri risultano essere pienamente consapevoli dell'estensione del loro mandato[67]. Vi sono, tuttavia, dei limiti importanti nell'effettività dell'azione posta in essere dai MNP. Esemplificativo, in tal senso, è lo studio condotto da Bhui e Bosworth sul ruolo svolto dai MNP nei contesti di privazione della libertà degli stranieri in Ungheria, Grecia e Turchia[68]. Dallo studio emerge, infatti, che il PM ungherese non è stato in grado

[64] Si veda, ad esempio , il rapporto del MNP finlandese: Parliamentary Ombudsperson of Finland, *Annual report 2021*, pp. 104-105, consultabile al sito: https://www.oikeusasiamies.fi/documents/20184/39006/summary2021-final-web2.pdf/ 5db7cabe-7725-2976-c10d-5e0b25654651?t=1668780796307; o quello del MNP del Lussemburgo: Médiateur du Grand-Duché de Luxembourg, *Annual report 2021*, p. 3, consultabile al sito: https://www.ombudsman.lu/uploads/RA-CELPL/RA2021%20-%20Rapport.pdf.

[65] Si veda, *ex multis*, il rapporto del MNP francese. Contrôleur général des lieux de privation de liberté, *Annual report 2022*, pp. 103-107, consultabile al sito: https://www.ohchr.org/sites/default/files/documents/hrbodies/spt-opcat/MNP/France_2022_MNP.pdf.

[66] È il caso del governo croato: si veda il *Annual Report 2021* del MNP polacco, consultabile al sito: https://www.ohchr.org/sites/default/files/documents/hrbodies/spt-opcat/MNP/2022-08-23/NMPTReport2021-poland.pdf.

[67] A fare eccezione è ad esempio, il MNP maltese: il *Monitoring Board of Visitors for Detained Persons* ha un mandato nazionale ristretto alla detenzione *de iure*. Si veda CPT, *Report to the Maltese Government on the visit to Malta carried out from 17 to 22 September 2020*, Stransburgo, 10 marzo 2021, CPT/Inf (2021) 1.

[68] H.S. BHUI, M. BOSWORTH, A. FILI, *Monitoring Immigration Detention at the Borders of Europe. Research report on a pilot project in Greece, Hungary, Turkey and Italy,* 2016-2017, 2018, consultabile al sito: https://www.law.ox.ac.uk/sites/files/oxlaw/project_report_final_copy.pdf.

di superare i limiti posti da un clima politico ostile ai diritti umani[69], mentre in Grecia il potenziale del MNP in campo di detenzione amministrativa è ancora in fase esplorativa[70].

Nonostante, quindi, non tutti i MNP degli Stati Membri abbiano la stessa influenza sui rispettivi governi, il crescente ricorso alla misura detentiva come strumento di controllo dell'immigrazione e l'incremento dei luoghi ove questa avviene, sembrano andare nella direzione di attribuire loro sempre più importanza, anche alla luce delle proposte modifiche delle Direttive a livello europeo[71]. Modifiche che porterebbero ulteriormente a spostare il baricentro della detenzione amministrativa da un principio di estrema *ratio* ad uno di sistematicità. Medesimo sembra essere l'obiettivo della proposta di Regolamento *Screening* contenuta nel nuovo Patto su Immigrazione e Asilo[72], la quale contiene una procedura da applicarsi agli stranieri che non soddisfano le condizioni di ingresso del Codice Schengen[73], da svolgersi in locali situati alla frontiera esterna dell'Unione secondo una «finzione di non ingresso»[74]. Al fine di impedire l'allontanamento dai locali ove lo

[69] *Supra*, p. 13.

[70] *Ibidem.*

[71] Esempio ne è la Proposta COM(2018) 634 final di Direttiva del Parlamento Europeo e del Consiglio, recante norme e procedure comuni applicabili negli Stati membri al rimpatrio di cittadini di paesi terzi il cui soggiorno è irregolare (rifusione). L'articolo 18, co. 1, della proposta elimina l'inciso che consente il trattenimento «soltanto» per preparare il rimpatrio e/o effettuare l'allontanamento, ed estende i presupposti per il trattenimento finalizzato al rimpatrio e/o all'allontanamento, da una parte superando al suo art. 6 l'attuale nozione discrezionale di rischio di fuga, e dall'altra introducendo all'articolo 18, co. 1, lett. c) come motivo di trattenimento la tutela dell'ordine pubblico e la sicurezza nazionale, concetti non definiti univocamente e pertanto lasciati alla discrezionalità degli Stati Membri.

[72] Proposta COM/2020/612 def. di Regolamento del Parlamento Europeo e del Consiglio che introduce accertamenti nei confronti dei cittadini di paesi terzi alle frontiere esterne e modifica i regolamenti (CE) n. 767/2008, (UE) 2017/2226, (UE) 2018/1240 e (UE) 2019/817.

[73] Articoli 3 e 4 del Regolamento (UE) 2016/399 del Parlamento europeo e del Consiglio, del 9 marzo 2016, che istituisce un codice unionale relativo al regime di attraversamento delle frontiere da parte delle persone (codice frontiere Schengen).

[74] La finzione di non ingresso, unita al trattenimento presso le c.d. *zone di transito*, è invero una delle costruzioni giuridiche più diffuse nei "*non-entrée mechanisms*". Si

screening avviene e il conseguente «ingresso» nel territorio dell'Unione[75], gli Stati Membri sono invitati ad adottare «*misure nazionali*» tra le quali è espressamente menzionata la detenzione[76]. Tra le proposte contenute nel Regolamento *Screening*, è tuttavia prevista l'introduzione di un meccanismo di monitoraggio dei diritti fondamentali volto anche a «garantire il rispetto delle norme nazionali che disciplinano il trattenimento della persona interessata, segnatamente i motivi e la durata del trattenimento» a cui «gli Stati Membri possono invitare le organizzazioni nazionali e non governative pertinenti a partecipare»[77], tra i quali dovrebbero rientrare anche i MNP[78]. In attesa dell'avanzare dei negoziati sul Patto, l'Agenzia dell'Unione europea per i diritti fondamentali (FRA) ha già iniziato le interlocuzioni con le organizzazioni nazionali e non governative degli Stati Membri – includendo anche i MNP – al fine di valutare la volontà degli stessi di prendere parte al meccanismo e l'impatto della loro eventuale partecipazione sull'operatività dello stesso[79].

5. *Il ruolo del Meccanismo Nazionale di Prevenzione nella detenzione amministrativa degli stranieri in Italia*

In Italia, la funzione di MNP è svolta dal Garante Nazionale per le persone private della libertà personale (GNPL)[80]. Il MNP italiano, nella fase successiva all'istituzione – avvenuta nel 2014 con l'invio di una

veda J.C. HATHAWAY, *The emerging politics of Non-Entrée*, in *Refugees*, 1992, fasc. XCI, pp. 40-41.

[75] Articolo 6, co. 1, della Proposta COM/2020/612 def.

[76] Recital 12 della Proposta COM/2020/612 def.

[77] Articolo 7 della Proposta COM/2020/612 def.

[78] Si veda sul punto il comunicato del MNP italiano alla Commissione LIBE: https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/9e109b82bc936743e1a1b7deec2e6edb.pdf.

[79] FRA, *Establishing national independent mechanisms to monitor fundamental rights compliance at EU external borders*, 14 ottobre 2022, consultabile al sito: https://fra.europa.eu/en/publication/2022/border-rights-monitoring.

[80] Articolo 7 del Decreto-legge 23 dicembre 2013, n. 146, *Misure urgenti in tema di tutela dei diritti fondamentali dei detenuti e di riduzione controllata della popolazione carceraria*, GU Serie Generale n. 300 del 23-12-2013.

note verbale all'STP da parte del Rappresentante Permanente d'Italia presso le Nazioni Unite e le altre Organizzazioni Internazionali a Ginevra[81] – si conformava come un MNP a sistema reticolare, con il Garante Nazionale a coordinare i garanti territoriali, organismi già istituiti o da costituire a livello regionale o locale, laddove non esistenti. Tuttavia, nei primi anni di attività dell'istituto sono emerse non poche criticità relative al modello scelto. Di conseguenza, il GNPL auspicava un intervento del legislatore volto a regolamentare i rapporti tra GNPL e garanti territoriali, con una norma di rango primario. Nel 2020, tale richiesta è recepita dal legislatore, che modifica la legge istitutiva del Garante[82]. Nella sua versione aggiornata, questa definisce il Garante quale unico MNP, con la possibilità di delegare ai Garanti regionali le funzioni di MNP in alcuni ambiti di competenza, tra cui rientra la privazione amministrativa della libertà degli stranieri[83]. Il Garante – composto da un Collegio di tre persone – è supportato da un ufficio, la cui quarta unità, denominata «privazione della libertà e persone migranti» è dedicata al monitoraggio e alla visita «delle strutture privative della

[81] OHCHR, Registry 1105 del 28 aprile 2014.

[82] Decreto-legge 21 ottobre 2020, n. 130, *Disposizioni urgenti in materia di immigrazione, protezione internazionale e complementare, modifiche agli articoli 131-bis, 391-bis, 391-ter e 588 del codice penale, nonché misure in materia di divieto di accesso agli esercizi pubblici ed ai locali di pubblico trattenimento, di contrasto all'utilizzo distorto del web e di disciplina del Garante nazionale dei diritti delle persone private della libertà personale*, GU Serie Generale n. 261 del 21-10-2020, convertito in Legge 18 dicembre 2020 n. 173, Conversione in legge, con modificazioni, del decreto-legge 21 ottobre 2020, n. 130, *recante disposizioni urgenti in materia di immigrazione, protezione internazionale e complementare, modifiche agli articoli 131-bis, 391-bis, 391-ter e 588 del codice penale, nonché misure in materia di divieto di accesso agli esercizi pubblici ed ai locali di pubblico trattenimento, di contrasto all'utilizzo distorto del web e di disciplina del Garante nazionale dei diritti delle persone private della libertà personale*, GU Serie Generale n. 314 del 19-12-2020.

[83] Art. 7, co. 1 bis, del Decreto-legge 23 dicembre 2013, n. 146, cit., convertito in Legge 21 febbraio 2014, n. 10, G.U. Serie Generale n. 43 del 21-2-2014 «Il Garante nazionale opera quale meccanismo nazionale di prevenzione ai sensi dell'articolo 3 del Protocollo opzionale alla Convenzione contro la tortura e altre pene o trattamenti crudeli, inumani o degradanti, adottato il 18 dicembre 2002 con Risoluzione A/RES/57/199 dall'Assemblea Generale delle Nazioni Unite e ratificato ai sensi della legge 9 novembre 2012, n. 195, ed esercita i poteri, gode delle garanzie e adempie gli obblighi di cui agli articoli 4 e da 17 a 23 del predetto Protocollo».

libertà delle persone migranti quali Cpr, Hotspot, Centri governativi di prima accoglienza, Centri per minori non accompagnati»[84] ed in generale dei «luoghi in cui lo straniero può essere trattenuto a qualunque titolo […]»[85]. Il Garante si occupa, inoltre, di monitorare le diverse fasi dell'implementazione dei rimpatri forzati, in forza della sua designazione quale organo di monitoraggio indipendente dei rimpatri forzati ai sensi della Direttiva 115/CE/2008[86].

Negli ultimi anni, il sistema italiano ha visto l'introduzione di tre nuove ipotesi di trattenimento dei richiedenti asilo[87], e la previsione di

[84] Articolo 8, co. 3, del Codice di Autoregolamentazione del Garante nazionale delle persone private dalla libertà personale.

[85] Articolo 3, co. 2, lettera c) del Codice di Autoregolamentazione, ove per ogni altro locale di cui all'articolo 6, co. 3-bis, primo periodo, debbano intendersi gli appositi locali istituiti all'interno degli hotspot o dei tre centri dislocati lungo la frontiera marittima delle coste pugliesi per le esigenze di prima assistenza, instituiti dall'art. 2, l. 451/1995.

[86] Articolo 8, co. 6, della Direttiva 115/CE/2008.

[87] Il Decreto-legge 21 ottobre 2020, n. 130, cit., interviene sull'art. 6 del 18 agosto 2015, n. 142, *Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonché della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale*, GU Serie Generale n. 214 del 15-09-2015. La nuova norma prevede che sia trattenuto il richiedente che versi nelle condizioni di cui agli articoli 12, co. 1, lett. b) e c), e 16 del decreto legislativo 19 novembre 2007, n. 251, *Attuazione della direttiva 2004/83/CE recante norme minime sull'attribuzione, a cittadini di Paesi terzi o apolidi, della qualifica del rifugiato o di persona altrimenti bisognosa di protezione internazionale, nonché norme minime sul contenuto della protezione riconosciuta*, GU Serie Generale n.3 del 04-01-2008. Si tratta del caso in cui il richiedente ricorra in una causa di diniego dello *status* di rifugiato e di esclusione dallo *status* di protezione sussidiaria. Prevede il trattenimento di chi si trovi nelle condizioni di cui all'articolo 29 bis, del decreto legislativo 28 gennaio 2008, n. 25, *Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello status di rifugiato*, GU Serie Generale n. 40 del 16-02-2008, ovvero nell'ipotesi di domanda reiterata in fase di esecuzione di un provvedimento di allontanamento. Prevede, infine, il trattenimento in caso di condanna anche non definitiva per i reati rilevanti ai fini delle cause di diniego dello status di rifugiato ai sensi dell'articolo 12, co. 1, lett. c) e di esclusione dallo status di protezione sussidiaria ai sensi dell'art. 16, co. 1, lett. d-bis) del decreto legislativo 19 novembre 2007, n. 251, cit.

luoghi di privazione della libertà ulteriori rispetto ai Centri di Permanenza e Rimpatrio (CPR) e ai «punti di crisi» (c.d. *hotspot*)[88], quali strutture a questi «analoghe»,[89] non meglio definite strutture «diverse e idonee nella disponibilità dell'Autorità di pubblica sicurezza», e «locali idonei presso l'ufficio di frontiera»[90]. Di conseguenza, il ruolo svolto dal MNP in materia di detenzione amministrativa degli stranieri è stato, fin dalla sua istituzione, di importanza fondamentale.

In primo luogo, rispetto alla sua attività di visita, *reporting* e *standard setting*, alcune delle raccomandazioni relative alle condizioni di trattenimento[91], formulate dal GNPL nel corso delle ripetute e continuative visite ai luoghi di trattenimento amministrativo, hanno trovato accoglimento al momento dell'adozione, nel maggio del 2022, della Direttiva ministeriale recante criteri per l'organizzazione dei centri di permanenza per i rimpatri[92], che ha sostituto il Decreto ministeriale

[88] Art. 10 ter, co. 1, del Decreto legislativo 25 luglio 1998, n. 286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, GU Serie Generale n.191 del 18-08-1998 - Suppl. Ordinario n. 139.

[89] Art. 10 ter, co. 1 bis, del Decreto legislativo 25 luglio 1998, n. 286, cit.

[90] Articolo 13, co. 5 bis, del Decreto legislativo 25 luglio 1998, n. 286, cit. introdotto dal Decreto-legge 4 ottobre 2018 n. 113, *Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata*, GU Serie Generale n.231 del 04-10-2018. Il trattenimento in «strutture diverse e idonee» nella disponibilità dell'Autorità di pubblica sicurezza, e «locali idonei presso l'ufficio di frontiera» è possibile qualora il trattenimento nell'attesa della convalida del giudice sul provvedimento di espulsione non possa avvenire in un CPR per carenza di posti disponibili.

[91] Si veda GNPL, *Norme e normalità. Standard per la privazione della libertà delle persone migranti. Raccolta delle Raccomandazioni 2016-2018*, 2019, i numerosi rapporti di visita del GNPL e le relazioni annuali al Parlamento. Si rinvia al sito del GNPL: https://www.garantenazionaleprivatiliberta.it/gnpl/.

[92] Ministero dell'Interno, Direttiva recante *Criteri per l'organizzazione e la gestione dei centri di permanenza per i rimpatri previsti dall'art 14 del decreto legislativo 25 luglio 1998, n. 286 e successive modificazion*i, del 19 maggio 2022, anche conosciuta come Direttiva Lamorgese.

del 2014 noto come Regolamento Unico CIE[93]. Pur permanendo la criticità di fondo per cui la regolamentazione delle modalità di detenzione è relegata ad una norma di rango secondario, la Direttiva contiene alcune previsioni – come, ad esempio, l'introduzione del dovere di tenuta, da parte degli enti gestori dei centri, dei registri degli eventi critici[94] – che sono il frutto del lavoro del MNP e del dialogo instaurato tra questi e le competenti organizzazioni.

In secondo luogo, il MNP ha formulato proposte e osservazioni relativamente alla legislazione in vigore e ai progetti di legge che incidono sulla privazione amministrativa della libertà dei migranti, con interventi che sono spesso risuonati come campanelli d'allarme rispetto al rischio di tortura e trattamenti degradanti. Esempio ne sono i pareri espressi nell'ambito della modifica legislativa che ha permesso di detenere gli stranieri in «strutture diverse e idonee nella disponibilità dell'Autorità di pubblica sicurezza», e «locali idonei presso l'ufficio di frontiera» nei quali il MNP ha sottolineato la problematicità di usare a scopo detentivo luoghi caratterizzati da indeterminatezza, e ha chiesto al Governo di comunicare ufficialmente ove questi sarebbero stati ubicati[95].

Il continuare a sottrarsi a tale obbligazione da parte dei governi che intanto si sono succeduti, ha sottolineato l'importanza di un ulte-

[93] Ministro dell'Interno, Decreto recante *Criteri per l'organizzazione e la gestione dei centri di identificazione ed espulsione*, del 20 ottobre 2014, noto come Regolamento Unico CIE.

[94] Art. 4, co. 2, lett. p) della Direttiva del 19 maggio 2022, cit. «[il gestore] cura la tenuta di un registro degli eventi critici, che deve essere consultabile dai soggetti di cui all'art. 7 commi 1, 2 e 3 e dalle Forze di Polizia, ove annotare nell'immediatezza ogni evento che abbia creato turbativa all'interno del centro ed eventuali episodi che abbiano causato lesioni ad ospiti o operatori e atti di autolesionismo e suicidari, nonché un registro dei colloqui degli stranieri per ciascun servizio di informazione legale, assistenza sociale e psicologica».

[95] GNP, *Parere espresso nell'ambito dell'iter di conversione decreto-legge 4 ottobre 2018 n. 113*, consultabile all'indirizzo: https://www.garantenazionaleprivatiliberta.it /gnpl/resources/cms/documents/6fecb3664615e424b5726b38b597df4a.pdf; GNPL, *Parere formulato su richiesta del Direttore centrale dell'immigrazione e della Polizia delle frontiere,* 15 febbraio 2019, consultabile all'indirizzo: https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/6fecb3664615e424b5726b38b597df4.

riore profilo di competenza del MNP italiano, ovvero quello relativo alla determinazione dei luoghi di detenzione in uso dallo Stato. Questa si declina, da una parte, nell'identificazione *geografica* dei luoghi detentivi, ovvero nell'individuare e rendere pubblico ove questi si ubicano nel territorio. Un esempio ne è il lavoro di mappatura svolto dal MNP in relazione alle «strutture diverse e idonee», pubblicato all'interno della Relazione al Parlamento 2023[96]. Dall'altra, nell'identificazione *ontologica* dei luoghi detentivi, ovvero nella sua capacità di identificare come detentivi luoghi che, sulla carta, non lo sono, ma diventano tali a causa dell'informalità delle prassi di gestione del fenomeno migratorio a livello nazionale. Il MNP esercita tale competenza fin dal 2016, quando per la prima volta ha visitato l'insediamento informale per persone migranti di Parco Roja sul confine italo-francese di Ventimiglia[97]. Da allora sempre nuovi e ulteriori luoghi *de facto* privativi della libertà personale sono stati identificati e monitorati dal MNP. Tra questi, di particolare importanza è l'attenzione dedicata ai locali di attesa per la permanenza delle persone respinte presso i valichi di frontiera aeroportuali e marittime[98], ove il tempo di permanenza arriva, talvolta, a superare la settimana, alle imbarcazioni di soccorso

[96] GNPL, *Appendice statistica della Relazione al Parlamento 2023*, p. 121. Il lavoro di mappatura del MNP assume particolare valore dal momento che non esiste un elenco pubblico delle «strutture diverse e idonee nella disponibilità dell'Autorità di pubblica sicurezza» mentre non risultano ancora allestiti «locali idonei» presso gli uffici di frontiera.

[97] GNPL, *Rapporto di visita al campo di accoglienza di Ventimiglia "Campo Roja"*, consultabile all'indirizzo: https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/6377a6b9628660a3955b03ec1f844b0d.pdf. La risposta del Ministero dell'Interno è consultabile all'indirizzo:https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/5128f3d1c6090b0d4508f1dd3becbfa5.pdf.

[98] GNPL, *Rapporto sulle visite ai locali in uso alle forze di polizia presso alcuni valichi di frontiera*, consultabile all'indirizzo: https://www. garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/acd25386033036d9bc9c7f2231772399.pdf. La risposta del Ministero dell'Interno è consultabile all'indirizzo:https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/fea9b636fbaa5fe9a46769fc8e0fd088.pdf.

senza possibilità di approdo e sbarco[99], ove in diverse occasioni gli stranieri sono stati trattenuti per giorni, reduci da un naufragio e senza conoscere le loro sorti. L'intervento del MNP, l'azione di recarsi in questi luoghi e di visitarli, li ha infatti sottratti dalla condizione di limbo giuridico nei quali l'assenza di una legislazione o l'opacità della stessa li aveva relegati, con un evidente impatto sui loro diritti fondamentali.

Il GNPL ha, inoltre, preso parte a procedimenti giudiziari relativi a maltrattamenti e suicidi come persona offesa, e formulato opinioni come *amicus curiae* alla Corte europea dei diritti dell'uomo in procedimenti relativi agli artt. 3 (proibizione della tortura), 5 (diritto alla libertà e alla sicurezza), e 8 (diritto al rispetto della vita privata e familiare) della CEDU, relativi alla detenzione amministrativa. Infine, in seguito alla condanna dell'Italia da parte della Corte Edu nella sentenza *Khlaifia*[100]*,* il legislatore ha introdotto in favore dello straniero trattenuto una procedura di reclamo sulle condizioni di trattenimento al Garante nazionale e ai garanti regionali o locali[101]. Diverse sono le criticità di tale meccanismo, il quale costituisce, tuttavia, l'unica forma in cui agli stranieri detenuti è permesso lamentare le proprie condizioni di detenzione amministrativa. Non esiste, invero, nel sistema italiano, un'autorità giurisdizionale, al pari del magistrato di sorveglianza per la detenzione penale, cui rivolgere istanze e reclami.

6. *Conclusioni*

Condividendo quanto sostenuto da Majcher, Flynn e Grange, per cui dall'inizio della «crisi dei rifugiati» nel 2015, la legislazione dell'UE

[99] GNPL, *Comunicato stampa sulla visita del Garante nazionale alla nave Diciotti per verificare le condizioni dei 177 migranti*, consultabile all'indirizzo: https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/b501587c41da44757bbd8f06b86394c8.pdf.

[100] Corte europea dei diritti dell'uomo, sentenza del 15 dicembre 2016, *Khalaifia c. Italia*, ricorso n. 16483/12.

[101] Articolo 14, co. 2 bis, del Decreto legislativo 25 luglio 1998, n. 286, cit., introdotto dal Decreto-legge 21 ottobre 2020, n. 130, cit., convertito in Legge 18 dicembre 2020 n. 173, cit.

ha portato all'adozione di leggi e pratiche non rispettose dei diritti e degli standard fondamentali[102], interrogarsi sulle funzioni e sull'impatto dei meccanismi preventivi sulla detenzione amministrativa, significa in primo luogo interrogarsi sul ruolo che i diritti umani svolgono in tale contesto. È una questione a cui la dottrina offre risposte diverse, spesso difformi. Cornelisse, ad esempio, sostiene che i diritti umani sconvolgono i presupposti di sovranità territoriale insiti nel controllo delle frontiere, funzionando, nel contesto della detenzione per immigrazione, come quelli che l'autrice definisce «*destabilisation rights*»[103]. Questi garantiscono l'applicazione di un pieno controllo legale alle rivendicazioni che lo Stato nazionale presenta come prevalentemente basate sulla propria sovranità territoriale[104]. Al contrario, altri autori, ponendo maggiore enfasi sull'evidenza empirica e sull'esperienza vissuta dei detenuti, e meno sulle tutele legali astrattamente garantite, mettono in dubbio l'impatto dei diritti umani nella pratica della detenzione amministrativa[105], ad esempio sottolineando le difficoltà che i detenuti incontrano nell'esercizio dei loro diritti durante la detenzione[106]. La figura dei MNP sembra racchiudere in sé entrambi questi aspetti: da un lato si presenta come *destabilisation institution* rispetto alle autorità nazionali, dall'altra ne è in ogni caso vincolata, con ripercussioni spesso evidenti sull'effettività del mandato, e di conseguenza sull'effettività della protezione dei diritti umani. Come evidenziato dalla dottrina, anche in questi casi i MNP continuano però a giocare il

[102] Si veda I. MAJCHER, M. FLYNN, M. GRANGE, *Immigration Detention in the European Union. In the Shadow of the "Crisis"*, Cham, 2020, p. 11.

[103] G. CORNELISSE, *Detention and Transnational Law in the European Union: Constitutional Protection Between Complementarity and Inconsistency*, in M. J. FLYNN, M. B. FLYNN (eds.), *Challenging Immigration Detention—Academics, Activists, Policymakers,* London, 2017, pp. 222-238.

[104] L. MARIN, M. SPENA, *Introduction: The Criminalization of Migration and European (Dis)Integration*, in *Eur. J. Migr. Law*, 2016 n. 18, pp. 147-156.

[105] H.S. BHUI, M. BOSWORTH, A. FILI, *Monitoring Immigration Detention at the Borders of Europe*, cit.

[106] M. BOSWORTH, M. VANNIER, *Comparing Immigration Detention in Britain and France: A Matter of Time?*, in *Eur. J. Migr. Law*, 2016, n. 18, pp. 157-176.

ruolo fondamentale di «*bulwark against erosion of rights*»[107], non solo a livello nazionale, ma anche a livello regionale ed internazionale. In quanto parte di un più ampio sistema di prevenzione della tortura, essi hanno infatti la possibilità di riportare le criticità sistematiche all'STP, il quale può muoversi di conseguenza intraprendendo azioni che sono a beneficio di tutti i MNP, di cui la menzionata stesura di un *General Comment* all'art. 4 è chiaro esempio[108]. Egualmente, i diversi MNP possono fare rete, tanto al fine di affrontare congiuntamente violazioni dei diritti che assumono carattere transfrontaliero, sia per lo scambio di buone prassi e di strategie per garantire l'effettiva implementazione delle raccomandazioni nei rispettivi Stati[109]. Infine, nel contesto regionale europeo, un ruolo fondamentale è giocato dal rapporto tra i MNP e il Comitato europeo per la prevenzione della tortura e delle pene o trattamenti inumani o degradanti (CPT) istituito in seno al Consiglio d'Europa. Invero, il rapporto tra questi due meccanismi di monitoraggio, che condividono medesime finalità e modalità operative[110], rappresenta una ricchezza in termini di innalzamento dello standard di tutela dei diritti umani. Il flusso di informazioni che li attraversa permette al CPT di avere piena conoscenza delle criticità relative alla detenzione prima della sua visita, così da prepararla nel modo più opportuno e indirizzare raccomandazioni puntuali agli Stati, mentre le raccomandazioni del CPT – tanto allo Stato interessato quanto agli altri

[107] H.S. BHUI, M. BOSWORTH, *Human rights protections and monitoring immigration detention at Europe's Borders*, in *European Human Rights Law Review*, 2020 n. 6, pp. 640-654, cit. p. 14.

[108] SPT, *Draft general comment No. 1 on places of deprivation of liberty (article 4)*, cit.

[109] Si veda lo *European MNP network project*, il progetto di rete europea MNP istituito dal Consiglio d'Europa e dall'Unione Europea e attuato dall'Associazione per la prevenzione della tortura (APT). Le attività sono consultabili al sito: https://www.seemnp.net/.

[110] Il CPT prevede un sistema di visite nei luoghi di detenzione, per verificare le condizioni di trattamento delle persone private della libertà. Nel corso delle visite le delegazioni del CPT si valgono del diritto di accesso illimitato ai luoghi di detenzione, all'interno dei quali possono spostarsi con assoluta libertà. Dopo ogni visita, il CPT invia un rapporto dettagliato al governo dello Stato interessato, contenente i risultati emersi nel corso della visita, nonché le raccomandazioni, i commenti e le eventuali richieste di informazioni complementari.

Stati – costituiscono un elemento utile alla costruzione degli *standards* di privazione della libertà sulla base dei quali i MNP formulano le proprie raccomandazioni a livello nazionale. Esempio di tale relazione biunivoca è la visita effettuata dal CPT agli *Hotspots* italiani[111], preparata anche sulla base dei precedenti monitoraggi del MNP, e le cui raccomandazioni sono confluite negli *stardards* nazionali di privazione della libertà amministrativa[112]. In generale, l'impegno dei tre organismi sembra andare nella direzione di una stretta collaborazione in materia di tutela dei diritti degli stranieri[113].

Alla luce di questa breve ricostruzione, è possibile ritenere che anche laddove l'impatto diretto dell'operato dei MNP sulle condizioni di detenzione appaia limitato, l'azione di monitoraggio e di diffusione delle informazioni da essi svolta, definisce un confine oltre il quale l'azione amministrativa non può agire priva di qualsiasi forma di controllo. Il loro potenziale nella tutela dello Stato di diritto nello spazio giuridico europeo è evidente: essi forniscono, invero, strumenti utili al controllo dell'operato delle amministrazioni nazionali alla società civile, alle istituzioni europee, agli organi internazionali di tutela dei diritti umani. Prova ne è l'utilizzo che la Corte EDU ha fatto, negli ultimi anni, dei rapporti dei MNP, riconoscendo, in alcuni casi, la violazione dell'art. 3 CEDU in relazione alle condizioni di detenzione amministrativa dei migranti, proprio sulla base delle informazioni in essi con-

[111] CPT, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 13 June 2017*, del 10 aprile 2018, CPT/Inf (2018) 13.

[112] GNPL, *Norme e normalità. Standard per la privazione della libertà delle persone migranti*, cit.

[113] Conferma ne è l'incontro che si è svolto a Roma il 14 settembre 2023 tra il MNP italiano, la Presidente del Sottocomitato ONU per la prevenzione della tortura e il Presidente del Comitato europeo per la prevenzione della tortura, e che ha avuto ad oggetto i diritti fondamentali delle persone destinatarie di un provvedimento di rimpatrio. Si veda GNPL, Comunicato stampa dell'8 settembre 2023, *Il Garante nazionale e i Presidenti dei Comitati sovranazionali di controllo sulla privazione della libertà a Roma per un confronto pubblico su diritti fondamentali e rimpatri forzati*, consultabile all'indirizzo: https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/7cd9b05e4acdca42df7d401b55b31ab7.pdf.

tenute[114]. L'azione dei MNP restituisce, in conclusione, significato al termine «dignità», valore fondante l'ordinamento dell'Unione, sempre menzionato ma raramente sostanziato nel contesto della detenzione amministrativa degli stranieri.

[114] Si veda Corte europea dei diritti dell'uomo, *J.A. e altri c. Italia*, cit., parr. 17-18 e 62.

LA CLOCHARDISATION DES MINEUR·E·S ISOLÉ·E·S ÉTRANGER·E·S EN FRANCE: UNE FABRIQUE D'(IN)SÉCURITÉ ET UN VULNUS À LA SOLIDARITÉ

Veronica Romano[*]

SOMMAIRE: 1. Mineur·e·s isolé·e·s étranger·e·s: caractéristiques et réglementation d'une catégorie juridiqué. – 2. Punies plutôt que protégé·e·s: l'insoutenable exclusion des MIEs de l'Aide sociale à l'enfance et leur criminalisation. – 3. Vies suspendues: dans les coulisses d'une protection judiciaire en demi-teinte. – 4. De quelle sécurité? De quelle solidarité? L'État au service de la criminalité.

1. *Mineur·e·s isolé·e·s étranger·e·s: caractéristiques et réglementation d'une catégorie juridique*

Le traitement accordé par les autorités françaises aux mineur·e·s isolé·e·s étranger·e·s (ci-après, MIEs) mérite une attention particulière, dévoilant le caractère criminogène des politiques migratoires.

Ce sujet de recherche se pose, en effet, au confluant du droit des étrangers et de la protection de l'enfance en danger, ce qui l'expose à deux logiques différentes et concurrentielles: celle du contrôle des flux migratoires, d'une part, celle de la protection des mineurs, d'autre part[1].

Avant d'aborder le vif du sujet, la délimitation de cette catègorie particulièrement vulnérable[2] de la mobilité humaine s'impose comme nécessaire.

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[1] F. JAULT-SESEKE, S. CORNELOUP, S. BARBOU DES PLACES (sous la direction de), *Droit de la nationalité et des étrangers*, Paris, 2015, p. 455.

[2] Il s'agit d'une double vulnerabilité, à la fois ontologique (en ce sens qu'un cartain degré de fragilité est propre à chaque être humain, y compris le mineur migrant) et situationnelle, voire causée ou exacerbée par les politiques sociales, économiques ou environnementales des individus et des groupes sociaux. Cfr., *ex multis*, B. PASTORE,

À l'echelle européenne, l'art. 2, lettre f), de la directive 2001/55/CE[3] définit les mineurs non accompagnés en tant que «*ressortissants de pays tiers ou apatrides âgés de moins de dix-huit ans qui entrent sur le territoire des États membres sans être accompagnés d'un adulte qui soit responsable d'eux, de par la loi ou la coutume, et tant qu'ils ne sont pas effectivement pris en charge par une telle personne, ou les mineurs qui ne sont plus accompagnés après leur entrée sur le territoire des États membres*», ce qui exclut les mineurs non accompagnés ayant la nationalité d'un État membre et les ressortissants de pays tiers ou apatrides qui résident dans l'État membre dans lequel ils sont nés et ont été abandonnés. Il s'agit d'une définition restrictive qui «*est le reflet de la perception de l'arrivée de ces mineurs sur le territoire des États membres, avant tout, comme constituant un problème de flux migratoires*»[4].

Certains États membres (la Grande-Bretagne, l'Italie, l'Espagne, la France et la Suède) n'ayant pas entièrement transposé cette définition, un problème d'harmonisation se pose[5].

Semantica della vulnerabilità, soggetto, cultura giuridica, Torino, 2021, p. 5; C. MACKENZIE – W. ROGERS – S. DODDS (sous la direction de), *Vulnerability. New Essays in Ethics and Feminist Philosophy*, New York, 2013, p. 1-29. Cette différentiation reflète celle introduite par J. BUTLER, *Precarious Life: The Powers of Mourning and Violence*, London, 2006 entre *precariousness* (inhérente à tout être humain) et *precarity* (résultant du manque d'infrastructures sociales et d'institutions politiques).

Cette vulnérabilité dépend de l'organisation des relations économiques et sociales et de la présence ou de l'absence d'infrastructures de soutien et d'institutions politiques).

[3] Directive 2001/55/CE du Conseil du 20 juillet 2001 relative à des normes minimales pour l'octroi d'une protection temporaire en cas d'afflux massif de personnes déplacées et à des mesures tendant à assurer un équilibre entre les efforts consentis par les États membres pour accueillir ces personnes et supporter les conséquences de cet accueil, JOCE L 212, p. 12.

[4] P. DUMAS, *L'accès des mineurs non accompagnés à la protection dans les États membres de l'Union européenne*, dans *Revue trimestrelle de droit européen*, 2013, n. 1, p. 35.

[5] Cfr. L. DELBOS (sous la direction de), *L'accueil et la prise en charge des mineurs non accompagnés dans huit pays de l'Union européenne, Étude comparative et perspectives d'harmonisation*, Paris, 2010, p. 165, p. 11; P. DUMAS, *L'accès des mineurs non accompagnés*, cit., p. 39, qui met aussi en exergue l'absence d'une compétence générale de l'Union européenne dans le domaine de la protection de l'enfance.

La legislation française ne distingue pas (au moins sur un plan théorique)[6] entre mineur·e·s ressortissant·e·s de l'Union européenne et mineur·e·s extra-communautaires : l'article 1 de l'arrêté du 17 novembre 2016, pris en application du décret n° 2016-840 du 24 juin 2016 relatif aux modalités de l'évaluation des mineurs privés temporairement ou définitivement de la protection de leur famille établit que «*la personne est considérée comme isolée lorsque aucune personne majeure n'en est responsable légalement sur le territoire national ou ne le prend effectivement en charge et ne montre sa volonté de se voir durablement confier l'enfant, notamment en saisissant le juge compétent*»[7].

Il faut, en outre, rappeler que d'après le premier alinéa de l'article 388 du code civil, «*le mineur est l'individu de l'un ou l'autre sexe qui n'a point encore l'âge de dix-huit ans accomplis*».

De la catégorie décrite ci-dessus la loi française distingue celle des *jeunes isolé·e·s étranger·e·s*, âgé·e·s de plus de 18 ans qui peuvent postuler pour un *contrat jeune majeur* valable jusqu'à l'âge de 21 ans.

L'article L.112-3 du CASF prévoit, en effet, que les interventions au titre de la protection de l'enfance «*peuvent également être destinées à des majeurs de moins de vingt et un ans connaissant des difficultés susceptibles de compromettre gravement leur équilibre*». Dans ce but, aux termes de l'article L. 222-5-1 du CASF, un entretien doit être organisé par le président du conseil départemental un an avant la majorité du jeune, pour faire un bilan de son parcours et envisager les conditions de son accompagnement vers l'autonomie[8].

Responsable de l'aide sociale à l'enfance est le département du lieu où se trouve la personne se déclarant mineure et privée temporairement ou définitivement de la protection de sa famille.

[6] On démontrera, en effet, qu'une discrimination à l'égard des MIEs se produit dans la pratique.

[7] Il faut préciser que l'expression *mineur·e·s isolé·e·s étranger·e·s* (ci-après, MIEs) ne relève pas à proprement parler du langage juridique, ayant été elaborée par les Organisations non-gouvernamentales. Cfr. I. FRECHON, L. MARQUET, *Unaccompanied Minors in France and Inequalities in Care Provision under the Child Protection System*, dans *Social Work and Society*, 2017, n. 2, p. 2.

[8] Toutefois, il ressort que dans certains départements l'accompagnement des jeunes majeurs vers l'autonomie n'est pas effective. Cfr. Défenseur des droits, *Les mineurs non accompagnés*, cit., p. 84.

Aux termes de l'article R.221-11 du code de l'action sociale et des famille (ci-après, CASF), le président du conseil départemental, une fois la requête de protection reçue, doit mettre en place un accueil provisoire d'urgence d'une durée de cinq jours.

Conformement à l'article L 226-4 du CASF, pendant le cinq jours d'accueil provisoire de la personne se déclarant mineure, le président du conseil départemental doit aussi prévenir le Procureur de la République de la présence d'un mineur en danger et effectuer l'évaluation de la minorité. Si l'évaluation n'est pas complétée dans ce délai, c'est au département de financer le prolongement de la mise à l'abri pour un délai de huit jours, par ordonnance de placement provisoire (OPP). Si, au terme de ce délai, la situation est toujours peu claire, le parquet saisit le juge des enfants[9].

Dans le cadre de l'évaluation de la minorité, le concours du préfet de département et du préfet de police pour vérifier l'authenticité des documents détenus par la personne, peut être sollicité. Dans ce but, le décret n° 2019-57 du 30 janvier 2019 a prévu la mise en place d'un fichier d'«*appui à l'évaluation de la minorité des personnes se déclarant mineures et privées temporairement ou définitivement de la protection de leur famille*» (dit fichier AEM).

En application de ce décret, la personne se déclarant mineure peut être orientée vers la préfecture pour le relevé de ses empreintes dans le fichier AEM, en vue d'une comparaison avec les fichiers VISABIO[10] et AGDREF[11], ce qui entraîne un transfert de données sensibles qui - comme l'a remarqué le Défenseur des droits - est «*symptomatique d'un glissement du droit commun de la protection de l'enfance vers un droit*

[9] Cfr. N. PATÉ, *L'accès – ou le non-accès – à la protection des mineur·e·s isolé·e·s en situation de migration*, Nanterre, p. 189.

[10] Il s'agit d'un système numérique destiné à vérifier comment les demandeurs d'asile sont entrés sur le territoire de l'UE, sur le fondement de quel visa et sous quelle identité. Pour plus de détails, également en matière d'incompatibilité avec les droits fondamentaux des demandeur·e·s d'asile, cfr. M. LE VERGER, *Des demandeurs d'asile piégés par la frontière numérique*, dans *La Revue des droits de l'homme*, 2018, n. 13, pp. 110-123.

[11] Il s'agit d'un dispositif numérique concernant les dossiers des ressortissant·e·s étrangèr·e·s gérés par les préfectures, ainsi que les titres de séjour et les mesures d'éloignement.

spécial des mineurs non accompagnés, animé par des logiques de gestion des flux migratoires»[12].

En tous cas, aux termes de l'article L. 221-2-4, alinéa II, du CASF, «*la majorité d'une personne se présentant comme mineure et privée temporairement ou définitivement de la protection de sa famille ne peut être déduite de son seul refus opposé au recueil de ses empreintes*».

L'évaluation de la minorité doit se faire aussi dans le respect de l'article 388, alinéas 2, 3 et 4, selon lequel «*les examens radiologiques osseux aux fins de détermination de l'âge, en l'absence de documents d'identité valables et lorsque l'âge allégué n'est pas vraisemblable, ne peuvent être réalisés que sur décision de l'autorité judiciaire et après recueil de l'accord de l'intéressé. Les conclusions de ces examens, qui doivent préciser la marge d'erreur, ne peuvent à elles seules permettre de déterminer si l'intéressé est mineur. Le doute profite à l'intéressé. En cas de doute sur la minorité de l'intéressé, il ne peut être procédé à une évaluation de son âge à partir d'un examen du développement pubertaire des caractères sexuels primaires et secondaires*». Il faut, en effet, toujours garder à l'esprit que l'intérêt supérieur de l'enfant constitue l'étoile du berger dans la protection de l'enfant en migration[13]. Il s'agit d'un principe inscrit dans l'article 3.1 de la Convention relative aux droits de l'enfant (ci-après, CIDE)[14], reconnu d'effet direct par le Conseil d'Etat[15] ainsi que par la Cour de Cassation[16].

Le Conseil Constitutionnel, pour sa part, n'a pas tardé à préciser que:

[12] Défenseur des droits, *Les mineurs non accompagnés au regard du droit*, 2022, pp. 46-47.

[13] J. FIERENS, *Alpha ursae minoris – L'étoile polaire et l'intérêt supérieur de l'enfant parmi les intérêts concurrents*, dans CONSEIL DE L'EUROPE (sous la direction de), *L'intérêt supérieur de l'enfant – Un dialogue entre théorie et pratique*, Strasbourg, 2019, pp. 38-42.

[14] «*Dans toutes les actions qui concernent les enfants, qu'elles soient le fait des institutions publiques ou privées de protection sociale, des tribunaux, des autorités administratives ou des organes législatifs, l'intérêt supérieur de l'enfant doit être une considération primordiale*». La CIDE a été ratifiée par la France en 1990.

[15] Conseil d'État, décision du 9 janvier 2015, n° 386865; Conseil d'État, décision du 22 septembre 1997, n° 161364.

[16] Cfr., *ex multis*, Cour de Cassation civile, Assemblée plénière, décision du 3 juin 2011, n° 09-69052.

l'exigence constitutionnelle de protection de l'intérêt supérieur de l'enfant implique de veiller à ce qu'aucun mineur ne soit indûment considéré comme majeur[17].

Cette décision concernait, d'ailleurs, les examens osseux tels que régis par l'article 388 du code civil: les Sages de la rue Montpensier[18] ont, en effet, estimé le dispositif français satisfaisant, l'article 388 du code civil établissant que le résultat des examens osseux ne permet pas de conclure à lui seul à la majorité de l'intéressé[19]; ces exames sont de surcroît entourés de plusieurs garanties: seul l'autorité judiciaire peut les ordonner; le consentement éclaire de l'intéressé est requis; les résultats doivent indiquer exactement leur marge d'erreur.

Au niveau européen, l'article 8 du règlement 604/2013/UE (dit «*Dublin III*»)[20] établit que «*l'État membre dans lequel le mineur non accompagné a introduit une demande de protection internationale prend dès que possible les mesures nécessaires pour identifier les membres de la famille, les frères ou sœurs ou les proches du mineur non accompagné sur le territoire des États membres, tout en protégeant l'intérêt supérieur de l'enfant*».

La Commission européenne, à son tour, a appelé aux États membres qu'il fallait déployer des efforts concertés pour accélérer les procédures de regroupement familial, en accordant la priorité aux enfants non accompagné·e·s ou séparé·e·s[21].

[17] Conseil Constitutionnel, décision du 21 mars 2019, Décision n° 2018-768 QPC.

[18] C'est la dénomination attribuée par la littérature juridique aux membres du Conseil Constitutionnel, du fait du lieu où ce dernier a son siège.

[19] La fiabilité de ces tests est très contestée. Établie au début du 20ème siècle sur la base des caractéristiques morphologiques d'une population nord-américaine et à des fins de traitement médical, la méthode de Greulich et Pyle ne satisfait pas à l'exigence d'estimer l'âge des jeunes migrant·e·s dont la majeure partie arrive de l'Afrique du Nord. Cfr. Défenseur des droits, *Les mineurs non accompagnés*, cit., p. 62.

[20] Règlement n° 604/2013 du Parlement européen et du Conseil établissant les critères et mécanismes de détermination de l'État membre responsable de l'examen d'une demande de protection internationale introduite dans l'un des États membres par un ressortissant de pays tiers ou un apatride, 26 juin 2013.

[21] Communication de la Commission au Parlement européen et au Conseil, *La protection des enfants migrants*, 12 avril 2017, COM(2017) 211 final.

Plus encore, la Cour européenne des droits de l'homme[22] a souligné que:

il existe actuellement un large consensus - y compris en droit international - autour de l'idée que dans toutes les décisions concernant des enfants, leur intérêt supérieur doit primer.

Dernier, mais non le moindre, l'observation générale conjointe n° 3 du Comité pour la protection des droits de tous les travailleurs migrants et des membres de leur famille et n° 22 du Comité des droits de l'enfant sur les principes généraux relatifs aux droits de l'homme des enfants dans le contexte des migrations internationales[23] (rappelée aussi par une décision du Défenseur des droits[24]) affirme que «*le paragraphe 1 de l'article 3 de la Convention relative aux droits de l'enfant fait obligation au secteur public comme au secteur privé, aux tribunaux, aux autorités administratives et aux organes législatifs de veiller à ce que, dans toutes les décisions qui concernent les enfants, l'intérêt de l'enfant soit évalué et soit une considération primordiale*» et que «*le droit de l'enfant à ce que son intérêt supérieur soit une considération primordiale est un droit de fond, un principe juridique interprétatif et une règle de procédure et s'applique aux enfants à la fois en tant qu'individus et en tant que groupe*».

Et pourtant, comme on va le démontrer, au mépris de ces principes, l'accès à l'ASE ne cesse de constituer un véritable «*parcours du combattant*»[25], prenant avant tout la forme d'un «*combat de papiers*»[26],

[22] Cour européenne des droits de l'homme, décision du 19 janvier 2012, requêtes n[os] 39472/07 et 39474/07, *Popov c. France*, point 140; Cour européenne des droits de l'homme, décision du 5 avril 2011, requête n° 8687/08, *Rahimi c/ Grèce*, point 108.

Popov c/ France, op. cit., point 140. V. aussi, CEDH, 5 avr.

2011, Rahimi c/ Grèce, n° 8687/08, AJDA 2011. 1993,

chron. L. Burgorgue-Larsen

[23] CMW/C/GC/3 - CRC/C/GC/22 (2017).

[24] Défenseur des droits, décision du 18 février 2022, n° 2022-042.

[25] Cette expression constitue un *leit motiv* dans la littérature juridique concernant les étranger·e·s. Voir, par exemple, C. DELANOË-DAOUD, B. DE VAREILLE-SOMMIÈRES, I. ROTH, *Les mineurs isolés étrangers devant le tribunal pour enfants de Paris*, dans *Ac-*

dévoilant la nature de la bureaucratie comme «*le moyen le plus rationnel que l'on connaisse pour exercer un contrôle impératif sur des êtres humains*»[27].

Comme on va le démontrer, ce contrôle s'exerce également via le mésusage du droit pénal.

2. *Punies plutôt que protégé·e·s. L'insoutenable exclusion des MIEs de l'Aide sociale à l'enfance et leur criminalisation*

L'évaluation de l'âge de la personne se déclarant mineure se fait le plus souvent au mépris des droits de l'enfant[28].

Bien que la France ne soit pas le seul Pays à se rendre coupable de ces violations[29], au-dèla des Alpes les conséquences ont l'air d'être bien plus lourdes, interpellant le droit pénal.

tualité Juridique Pénal, 2016, p. 17; N. PATÉ, *L'accès – ou le non-accès – à la protection,* cit., p. 175.

[26] *Ivi*, p. 197.

[27] M. WEBER, *Economie et Société*, tome I, Paris, p. 410.

[28] Ces violations sont documentées, entre autres, par LA CIMADE, *En finir avec les violations des droits des mineurs isolés*, Paris, janvier 2023. Tous les reports de *La Cimade* sont publiés au lien suivant: www.lacimade.org.

[29] En témoigne, entre autres, Cour européenne des droits de l'homme, décision du 21 juillet 2022, requête n° 5797/17, *Darboe et Camara c. Italie*, concernant deux mineur·e·s étranger·e·s arrivé·e·s sur le territoire italien en juin 2016 à bord d'une imbarcation de fortune. L'un des deux requérants étant disparu après la saisine de la Cour, le jugement s'est concentré sur l'autre dont la minorité, d'abord confirmée par la date de naissance indiquée sur le carnet de santé remis aux autorités italiennes, s'est avéré faux après examen radiologique, conduit sans le consentement du mineur et sans que celui-ci ne reçoive aucun rapport médical ni judiciaire ou administrative contre lequel interjeter appel. La Cour a conclu à la violation des articles 8 (droit au respect de la vie privée et familiale), 13 (droit à un recours effectif) et 3 (interdiction des traitements inhumains et dégradants). En ce qui concerne notamment ce dernier point, la violation a consisté en le placement du mineur dans un centre pour adultes, en plus surpeuplé. Cfr. V. ROMANO, *Incompatibile con gli articoli 3, 8 e 13 della Cedu il collocamento di un minore straniero non accompagnato in un centro per adulti: la Corte di Strasburgo condanna l'Italia*, dans <foroitaliano.it>, 29 juillet 2022. Pour aller plus loin, v. F. JAULT-SESEKE, *Mineurs non accompagnés: l'affirmation d'une présomption de minorité,* dans *Revue critique de droit international privé*, 2013, n. 2, qui met en exergue le contraste

Tout d'abord, comme l'a souligné Nathalie Ferré, les personnes se prétendant mineures doivent faire face au regard supçonneux porté par l'administration sur les documents étrangers[30].

D'ailleurs, que les MIEs soient désormais les cibles d'un refrain politique et médiatique visant à les stigmatiser en tant que criminels potentiels trouve confirmation dans le projet de loi pour contrôler l'immigration, améliorer l'intégration (dit «*loi Darmanin*»), n° 304 du 1er février 2023, et notamment dans certains amendements deposés en mars 2023 (et consultables en ligne)[31] qui, au nom de la «*lutte contre les faux mineurs*»[32], propose la création d'un fichier recensant les mineurs non accompagnés délinquants, ainsi que le bouleversement de la présomption d'authenticité des documents d'état civil faits à l'étranger

de la décision mentionnée avec Cour européenne des droits de l'homme, décision du 10 octobre 2019, requête n° 50376/13, *M.D. c. France*, qui avait conclu à la non-violation dans le cas du refus d'hébergement d'une personne se déclarant mineure mais jugée majeure sur la base de tests osseux. Les juges de Strasbourg ont souligné que «*dans les affaires relatives à l'accueil d'étrangers mineurs, accompagnés ou non accompagnés […] les autorités nationales se trouvent devant une tâche délicate lorsqu'elles doivent évaluer l'authenticité d'actes d'état civil, en raison des difficultés résultant parfois du dysfonctionnement des services de l'état civil de certains pays d'origine […] et il faut donc leur réserver un certain pouvoir d'appréciation à cet égard*» (points 94 et 95 de la décision). Néanmoins, comme l'a rappelé le Défenseur des droits, «*les mineurs ne peuvent être pénalisés par les dysfonctionnements de leur pays au niveau de leur état civil*» (Défenseur des droits, *Les mineurs non accompagnés*, *cit.*, p. 73), de sorte qu'il incombe aux autorités d'entamer toutes les démarches nécessaires afin que l'identité des MIEs leurs confié·e·s soit reconstituée, conformement à l'article 8 de la Convention (cfr., *ex multis*, Cour européenne des droits de l'homme, décision du 26 juin 2014, requête n° 65941/11, *Labassée c. France*, point 38, «*le droit au respect de la vie privée exige que chacun puisse établir les détails de son identité d'être humain*»). Il faut, d'ailleurs, rendre compte d'autres décisions de la Cour de Strasbourg plus respecteuses des droits de l'étranger. Par exemple, Cour européenne des droits de l'homme, décision du 28 février 2019, requête n° 12267/16, *Khan c. France*, a conclu à la violation de l'article 3 de la Convention pour la non-prise en charge du requérant mineur après démantèlement de la zone Sud de la lande de Calais. Dans ce cas-là, la Cour a rappelé que «*la situation d'extrême vulnérabilité de l'enfant est déterminante et prédomine sur la qualité d'étranger en séjour illégal*» (point 74).

[30] N. FERRÉ, *La détermination de la minorité*, dans *Plein Droit*, 2002, n. 52, p. 15.

[31] https://www.senat.fr

[32] L'expression est tirée de l'amendement proposé par M. Courtial à la page 23 de la liasse des amendements publiée au lien ci-dessus.

et présentés par les MIEs («*présumés fraudeurs*»[33]) lors de l'évaluation de leur âge.

Plus précisement, l'amendement vise à ajouter un article aux termes duquel «*par dérogation aux dispositions de l'article 47* [34]*, dans le cadre de l'évaluation de la situation des personnes se présentant comme des mineurs étrangers non accompagnés d'un représentant légal, les documents présentés comme des actes d'état civil faits en pays étranger ne font pas foi et ne permettent pas d'établir de façon certaine l'état civil de celui qui le produit*».

À bien y regarder, le projet de loi Darmanin va plus loin – tout en faisant marche arrière dans le respect des droits fondamentaux – que la proposition de loi visant à mieux lutter contre la fraude à l'identité dans le cadre des mineurs non accompagnés[35]. Celle-ci, en effet, s'était bornée à proposer la modification (elle aussi prévue par la loi Darmanin) de l'article 388 du code civil en ce sens que tout refus de la personne se déclarant mineure devrait valoir présomption de majorité[36].

À l'origine de ces propositions[37] se pose la conviction que derrière des faux mineurs des terroristes potentiels puissent se cacher. Ce n'est pas par hasard si la proposition datée de 2019 s'ouvre en rappelant que «*l'attentat du 25 septembre 2020, qui visait à nouveau le journal Charlie Hebdo […] met également en lumière un probléme de sécurité récurrent. En effet, l'auteur présumé de ces attaques se serait fait passer par un mineur*»[38].

[33] N. FERRÉ, *La détermination de la minorité*, cit., p. 15.

[34] «*Tout acte de l'état civil des français et des étrangers fait en pays étranger et rédigé dans les formes usitées dans ce pays fait foi, sauf si d'autres actes ou pièces détenus, des données extérieures ou des éléments tirés de l'acte lui-même établissent que cet acte est irrégulier, falsifié ou que les faits qui y sont déclarés ne correspondent pas à la réalité*».

[35] Proposition de loi n° 3443 du 26 février 2019.

[36] «*En cas de refus, la personne se présentant aux fins d'admission à l'aide sociale à l'enfance comme un mineur étranger non accompagné d'un représentant légal est présumée majeure*».

[37] Il faut préciser que la Commission des lois constitutionnelles avait proposé de rejeter la proposition de loi daté de 2019. Cfr. ASSEMBLEE NATIONALE, *Rapport sur la proposition de loi visant à mieux lutter contre la fraude à l'identité dans le cadre des mineurs non accompagnée*, 17 mars 2021, p. 39.

[38] La proposition de loi est consultable au lien suivant: www.assemblee-nationale.fr.

Comme l'écrit l'association française *La Cimade*, «*au nom d'une sécurité universelle prétendument atteignable, le gouvernement crée un effet loupe, et assume de perpétrer amalgames et clivages: quand un jeune pakistanais attaque les anciens locaux de Charlie Hebdo, on accuse l'ensemble des mineur·e·s étranger·e·s d'être responsables et l'on réfute toute légitimité à leur prise en charge*»[39].

En tous cas, indépendamment des modifications législatives en cours et de l'intérêt supérieur de l'enfant, il s'avère que la présomption de minorité soit déjà renversée dans la pratique, ce qui fait des MIEs un «*bon exemple des contraddictions et des limites que présente l'application des droits de l'homme à une realité ou la souveraineté des États, menant à une discrimination des étrangers, prime sur le cadre juridique international*»[40].

Cela tient à deux raisons: l'une relevant du droit civil; l'autre, relevant du droit pénal.

Du côté civil, la force probante des actes d'état civil étrangers est facilement surmontable, car à la lumière de l'article 47 du code civil leur authenticité peut être mise en doute par d'autres actes ou pièces détenus, des données extérieures ou des éléments tirés de l'acte lui-même établissant que cet acte est irrégulier, falsifié ou que les faits qui y sont déclarés ne correspondent pas à la réalité.

En s'appuyant sur une interpretation sécuritaire de cet article, les services spécialisés dans l'expertise de l'authenticité des actes disqualifient parfois d'office les actes de naissance du fait qu'ils ne comportent pas de photographie[41]; ou bien, à l'issue de l'entretien évaluatif on constate que: «*les déclarations du jeune concernant l'organisation de son départ semblent incohérentes au regard de l'âge allégué*», «*l'itinéraire décrit par le jeune montre un fort degré d'autonomie et de maturité*», «*les capacités de raisonnement, d'élaboration et la posture d'ensemble du*

[39] LA CIMADE, *Lutter contre les amalgames et la désinformation visant les personnes étrangères*, Paris, Janvier 2021, p. 7.

[40] D. SENOVILLA HERNÁNDEZ, *Analyse d'une catégorie juridique récente: le mineur étranger non accompagné, séparé ou isolé*, dans *Revue européenne des migrations internationales*, 2014, n. 1, p. 22.

[41] L. CARAYON, J. MATTIUSSI, A. VUATTOUX, *Pousser la porte… et ensuite?*, dans *Plein droit*, 2022, n. 133, p. 3.

jeune ne semblent pas compatibles avec l'âge déclaré et ressemblent plus à ceux d'un jeune majeur»[42].

Ces évaluations entraînent parfois une véritable violation de la sphère intime du mineur, étant ménées, par exemple, à la lumière de «*ce qui est supposé être la façon dont un jeune doit réagir à l'abandon où à la mort*»[43].

Il s'agit de véritables «*pratiques de filtrage*»[44] finissant par empêcher l'accès des MIEs à l'ASE: preuve en est que seuls 15-20 % des personnes se déclarant mineures ont été prises en charge en 2019[45].

Ces pratiques sécuritaires ont, dés lors, été renforcées par une affirmation du Conseil d'État qui, dans trois ordonnances du 25 janvier 2019[46], a rappelé que:

sous réserve des cas où la condition de minorité ne serait à l'évidence pas remplie, il incombe aux autorités du département de mettre en place un accueil d'urgence pour toute personne se déclarant mineure et privée temporairement ou définitivement de la protection de sa famille, confrontée à des difficultés risquant de mettre en danger sa santé, sa sécurité ou sa moralité en particulier parce qu'elle est sans abri. Lorsqu'elle entraîne des conséquences graves pour le mineur intéressé, une carence caractérisée dans l'accomplissement de cette mission porte une atteinte grave et manifestement illégale à une liberté fondamentale.

Bien qu'apparemment gardiennes des droits de l'enfant en danger, ces affirmations ont ouvert la porte au dangereux critère de la «*minorité qui ne serait à l'évidence pas remplie*»[47], au nom duquel l'authen-

[42] Il s'agit des commentaires réellement rédigés. Cfr. Défenseur des droits, *Les mineurs non accompagnés*, cit., p. 51. Pour d'autres exemples tirés des entretiens, voir LA CIMADE, *29 propositions de La Cimade pour protéger les enfants en danger en France*, Paris, mai 2021, p. 3.

[43] L. CARAYON, J. MATTIUSSI, A. VUATTOUX, *Pousser la porte*, cit., p. 4.

[44] Expression tirée de D. SENOVILLA HERNÁNDEZ, *Analyse d'une catégorie juridique*, cit., p. 30.

[45] Direction de la protection judiciaire de la jeunesse, *Rapport annuel d'activité 2019 – Mission mineurs non accompagnés*, Paris, Mai 2020, p. 4.

[46] Conseil d'État, 25 janvier 2019, ordonnances n^{os} 427169, 427170, 427167.

[47] Défenseur des droits, *Les mineurs non accompagnés*, cit., p. 46.

ticité de plusieurs actes d'état civil présentés par des personnes se déclarant mineures a été contestée. On comprend, dès lors, la reccomandation, de la part du Défenseur des droits, à une interpretation restrictive de la notion de majorité manifeste, d'autant plus lorsque les personnes présentent à l'appui de leurs déclarations des actes d'état civil[48].

Du côté penal, la Cour de Cassation a précisé que, contrairement au juge civil qui doit accorder aux documents de l'état civil une valeur probante en application de l'article 47 du code civil, le juge pénal n'est pas tenu par aucun élément de preuve[49]. Celui-ci pourrait donc, dans l'exercise du pouvoir d'appréciation qui caractérise son travail, accorder prévalence aux tests osseux malgré la production d'un acte d'état civil[50], qualifiant ainsi un jeune étranger de majeur et retenant sa culpabilité, par exemple, pour les délits de faux et usage de faux[51] et de fraude aux prestations sociales[52].

Il s'avère en effet très souvent dans la pratique que le refus de prise en charge du fait de la prétendue majorité soit suivi par la décision du Parquet de déclencher des procédures complémentaires (y compris

[48] *Ibidem*.

[49] Cour de Cassation criminelle, décision du 17 juillet 1991, n° 299. Sur le même sujet, cfr. N. FERRÉ, *La détermination de la minorité*, cit., p. 20.

[50] D'ailleurs, comme l'écrit N. PATÉ, *L'accès – ou le non-accès – à la protection*, cit., p. 170, «*alors que dans certains pays ces expertises sont interdites – comme en Allemagne, au Royaume-Uni ou en Suisse – on constate en France une conception de ces expertises comme seuls éléments de preuve, seuls porteurs de vérité*».

[51] L'article 441-1 du code pénal punit de trois ans d'emprisonnement et de 45 000 euros d'amende «*toute altération frauduleuse de la vérité, de nature à causer un préjudice et accomplie par quelque moyen que ce soit, dans un écrit ou tout autre support d'expression de la pensée qui a pour objet ou qui peut avoir pour effet d'établir la preuve d'un droit ou d'un fait ayant des conséquences juridiques*».

[52] L'article 441-6 du code pénal punit de puni de deux ans d'emprisonnement et de 200000 euro d'amende «*le fait de fournir sciemment une fausse déclaration ou une déclaration incomplète en vue d'obtenir ou de tenter d'obtenir, de faire obtenir ou de tenter de faire obtenir d'une personne publique, d'un organisme de protection sociale ou d'un organisme chargé d'une mission de service public une allocation, une prestation, un paiement ou un avantage indu*». Il ressort de ces dispositions que pour être qualifié de manœuvre frauduleuse, l'acte doit emporter des conséquences juridiques ou, à tout le moins, poursuivre l'objectif de produire un effet juridique que n'aurait pas existé sans cela (Défenseur des droits, *Les mineurs non accompagnés, cit*., p. 93).

des examens osseux, s'ils n'ont pas déjà été faits) qui parfois aboutissent à des charges pénales[53].

Les MIEs subissent, ainsi, une «*double sanction*»[54]: l'exclusion de l'ASE et la charge pénale.

Pourtant, comme l'a souligné la Cour d'appel de Caen[55] et comme l'a rappelé le Défenseur des droits[56]:

Il faudrait douter de l'existence de l'élément moral constitutif de l'infraction, à savoir l'intention des jeunes exilés de commettre une fraude aux prestations sociales, ou d'user de faux documents, en particulier pour les adolescents sous l'emprise de réseaux mais aussi du simple fait de leur méconnaissance de l'usage de l'état civil tant dans leur Etat d'origine qu'en France.

La «*politique publique de clochardisation massive*»[57], engendrée par l'exclusion à l'ASE aboutit ainsi à une incarceration massive de la jeunesse en danger. Ceci est d'autant plus vrai si l'on considère le recours à la garde à vue pour les infractions dites mineures (par exemple, vols sur la voie publique ou dans les transports) et commises par des personnes se déclarant mineures[58]. Vivant à la rue, ceux-ci deviennent en effet proie facile des réseaux criminels qui les récrutent et les exploitent en leur promettant un abri en contrepartie de l'engagement à commettre des délits allant surtout au bénéfice des organisations criminelles[59].

[53] Cette pratique est très bien décrite par K. PARROT, *Carte Blanche. L'État contre les étrangers*, Paris, 2019, pp. 170-175.

[54] C. DELANOË-DAOUD, B. DE VAREILLE-SOMMIÈRES, I. ROTH, *Les mineurs isolés étrangers devant le tribunal pour enfants de Paris*, dans *AJ Pénal*, 2016, p. 21.

[55] Cour d'appel de Caen, chambre des appels correctionnels, décision du 10 février 2017, n°17/00056.

[56] Défenseur des droits, *Les mineurs non accompagnés*, cit., p. 59.

[57] K. PARROT, *Carte Blanche, cit.*, p. 185.

[58] E. GALLARDO, *Le défi migratoire*, dans J-B. Perrier (sous la direction de), *Europe(s) et justice pénale*, Paris, 2023, pp. 193-197 signale, à ce propos, une «*instrumentalisation du droit pénal*» de plus en plus mobilisé par certains juges afin de sortir de la rue les mineurs devenus proie des réseaux criminels.

[59] Les MIEs deviennent ainsi victimes de traîte des êtres humains. Cfr. Direction de la protection judiciaire de la jeunesse, *Rapport annuel d'activité 2019*, cit., p. 34; La

3. *Vies suspendues: dans les coulisses d'une protection judiciaire en demi-teinte*

L'étranger se prétendant mineur et dont la minorité est contestée peut saisir le juge des enfants et, le cas échéant, interjeter appel[60]. Toutefois, la saisine n'étant pas suspensive, la mise à l'abri dans le cadre de l'ASE est interrompue[61].

Dans l'attente de la convocation (qui normalement est fixée après deux mois)[62], les MIEs pourraient théoriquement bénéficier d'un logement dans le cadre de l'hébergement d'urgence prévu à l'article L. 345-2-2 du CASF[63].

Cependant, même l'accès à l'hébergement d'urgence est une chimère[64]. En témoigne, par exemple, l'*affaire M.D. c. France*[65], con-

Cimade, *En finir avec*, cit., pp. 20 -21.

[60] Article 1191 du code de procédure civile: «*Les décisions du juge peuvent être frappées d'appel: par les parents ou l'un d'eux, le tuteur ou la personne ou le service à qui l'enfant a été confié jusqu'à l'expiration d'un délai de quinze jours suivant la notification; par le mineur lui-même jusqu'à l'expiration d'un délai de quinze jours suivant la notification et, à défaut, suivant le jour où il a eu connaissance de la décision; par le ministère public jusqu'à l'expiration d'un délai de quinze jours suivant la remise de l'avis qui lui a été donné*».

[61] N. PATÉ, *L'accès – ou le non-accès à la protection*, cit., p. 194.

[62] C. DELANOË-DAOUD, B. DE VAREILLE-SOMMIÈRES, I. ROTH, *Les mineurs isolés étrangers devant le tribunal*, cit., p. 17.

[63] «*Toute personne sans abri en situation de détresse médicale, psychique ou sociale a accès, à tout moment, à un dispositif d'hébergement d'urgence. Cet hébergement d'urgence doit lui permettre, dans des conditions d'accueil conformes à la dignité de la personne humaine et garantissant la sécurité des biens et des personnes, de bénéficier de prestations assurant le gîte, le couvert et l'hygiène, une première évaluation médicale, psychique et sociale, réalisée au sein de la structure d'hébergement ou, par convention, par des professionnels ou des organismes extérieurs et d'être orientée vers tout professionnel ou toute structure susceptibles de lui apporter l'aide justifiée par son état, notamment un centre d'hébergement et de réinsertion sociale, un hébergement de stabilisation, une pension de famille, un logement-foyer, un établissement pour personnes âgées dépendantes, un lit halte soins santé ou un service hospitalier. L'hébergement d'urgence prend en compte, de la manière la plus adaptée possible, les besoins de la personne accueillie, notamment lorsque celle-ci est accompagnée par un animal de compagnie*».

[64] Par ailleurs, si d'un côté le droit de l'Union européenne impose aux États membres de fournir un lieu d'hébergement adapté aux mineurs, de l'autre, il ne fait

cernant un jeune se déclarant mineur sur la base d'un passeport guinéen pas considéré fiable par les autorités françaises qui, après avoir procédé à des tests osseux, ont conclu à la majorité du requérant; celui-ci, étant sans abri, avait fait appel à l'hébergement d'urgence dont n'avait bénéficié que très rairement à cause de l'insuffisance de places; par conséquent, il avait vecu à la rue pendant quarante nuits, de temps en temps profitant de l'accueil de la part d'une famille ou du centre hospitalier universitaire (dont l'accès fut lui réfusé à partir d'un certain moment)[66].

En témoigne également une décision du Tribunal administratif de Grenoble, qui a ordonné aux autorités françaises de donner un hébergement d'urgence à un étranger qui, après avoir été reconnu majeur en dépit de ses déclarations de minorité, s'était retrouvé sans abri et avait vecu à la rue dans l'attente que sa demande d'hébergement soit accueillie[67]. Qu'il s'agit, toutefois, d'une protection judiciaire toujours en demi-teinte est témoigné par un autre passage argumentatif de la même décision où le Tribunal affirme que le refus de l'accès à l'ASE, sur la base de la prétendue majorité du requérant, n'a pas porté une atteinte grave et manifestement illégale à l'une des libertés fondamentales de celui-ci. En effet, continue le Tribunal:

il résulte de l'article 47 du code civil cité au point 8 que la force probante d'actes d'état-civil étrangers peut être combattue par tout moyen susceptible d'établir que l'acte en cause est irrégulier, falsifié ou inexact, notamment au vu de données extérieures, le juge formant sa conviction au regard de l'ensemble des éléments versés au dossier dans le cadre de

aucunement obligation aux États membres de fournir un logement aux mineurs non accompagnés qui sont en situation irrégulière. Par conséquent, il n'y a pas de l'harmonisation au niveu européen: les législations de l'Espagne, de la France, de l'Italie et de la Roumanie reconnaissent systématiquement un droit de séjour aux mineurs non accompagnés, tandis que ce n'est pas le cas des législations de la Grande-Bretagne, de la Grèce, de la Hongrie et de la Suède. Cfr. P. DUMAS, *L'accès des mineurs non accompagnés,* p. 38; L. DELBOS, *L'accueil et la prise en charge des mineurs non accompagnés*, cit., p. 25 ss.

[65] Cour européenne des droits de l'homme, décision du 10 octobre 2019, cit.

[66] *Ivi*, p. 9.

[67] Tribunal administratif de Grenoble, décision du 26 juin 2023, n° 2303956.

l'instruction du litige qui lui est soumis. Pour écarter la force probante de ces documents, le département de l'Isère a estimé qu'ils avaient été réalisés dans le but manifeste de permettre une prise en charge par l'aide sociale à l'enfance […] Le département s'est, également, fondé sur les conclusions du rapport d'évaluation réalisé par un agent de l'ASE faisant état d'un récit dénué de toute crédibilité, d'une maturité de M. A et d'une apparence physique incompatible avec celle d'un adolescent de tout juste 15 ans. Dès lors qu'un acte administratif ne revêt pas le caractère d'une décision, le moyen tiré de ce qu'il méconnaîtrait l'article L. 212-1 du code des relations entre le public et l'administration relatif à la signature des décisions et aux mentions relatives à leur auteur, ne peut qu'être écarté.

Dans un autre cas, le Conseil d'État a annulé la décision du Tribunal administratif de Paris qui avait ordonné de procéder à l'hébergement d'urgence d'un étranger jusqu'à ce que l'autorité judiciaire ait définitivement statué sur sa prise en charge par l'ASE. Selon le Conseil d'État le refus de prise en charge ne portait pas une atteinte grave et manifestement illégale à une libérté fondamentale[68].

4. *De quelle sécurité? De quelle solidarité? L'État au service de la criminalité*

Qu'ils (ou elles) se trouvent à la rue ou en prison, les MIEs sont privés des leurs droits fondamentaux, en violation de l'article 20 de la CIDE qui stipule: «*tout enfant temporairement ou définitivement privé de son milieu familial, ou qui dans son propre intérêt ne peut être laissé dans ce milieu, a droit à une protection et une aide spéciale de l'État y compris les enfants demandeurs d'asile, réfugiés ou migrants, sans considération de leur nationalité, de leur statut au regard de l'immigration ou de leur apatridie*».

[68] Conseil d'État, décision du 22 décembre 2022, n° 469560, citée par F. JAULT-SESEKE, *Mineurs non accompagnés*, cit. Sur le même sujet voir également S. SLAMA, *Droit fondamental à l'hébergement d'urgence: dix ans de démantèlement jurisprudentiel*, dans *La Revue des droits de l'homme*, 2023, n. 23, pp. 4-8.

La question se pose, premièrement, de quelle sécurité les autorités françaises souhaitent promouvoir[69]; deuxièmement, si ces politiques d'exclusion sociale ne remettent en question la valeur européenne de la solidarité.

Les deux questions sont interdépendantes si on entend la sécurité pas seulement dans son acception négative, en tant que simple absence de vulnérabilité aux agressions ou aux menaces, mais aussi dans son volet positif, impliquant la reconnaissance des besoins fondamentaux des individus et la participation inclusive à la vie sociale[70], ce qui nécessite un certain degré de solidarité dans les communautés. En effet, comme l'a écrit Valentina Pazé, la solidarité implique tout d'abord l'identification dans une communauté[71], celle-ci à entendre comme une «*connection embrassant l'humanité tout entière*»[72] ou – en tirant la belle expression de la juriste Mireille Delmas-Marty – comme une «*communauté de destins*»[73], fondée sur la reconnaissance de l'Autre comme Soi-même[74] ainsi que sur le nouvel impératif catégorique de l'«*intersolidarité planétaire*»[75].

D'ailleurs, aux autres conceptions qui rattachent la valeur de la solidarité à la communauté entre sujets appartenant à la même Nation[76]

[69] A. BARATTA, *Diritto alla sicurezza o sicurezza dei diritti?*, dans S. Anastasia – M. Palma (sous la direction de), *La bilancia e la misura*, Bologna, 2001.

[70] B. PASTORE, *Semantica della vulnerabilità, soggetto, cultura giuridica*, Torino, 2021, p. 53.

[71] V. PAZÉ, *Il destino della solidarietà, tra comunità e mondo*, dans *Filosofia politica*, n. 1, 2007, p. 134: «*non si dà solidarietà senza identificazione in una comunità*».

[72] K. BAYERTZ, *Il concetto e il problema della solidarietà*, dans P. Portinaro (sous la direction de), *L'interesse e il dono. Questioni di solidarietà*, Torino, 2002, p. 13: «*legame che abbraccia l'intera umanità*».

[73] M. DELMAS-MARTY, *Libertés et sûretés dans un monde dangereux*, Paris, 2010, pp. 224-225.

[74] P. RICOEUR, *Soi-même comme un autre*, Paris, 1990.

[75] M. DELMAS-MARTY, *Les forces imaginantes du droit III. La refondation des pouvoirs, Seuil*, Paris, 2007, p. 117.

[76] Voir, par exemple, M. WALZER, *Spheres of Justice. A defense of pluralism and equality*, New York, 1983, qui distingue une morale mince qui n'engendre que des obligations de solidarité à l'égard des personnes appartenant à la même Nation, et une morale plus rigoureuse allant au profit de tout être humain.

(la «*communauté immaginée*»)[77], on peut retorquer que la Nation n'est qu'une illusion, puisque la plupart de nos compatriotes peuvent nous être totalement inconnus et que, d'autre part, des étrangers peuvent être nos amis[78].

Il faut, donc, se débarasser de l'idée de la solidarité vers les compatriotes comme la seule solidarité possible, la solidarité originaire et naturelle opposée à la solidarité vers les étrangers, qui par contre ne serait pas naturelle. Peu importe à qui elle s'adresse: la solidarité est le «*résultat d'un processus d'apprentissage*»[79] et se réalise aussi via l'État social de droit[80]. Elle est, d'ailleurs, qualifiée de droit humain et de devoir par le *Projet de déclaration sur le droit à la solidarité internationale de l'Assemblée Générale des Nations Unies*, respectivement aux articles 41[81] et 61. Ce dernier article, en particulier, établit que «*tous les États, agissant individuellement ou collectivement, notamment par le biais d'organisations internationales ou régionales dont ils sont membres, ont le devoir impératif de réaliser le droit à la solidarité internationale*».

À l'échelle européenne, comme l'a dit l'avocat général Bot, «*la solidarité figure parmi les valeurs cardinales de l'Union et […] constitue à la fois la raison d'être et l'objectif du projet européen*»[82]. La solidarité, joue, dès lors, le rôle de valeure primordiale dans la construction d'une Union dans une perspective de fondation constitutionnelle, mais également dans une perspective de justice sociale[83].

D'ailleurs, si d'un côté la solidarité n'est citée qu'au deuxième alinéa de l'article 2 du Traite de l'Union européenne (ce qui paraît

[77] B. ANDERSON, *Imagined Communities: Reflections on the Origin and Spread of Nationalism,* London, 1983.

[78] V. PAZÉ, *Il destino della solidarietà,* cit., p. 137.

[79] *Ivi*, p. 138.

[80] *Ivi*, p. 137.

[81] «*Le droit à la solidarité internationale est un droit de l'homme qui permet aux individus et aux peuples, sur la base de l'égalité et de la non-discrimination, de participer effectivement à un ordre social et international dans lequel tous les droits de l'homme et toutes les libertés fondamentales puissent être pleinement réalisés, ainsi que d'y contribuer et d'en jouir*».

[82] Conclusions de l'Avocat général Y. BOT, présentées le 26 juillet 2017, dans l'affaire C-643/15 et C-647/15, République slovaque et Hongrie c/ Conseil, point 17.

[83] N. RUCCIA, *La nature juridique de la solidarité en droit de l'Union européenne*, dans *Revue trimestrielle de droit européen*, 2023, n. 2, pp. 203 ss.

établir une sorte de subalternité par rapport aux valeurs invoquées au premier alinéa)[84], d'autre côté le Préambule de la Charte européenne des droits fondamentaux qualifie la solidarité de valeur indispensable et universelle, au même titre que la dignité humaine, la liberté et l'égalité[85].

Tout en ayant conscience que la solidarité est une «*notion fuyante de l'ordre juridique de l'Union*»[86] à caractère éminemment financier dans le domaine de l'immigration et de l'asile[87], l'espoir tient à ce que,

[84] «*L'Union est fondée sur les valeurs de respect de la dignité humaine, de liberté, de démocratie, d'égalité, de l'État de droit, ainsi que de respect des droits de l'homme, y compris des droits des personnes appartenant à des minorités. Ces valeurs sont communes aux États membres dans une société caractérisée par le pluralisme, la non-discrimination, la tolérance, la justice, la solidarité et l'égalité entre les femmes et les hommes*».

[85] «*Consciente de son patrimoine spirituel et moral, l'Union se fonde sur les valeurs indivisibles et universelles de dignité humaine, de liberté, d'égalité et de solidarité*».

[86] N. RUCCIA, *La nature juridique de la solidarité*, cit., pp. 203 ss.: «*la solidarité soulève également une ambiguïté conceptuelle en ce qu'elle se situe à la frontière entre principes et droits. […] Les termes du débat sont connus en ce que […] le principe décrit une sorte de sous-droit, entendu comme correspondant à des normes incomplètes, car démunies d'autosuffisance […] En effet […] les principes peuvent être mis en oeuvre par le biais d'actes législatifs ou exécutifs […] Ils ne donnent toutefois pas lieu à des droits immédiats à une action positive de la part des institutions de l'Union ou des autorités des États membres. En d'autres termes, les principes ne peuvent être invoqués devant la Cour de justice de l'Union européenne ni à l'appui au cas d'un recours direct en annulation ou en carence ni d'un recours en manquement. Le juge national n'est pas davantage en mesure de contrôler la compatibilité avec ces principes des dispositions de droit national et donc d'en écarter, le cas échéant, l'application. Tout au plus peut-il interpréter le droit national à la lumière de ces principes. Aussi, dans la Charte, la solidarité produit des effets normatifs limités*». Dans le même sens, voir aussi E. KUCUK, *Solidarity in EU Law: an Elusive Political Statement or a Legal Principle with Substance?*, dans *Journal of European and Comparative Law*, 2016, pp. 982, qui, concernant la solidarité dans le domaine migratoire, observe: «*article 80 TFEU imposes a clear and unconditional obligation of solidarity on the Member States in asylum, immigration, and border check activities. It can be an effective legal tool in enhancing solidarity, if used in construing the relevant secondary legislation. However, although there have been cases in which Article 80 TFEU could have been used in order to define the content of asylum obligations, the CJEU does not seem eager to make use of it*».

[87] Cfr., par exemple, Conseil européen, Conclusions de la réunion extraordinaire, Bruxelles, EUCO 1/2023, 9 février 2023, p. 11, qui «*demande à la Commission de mo-*

dans l'avenir, une nouvelle éthique de la solidarité puisse faire son chemin.

La construction de cette nouvelle éthique devrait se faire à partir de l'article 3 du Traité de l'Union européenne dans la partie où il affirme que l'Union européenne «*combat l'exclusion sociale et les discriminations, et promeut la justice et la protection sociales, l'égalité entre les femmes et les hommes, la solidarité entre les générations et la protection des droits de l'enfant*», indépendamment de la nationalité.

D'ailleurs, le droit de l'Union européenne doit être interpreté et appliqué conformemente à la jurisprudence de la Cour de Strasbourg[88], d'après laquelle:

la situation de particulière vulnérabilité de l'enfant mineur est déterminante et prévaut sur la qualité d'étranger en séjour irrégulier[89].

biliser immédiatement des fonds et des moyens substantiels de l'UE pour aider les États membres à renforcer les capacités et les infrastructures de protection des frontières, les moyens de surveillance, y compris aérienne, et les équipements». D'ailleurs, aux termes de l'article 80 TFUE, «*les politiques de l'Union visées au présent chapitre et leur mise en œuvre sont régies par le principe de solidarité et de partage équitable de responsabilités entre les États membres, y compris sur le plan financier. Chaque fois que cela est nécessaire, les actes de l'Union adoptés en vertu du présent chapitre contiennent des mesures appropriées pour l'application de ce principe*». Les exigences de solidarité, donc, peuvent être remplies par les États membres non pas nécessairement par une redistribution équitable des migrants sur le sol européen, mais aussi par des instruments de soutien technique, administratif, financier et opérationnel.

[88] Le préambule à la Charte européenne des droits de l'homme précise que «*la présente Charte réaffirme, dans le respect des compétences et des tâches de l'Union, ainsi que du principe de subsidiarité, les droits qui résultent notamment des traditions constitutionnelles et des obligations internationales communes aux États membres, de la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales, des Chartes sociales adoptées par l'Union et par le Conseil de l'Europe, ainsi que de la jurisprudence de la Cour de justice de l'Union européenne et de la Cour européenne des droits de l'Homme. Dans ce contexte, la Charte sera interprétée par les juridictions de l'Union et des États membres en prenant dûment en considération les explications établies sous l'autorité du praesidium de la Convention qui a élaboré la Charte et mises à jour sous la responsabilité du praesidium de la Convention européenne*».

[89] Cfr., *ex multis*, Cour européenne des droits de l'homme, décision du 31 mars 2022, requête n° 49775/2020, *N.B. et autres c. France*, point 47.

Le chemin vers la solidarité européenne est encore inachevé. Robert Schuman nous avait mis en garde: «*l'Europe ne se fera pas d'un coup, ni dans une construction d'ensemble: elle se fera par des réalisations concrètes créant d'abord une solidarité de fait*».

List of main abbreviations

American Journal of International Law	*AJIL*
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*
Annuaire européen/European Yearbook	*EurYB*
Annuaire Français de Droit international	*AFDI*
Anuario de Derecho Constitucional Latinoamericano	*ADCL*
Anuario de Derechos Humanos	*ADH*
Anuario Mexicano de Derecho Internacional	*AMDI*
Archivio penale	*Arch. pen.*
Argomenti di diritto del lavoro	*ADL*
Berkeley Journal of International Law	*BJIL*
Boletín Mexicano de Derecho Comparado	*BolMexdeDerechoComp*
Boston College International and Comparative Law Review	*Boston Coll. Int. Comp. Law Rev.*
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*
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*
Common Market Law Review	*CML Rev.*
Cornell International Law Journal	*Cornell ILJ*

Corriere giuridico	*Corr. giur.*
Daedalus	*Daed.*
Democrazia e Diritto	*Dem. dir.*
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 Comparato ed Europeo	*Dir. pubbl. comp. eur.*
Diritto, Immigrazione e Cittadinanza	*Dir., Imm. e Cittad.*
Discourse, Context & Media	*DCM*
Enciclopedia del diritto	*Enc. giur.*
Enciclopedia giuridica Treccani	*Enc. giur. Treccani*
Estudios Constitucionales	*E.C.*
Études internationales	*Et. Intern.*
Eurojus.it	*Eurojus*
Europa e diritto privato	*Eur. dir. priv.*
Europäische Grundrechte Zeitschrift	*EuGRZ*
European Constitutional Law Review	*ECLRev*
European Human Rights Law Review	*EHRLR*
European Journal of International Law	*EJIL*
European Journal of Migration and Law	*Eur. J. Migr. Law*
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*
Famiglia e diritto	*Fam. dir.*

Federalismi.it - Rivista di Diritto pubblico italiano, comparato, europeo	*Federalismi.it*
Forced Migration Review	*FMR*
Foro italiano	*Foro it.*
Freedom, Security & Justice: European Legal Studies	*FSJ*
German Law Journal	*Ger. Law J.*
German Yearbook of International Law	*Germ. YB Int. Law*
Giurisprudenza italiana	*Giur. it.*
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Grotius	*Grotius*
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Following a call for proposals, the Legal Observatory on the European Area of Freedom, Security and Justice (FSJ Observatory), together with the PRIN research groups "International Migrations, State, Sovereignty and Human Rights: Open Legal Issues" and the Jean Monnet Module "Democracy and Rule of Law: A New Push for European Values (EU-DRAW)", invited young researchers (PhD candidates, postgraduates, postdoctoral fellows, etc.) to present and discuss their scientific work in a workshop held at the University of Salerno on 25 May 2023.
The research carried out in this volume is based on the awareness that the (always) sensitive management of the migration phenomenon remains an extremely critical factor for each European State, for the Union as a whole, and for other international organizations. It is also a general "challenge" to the effective guarantee of human rights (both substantive and procedural), in conflict with the values of the rule of law and respect for human dignity, as a unifying element in the affirmation of the indivisibility of human rights in relation to the rights of migrants.

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