Asylum and the EU Charter of Fundamental Rights

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editoriale scientifica

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Table of Contents

Foreword

The present volume collects a number of essays concerning the role of the EU Charter of Fundamental Rights for the European legal regime in the field of asylum and refugees protection.

The production and collection of such essays represents one of the outcomes of the Project "Judging the Charter", a two-year research and training project, co-funded by the Justice Programme (2014-2020) of the European Union - Directorate General Justice and Consumers, started in September 2016. It was aimed at increasing competencies of national judges and other legal professionals in relation to the Charter of Fundamental Rights of the European Union, in particular at sharing knowledge, how judiciary and academia are interpreting crucial questions relating to the applicability of the Charter and the rights and principles enshrined in the Charter.

The project – which was coordinated by the Ludwig Boltzmann Institute of Human Rights (Vienna) and implemented by the Institute for International Legal Studies of the National Research Council of Italy (ISGI-CNR, Rome), the Institute for Law and Society (INPRIS, Warsaw), the Croatian Ombudsman Office (Zagreb), the Centre for European Constitutional Law (CECL, Athens) and the Federal Ministry for Justice (Austria), in cooperation with the Judicial Academies of Croatia, Italy, Romania and Slovenia – focused especially on the role of the Charter in the field of asylum.

Based on existing research and jurisprudence of the Court of Justice of the European Union, the significance of the EU Charter of Fundamental Rights for the European asylum system, as well as national asylum laws and practises, were analysed; and research findings fed into training materials on the Charter and its applicability in judiciary practice. In the context of elaborating materials, two pilot trainings, addressed to judges involved in asylum procedures, were also conducted in each Project partner country.

Finally, at an international Conference held in Rome (National Research Council venues), on the 22nd and 23rd of May 2018, research findings as well as experience in the trainings, and a training manual for trainers of practitioners in the field of asylum law, were presented to an audience composed by judges, representatives of academia, legal practitioners, as well as to NGO representatives.

This book precisely collects research papers and studies which have been presented and discussed in the Rome Conference, together with other studies that have been developed during the Project, with a view to preparing trainings materials on the EU Charter of Fundamental Rights and its applicability in judicial practice concerning asylum cases.

The book as a whole and the single contributions pursue some common objectives: determining which consequences the Charter provisions have, in the light of relevant case law of the Court of Justice of the EU, for European asylum law and national asylum laws and practices of the Member States; and highlighting the potential role of the Charter for the European system as well as national legal regimes of Member States in the field of asylum, also by showing the added value of the provisions of the Charter in terms of safeguarding asylum-seekers' rights, vis-à-vis other European instruments for the protection of human rights (in particular, the European Convention of Human Rights, but also the European Social Charter).

The thematic areas in which an in depth-analysis has been conducted are many. The most crucial are: the definition of asylum in EU law; the Dublin system; qualification criteria and procedural requirements in the EU asylum system; the right of asylum-seekers to an effective remedy; reception and detention conditions of asylum-seekers.

The collected essays have been divided into two parts (Sections).

The first one (Section I) deals with some general aspects, like the relevance and effectiveness of the EU Charter of Fundamental Rights as a legal instrument (Gabriel Toggenburg; Lorenza Violini & Alessandra Osti); the impact of its application to the Dublin system, according to the jurisprudence of the Court of Justice (Andrea Crescenzi); meaning and scope of the right to an effective remedy in the field of asylum (Marcelle Reneman), possible improvements in the application of the Charter principles and rights in the EU legislation and policies concerning asylum (Chiara Favilli).

The second part of the book (Section II) collects more specific contributions, dealing either with special legal issues, or with specific national contexts. One may find here: an essay on the legal features concerning the application of the right to an effective remedy to asylum-seekers as particularly vulnerable persons (Rosita Forastiero); the issue of discrepancies between EU law and the European Convention of Human Rights in so far as the grounds for detention of asylum-seekers are concerned (Giuliana Monina); a study on the preliminary questions in asylum cases lodged by the Courts from Central and East-

ern Europe (Jacek Białas & Małgorzata Jaźwińska); the impact of the EU Charter of Fundamental Rights in asylum procedures in Greece, following the implementation of the EU-Turkey Statement (Georgia Spyropoulou); and some reflections on the situation and treatment of asylum-seekers and their fundamental rights in the so-called Western Balkans Route (Iris Goldner Lang).

Lastly, in the Afterword, the issue of social rights and social integration in Europe of refugees and asylum-seekers is analysed, taking into particular account the potential not only of the EU Charter of Fundamental Rights, but also that of the Council of Europe Social Charter (Giuseppe Palmisano).

Considering contents and objects of the different contributions, it goes without saying that the analyses and studies which are included in this volume, and the book itself taken as a whole, have no claim to be complete or exhaustive, nor to propose a systematic approach to the global topic indicated in the title ("Asylum and the EU Charter of Fundamental Rights"). The intention is just to propose a series of reflections and insights, made by distinguished scholars and legal experts, on the relevance of the EU Charter of Fundamental Rights Charter for the EU asylum system, as well as on the actual and potential impact of the Charter rights and principles on the application of both such system and national laws and practises of EU Member States concerning asylum.

The editors' hope is that this book could give a modest contribution to clarify the meaning and improve the use of the EU Charter of Fundamental Rights in the field of asylum, for a better judicial protection of human rights and dignity of refugees and asylum-seekers all over the European Union.

Giuseppe Palmisano

SECTION I

The Charter of Fundamental Rights: An Illusionary Giant? Seven brief points on the relevance of a still new EU instrument

Gabriel N. Toggenburg*

Contents: 1. Introduction: the Charter's Impressive Appearance and the destiny of Mr Tur Tur. – 2. The Charter's Field of Application: a Foggy Borderline. – 3. The Charter's Distinction Between Rights and Principles: Much is Left Open to Interpretation. – 4. The Charter and National Governments: not Much Engagement so far. – 5. The Charter and National Legislators: no Visibility for the Charter. – 6. The Charter and the National Judiciary: Increasing Engagement. – 7. Conclusion: After All, An Ally and a Lighthouse.

1. *Introduction: the Charter's Impressive Appearance and the Destiny of Mr Tur Tur*

It is soon 10 years that the European Union is equipped with a legally binding bill of fundamental rights. The Charter is likely to be the worlds' most modern and encompassing legally binding human rights document. It not only combines both political and socio-economic rights – thereby going beyond the Council of Europe's European Convention on Human Rights[1] – but it also makes well established rights more powerful such as in the case of access to justice. Moreover it introduces new human rights language in areas such as data protection, asylum, right to good administration, the field of business and consumer protection.[2] And it is more explicit on the need to establish inclusive societies by for instance addressing the needs and rights of elderly peo-

* Gabriel N. Toggenburg is Senior Legal Advisor in the Office of the Director at the European Union Fundamental Rights Agency (FRA), Honorary Professor for European Union and Human Rights Law at the University of Graz. The chapter follows the style of the oral presentation at the conference. It reflects the personal views of the author.

[1] For a graphical comparison see European Union Fundamental Rights Agency, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level - Guidance*, 2018, p. 27.

[2] See articles 8, 18, 41, 41, 16, 38 of the Charter.

ple, persons with disabilities, children etc.[3] Last but not least, the Charter was not drafted in a more or less obscure process of international horse-trading but a transparent European Convention with a strong participation of national and European parliamentarians.[4] The Charter was from the outset considered "the expression, at the highest level, of a democratically established political consensus of what must today be considered as the catalogue of fundamental rights guarantees".[5]

Beginning of December 2009, with the entry into force of the Lisbon treaty, this solemn document became the legally binding compass for the European Union which is home to half a billion of human beings and accounts for a quarter of the global GDP and is as the world's second largest economy a relevant global player. It is widely recognised that the Charter has had considerable influence in generating a new fundamental rights culture within the EU's institutional machinery[6] and its application at the EU level is regularly reported on by the European Commission.[7]

But having a closer look, it becomes obvious that the Charter has inbuilt weaknesses and its practical potential appears underused. In that sense the Charter might remind of the illusionary giant Mr Tur-Tur in "Jim Button and Luke the Engine Driver".[8] Mr Tur Tur (his first name happens to be the same as his surname) suffered from a remarkable speciality: he appeared the taller, the farer he was away from the observer. And the closer you came to him, the more he was shrinking. Does the Charter and its relevance shrink when a we have closer look at it? Let's briefly test this in five steps.

[3] See articles 25, 26, 24 of the Charter.

[4] G. De Burca, *The Drafting of the EU Charter of Fundamental Rights*, in *European Law Review*, 2001, p. 126-138.

[5] Opinion of Advocate General Mischo delivered on 20 September 2001 in the Joined Cases C-20/00 and C-64/00, Para. 126. This view appears in a way to be shared by the European Court of Human Rights, see ECtHR, judgement of 7.7.2011, Bayatyan v. Armenia, Para 106.

[6] See e.g. G.N. Toggenburg, *The EU Charter: Moving from a European Fundamental Rights Ornament to a European Fundamental Rights Order*, in G. Palmisano (ed.), *Making the Charter of Fundamental Rights a Living Instrument*, 2014, pp. 10-29 (a version of this article is also available online as EIF Working Paper 2014/4).

[7] See most recently European Commission (2018), 2017 annual report on the application of the Charter, online here.

[8] The book by Michael Ende was published in 1960 and is considered one of the most successful German language children's books of the postwar era. It was translated in over thirty languages. Ende (1929-1995) said that he wrote books for all children aged between 80 and 8 years.

2. *The Charter's Field of Application: a Foggy Borderline*

Despite all its clear and encompassing wording the Charter surprises the reader at the very end when admitting – in a sort of encrypted way – that the Charter is mainly addressed to the EU itself and not to the same degree to the EU Member States. These are only obliged under the Charter when "implementing European Union law". It is well-known that the case law of the Court of Justice of the European Union (CJEU) is reading this as covering all situations where the Member States are acting within the scope of EU law. But still this is far from a clear-cut instruction. Besides the Charter, a second norm of primary or secondary EU law must be applicable to a given case in order for the Charter to kick in. As the president of the CJEU has put it: the Charter is the 'shadow' of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter.[9]

Such an additional filter is unknown to other human rights instruments such as the ECHR. It obviously requires an examination by the legal practitioner before she or he can operationalise the solemn Charter. It is here not the space to enter this Article 51 dilemma but I would just like to make the point that anecdotal evidence shows that for legal practitioners the foggy boundaries of the Charter's field of application are a major disincentive to use it in legal practice. This is also why the Council of the European Union called on the European Union Agency of Fundamental Rights (FRA) to develop, based on the case law of the CJEU – relevant guidance for legal practitioners. Such practical guidance – a handbook – was just presented at the Charter conference of Austrian EU Presidency in October 2018.[10]

It is also noteworthy to mention that whereas it appears quite obvious from the wording of the Charter that the EU itself (its institutions, agencies and bodies) is *always* bound by the Charter, also this aspect was put into doubt in the context of Europe's economic governance.[11] The Court has in the meantime clarified that the Charter applies to the EU institutions also "when they act outside the EU legal framework".[12]

[9] K. Lenaerts, J.A. Gutiérrez–Fons, *The Place of the Charter in the EU Constitutional Edifice*, in S. Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary*, 2014, p. 1567.

[10] FRA, 2018, Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level - Guidance.

[11] ECJ 27.11. 2012, Case 370/12, *Pringle*.

[12] ECJ 20.09.2016, Joined Cases Case 8/15P and 10/15P, *Ledra*, Para 67.

But the Parliament is still not satisfied with the relevance of the Charter in this regard and pushes for more attention to be given in political practice to potential repercussions of any EU (or semi-EU) intervention on civil, economic and social rights.[13] This is a valid and legitimate call.

The European Parliament is also lamenting over an "excessively restrictive interpretation" of the Charter's provision on its field of application (Article 51) by the European Commission and calls to change course so "to meet EU citizens' expectations in relation to their fundamental rights".[14] It can be expected that the boundaries of the Charter's field of application will be further fine-tuned by the case law of the CJEU. However, a redesign of Article 51 (and consequently also Article 6 (TEU) via a revision of EU primary law is not in sight.[15]

3. *The Charter's Distinction Between Rights and Principles: Much is Left Open to Interpretation*

Leaving Article 51, the reader of the Charter is likely to experience a second "Tur Tur moment" when reading Article 52. This article reveals in its paragraph 5 that not all Charter provisions are equal. Some have a more direct effect and have therefore the potential to be considerably more relevant in legal practice. Only where there are "legislative and executive acts" taken by the EU and/or the Member States to implement Charter "principles", the latter can be "judicially cognisable". As is well known, the Explanation to the Charter provide only rather limited guidance to understand, whether a Charter provision is a right or a principle. Also in this context the legal practitioner is left with doubts and a solid degree of responsibility is shifted to the CJEU who has the final say in interpreting primary law.

While not entering the discussion of what is a Charter right and what is a Charter principle, it is relevant here to stress that all Charter provisions are to the same degree legally binding. What differs is the

[13] See for instance the draft report by Barbara Spinelli on "The implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework".

[14] See European Parliament, resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014) (2014/2254(INI)), Para 21.

[15] This was called for by a former member of the European Commission, see Viviane Reding Vice-President of the European Commission, EU Justice Commissioner, speech given at the XXV Congress of FIDE in Tallinn, 31 May 2012.

degree to which a provision can be used in court. Also, it is incorrect to assume that all socio-economic rights, or all provisions in title IV (on solidarity) are principles and other Charter provisions rights. Admittedly, the distinction between rights and principles was introduced at the end of the political negotiations concerning the Charter in order to allow a few hesitating Member States to accept that the Charter became a legally *binding* document combining *both* socio-economic *and* political rights. From this one can however not draw any legal conclusion apart from the one that the introduction of the notion of "principles" allows to argue that certain Charter provisions have a reduced justiciability compared to others.[16]

The wording of the various Charter provisions does not give much guidance either. Some of the provisions that require implementing measures are labelled as "rights"[17] and in the past the Court declared a primary law "principle" as directly applicable stating that such wording is "specifically used in order to indicate the fundamental nature of certain provisions".[18] The difficulties for the legal practitioner are compounded by the fact that Article 52(4) establishes that "so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions". Such a helicopter perspective is difficult to take for a national practitioner. All this reinforces the Tur Tur experience: the Charter is less of a "Charter to go" than it appears at first sight.

Lets in the following briefly look at how the Charter is used at the national level, by the three branches of government.

4. *The Charter and National Governments: not Much Engagement so far*

Close to two thirds of the persons living in the EU have heard of the Charter but only a bit more than a tenth know actually what the Charter is. In close to all EU Member States a majority of survey re-

[16] At maximum one could go as far as to argue for a rebuttable presumption that Charter provisions under title IV are principles rather than rights – an avenue chosen by the General Advocate Opinion 18.07.2013, Case 176/12, Para 55.

[17] See for instance Article 9 (right to marry and found a family), 27 (workers' right to information and consultation within the undertaking) or 34 (social security and social assistance).

[18] ECJ 08.04.1975, Case 43/75, *Defrenne II*, Paras 28-29.

spondents is interested in having more information about the Charter.[19] And it appears that even amongst persons who deal with fundamental rights, awareness of the Charter is not necessarily high.[20] Against this background, the question arises whether the Member States took proactive measures to raise the awareness at national level so that the potential of the Charter can be fully unlocked.

According to Article 51 of the Charter, the Member States are not only obliged to respect the rights and observe the principle of the Charter but also to "promote the application thereof". However, such a proactive stance is hardly visible. Not even after having addressed the 28 Member States directly, was the FRA able to identify policies in that regard. Only rare examples stuck out such as in Finland where a Memorandum on the Interpretation and Implementation of the EU Charter for fundamental rights was prepared[21] to provide legal practitioners practical help in identifying situations where the EU Charter applies, and to understand how it differs from other fundamental and human rights instruments, especially the ECHR and the national constitutional rights. In Sweden a review of the Charter's application was carried out as part of the government's human rights strategy.[22] The study identifies the fact that the Charter is still a young instrument as one reason why its use is still rather limited, noting that it also took a while until the ECHR was known and used in legal practice. Close to ten years after the entry into force one would expect more political energy to be invested in such such stock-taking exercises so to better understand how to best unfold the potential of the Charter as a new fundamental rights instrument.[23]

Against this background, the FRA called on the Member States to regularly assess the Charter's actual use in national case law and leg-

[19] Eurostat (2015), Flash Eurobarometer 416.

[20] FRA, *Challenges and Opportunities for the Implementation of the Charter of Fundamental Rights, Opinion of the European Union Agency for Fundamental Rights*, Opinion 4/2018, 25.09.2018.

[21] Finland, Ministry of Justice (2016), Document OM 1/469/2016, available only in Finnish. An updated version of the Memorandum is currently in progress.

[22] Sweden, Ministry of Culture (2016, Official letter 2016/17:29 The government's strategy on human rights on a national level (*2016/17:29 Regeringens strategi för det nationella arbetet med mänskliga rättigheter, Skr. 2016/17:29*), 13 October 2016. The assignment to the University of Uppsala is available here.

[23] For Poland see Ministry of Foreign Affairs (2016), Application of the EU Charter of Fundamental Rights by Polish Courts, Bilingual conference proceedings.

islative and regulatory procedures, with a view to identifying shortcomings and concrete needs for better implementation of the Charter at national level. Based on such regular assessments, Member States should launch initiatives and policies aimed at promoting awareness and implementation of the Charter at national level, so that the Charter can play a relevant role wherever it applies.[24]

5. *The Charter and National Legislators: no Visibility for the Charter*

One would expect that the Charter plays a considerable role when national legislators and administrations adopt laws and policy documents. After all EU law is predominantly implemented at national level and a very significant part of national law and policy making is co-determined by EU law. But it appears that the Charter hardly plays an adequate role when national legislation is prepared.

As stressed by FRA,[25] in most Member States, there is an explicit obligation to check bills against national fundamental rights standards. Moreover, many national systems establish the explicit obligation to ensure draft legislation (or regulations) is assessed for its compatibility with international law and/or EU law. The European Convention on Human Rights (ECHR), which, in contrast to the Charter, is not limited to situations falling within the scope of EU law, is often mentioned in such procedural rules as an explicit benchmark that bills have to be checked against. Given the fact that much of national law and policy making is indeed likely to (somehow) fall within the scope of EU law, the Charter should be taken into account from the very outset. But also in this regard awareness appears to be lacking at national level.

Against this background, the FRA recommends[26] that EU Member States should review their national procedural rules on legal scrutiny and impact assessments of bills from the perspective of the EU Charter of Fundamental Rights. Such procedures should explicitly refer to the Charter, just like they do to national human rights instruments, to minimise the risk that the Charter is overlooked. The Agency calls[27] on the States to consider a more consistent 'Article 51 screening' in the

[24] FRA, Opinion 4/2018 (see opinion number 3).
[25] FRA, Opinion 4/2018 (see opinion number 4).
[26] FRA, Opinion 4/2018 (see opinion number 4).
[27] FRA, Opinion 4/2018 (see opinion number 4).

legislative process to assess at an early stage: whether or not a legislative file (partly) falls within the scope of EU law and thus also the Charter; whether the legislative proposal could potentially limit Charter rights; whether such limitations are in line with Article 52(2) of the Charter; and, whether the legislative proposal has the potential to proactively promote the application of Charter rights and principles.

6. *The Charter and the National Judiciary: Increasing Engagement*

Since the entry force till now the CJEU has referred in around 800 decisions to the Charter of Fundamental Rights. Especially the early years after the entry into force of the Charter, showed a very steep increase of references to the Charter. Such absolute figures are missing for the national level as it is impossible to track the use of the Charter in all the countless courtrooms in all 28 EU Member States. But the requests by national courts for preliminary rulings by the CJEU provide absolute numbers and give an indication that the Charter indeed plays a role before national courts: Between 2010 and 2017, national courts lodged 392 requests for preliminary rulings that include references to the Charter of Fundamental Rights (on average 49 per year). During the same period, 3,528 references for preliminary rulings were made by EU Member States overall. This means that the Charter was mentioned in 11% of all references.[28]

Whereas (apart from requests for preliminary rulings) the *quantity* of national judgements using the Charter can hardly be assessed, the *quality* of such judgements can be analysed. The FRA is tracking the use of the Charter since 5 years in a dedicated chapter of its annual Fundamental Rights Report.[29] Selected case law (three judgements per country per year) is saved in the Charterpedia – a one stop shop for Charter related information. From the evidence collected it appears that the quality of references to the Charter is increasing.[30] Whereas it is here not to space to analyse such case-law it is relevant to note that the Charter can also play a role in cases where it does strictly speaking

[28] FRA, Opinion 4/2018, p. 48.

[29] FRA, Fundamental Rights Report 2018, p. 35-54. Links to the Charter chapters in former Fundamental Rights Reports can be found online here.

[30] Out of the three branches of governance, the use of the Charter in the judiciary appears to raise most interest. See for instance L. Burgorgue-Larsen, *La Charte des droits fondamentaux saisie par les juges en Europe*, Paris, 2017.

not apply. The Charter serves as lighthouse or a road sign that influences the judges' interpretation of national law. For instance, in a case before an Italian court, the court admitted that due to Article 51 the Charter did not apply but it stressed that this would not hinder it to use the Charter as a "source of 'free interpretation' of national legislation, being an 'expression of common principles of European legal systems' (Constitutional Court no. 135/2002) and, as a consequence, having an effect also within the national legal system".[31]

7. *Conclusion: After All, An Ally and a Lighthouse*

We started with the acknowledgment of the Charter's impressive appearance in terms of its clear and encompassing wording. However, whereas the Charter is easy to read, it is difficult to understand.[32] It is less of a "Charter to go" than the drafters made us think.

At EU level its relevance is unconditional, compelling and overall a success story.[33] At national level the picture is more complex. Before "domestic consumption" an assessment needs to be made whether the Charter at all applies in a given case. This is compounded by the fact that legal practitioners need to check the specific character of the single provision ("mere" principles, while having legal effects, need implementing measures before they can be invoked in court). Against this background, it is less of a surprise that the awareness about and the daily use of the Charter appears still limited.

Is the Charter thus an illusionary giant like Tur Tur in the novel about Jim Knopf? Having a closer look at the Charter indeed makes the

[31] Italy, Corte Suprema di Cassazione, Case 41, 3 January 2013.

[32] G. N. Toggenburg, *The EU's charter of fundamental rights - five years on*, in *EU Observer*, 1.12.2014.

[33] But there is clearly room for improvement. See Olivier de Schutter (2016), The Implementation of the Charter of Fundamental Rights in the EU institutional Framework, study for the European Parliament, available online here. Note that the recent opinion of the FRA on the implementation of the Charter makes recommendations also for the EU level. FRA calls amongst other on the EU legislator to make more regularly use of external human rights expertise when assessing fundamental rights impacts or the compatibility of legislative drafts with fundamental rights standards. And it calls for an annual "Charter exchange" in the Council Working Party FREMP. See FRA, Opinion 4/2018, (opinions 1, 2, 6, 7 and 8).

Charter's relevance appear to shrink. But the story of Tur Tur shows that this is not necessarily negative. Whereas Jim Knopf was in the beginning very afraid of Tur-Tur, the illusionary giant soon became his friend. It was with his guidance that he found his way home to the small island of Morrowland. Once back home Jim decided that the island needs a lighthouse, but the island was too small to support one. Jim Knopf remembered Mr. Tur Tur and his ability to appear as a giant when seen from afar. So he invited Tur-Tur to join him in Morrowland in order to use this his unique ability as a living lighthouse.

What can we learn from this? For the island of the EU as it currently stands, a supranational human rights bill that applies "semper et ubique", including in all purely internal situations would be "too heavy" as it would encroach on the delicate federal balance between the EU and its Member States. The EU Charter is not (and was not) meant to be a real giant. As such it would trample on the feet of other human rights documents. Adding value where it can and otherwise pointing to alternative avenues is the Charter's vocation, not gigantomachy. In fact the Charter has the potential to become a lighthouse that guides the EU and that points to human rights compatible solutions at national level.

That we are not fully there yet does not come us a surprise. The awareness and standing of the ECHR in 1963, 10 years after its entry into force, was no more prominent than is the case for the Charter in 2019. We should not forget that good things take their time.[34]

[34] By the way, Michael Ende used to say that writing requires patience. Once he had finished the book "Jim Button and Luke the Engine Driver" it took him 18 very long months and 10 negative replies by potential publishers till his book could raise like a star to the sky of the most successful writings.

The Effectiveness of the Charter of Fundamental Rights in a Comparative Perspective: which Level of Integration?

Lorenza Violini e Alessandra Osti*

1. *Introductory Remarks*

The EU Treaties do not have a constitutional character and, indeed, the term "constitution" is expressly avoided, as decided by the EU Council following the failure of the French and Dutch referenda.[1] However, the incorporation of the Charter of Fundamental Rights[2] (hereinafter EUCFR) in the Lisbon Treaty (2009) has certainly contributed to a *de facto* constitutionalization of the European legal space and, therefore, to the emergence of the issue of the constitutional identity of the Member States.[3] The scenario briefly presented here has also

* Although resulting from a combined and coordinated effort and representing a shared view of the issue, the present chapter was written separately: paragraphs 1, 2 and 5 written by Lorenza Violini (Professor of Constitutional Law at the University of Milan) and paragraphs 3 and 4 written by Alessandra Osti (Research Fellow in Public Comparative Law at the University of Milan).

[1] IGC 2007 Mandate, Doc. 11218/07, 26 June 2007, 3.

[2] A first version of the Charter of Fundamental Rights of the European Union had been proclaimed at Nice in 2000. It only acquired the legal status of the highest-ranking fundamental rights catalogue with the Lisbon Treaty by the reference in article 6 (1). Since 2009, the main, legally binding source of fundamental rights in EU were the general principles of the EU law derived by international convention (especially the ECHR) and from the constitutional traditions common to the Member States.

[3] On the point of the national/constitutional identity see, among others, A. Von Bogdandy and S. Schill, *Overcoming absolute primacy: Respect for National Identity Under the Lisbon Treaty*, in *Common Market Law Review*, 48, 2011, 1417-1454; G. Van Der Schyff, *Eu Member State Constitutional Identity: a Comparison of Germany*

developed due to the evolving jurisprudence of the European Court of Justice (hereinafter CJEU), which, at least in some cases, acts as a proper European constitutional court or a quasi-constitutional court.[4] This might elicit opposition by national states and potentially strain relationships with national constitutional courts.[5]

As an example of the CJEU's admittedly tentative entry into the national constitutional spaces, ("stirring up", at times, the aforementioned emergence of national constitutional identities), we may consider the recent decision in the Portuguese case *Associação Sindical dos Juízes Portugueses,* delivered in February 2018.[6] In this judgment, the CJEU, in its Grand Chamber composition, had to establish whether Law No. 75/2014, which temporarily reduced the remuneration (among others) of the judges of the Court of Auditors, was compatible with EU Law (especially with the principle of *judicial independence*, enshrined in the second subparagraph of Article 19(1) Treaty of the European Union (hereinafter TEU) and in Article 47 EUCFR).

Even though the CJEU ruled that «the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude general salary-reduction measures», it is worth noting that the Court, in its reasoning, pointed out that the considered EU provisions relate to "the fields covered by Union law", irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter. Consequently, the Luxembourg judges elaborated on the guarantee of independence of the judiciary, which undeniably represents a key constitutional issue.[7]

and the Netherland as Polar Opposite, in *ZaöRV,* 76, 2016, 167-191; E. Cloots, *National Identity, Constitutional Identity, and Sovereignty in the EU*, in *Netherlan Journal of Legal Philosophy*, (45) 2, 2016, 82-98.

[4] G. Itzcovich, *The European Court of Justice as a constitutional Court. Legal Reasoning in a Comparative Perspective*, STALS Research Paper 4/2014; E. Billis, *The European Court of Justice: a "Quasi-Constitutional Court" in criminal matters? The Taricco Judgment and its shortcomings*, in *New Journal of European Criminal Law*, (7) 1, 2016, 20-38.

[5] J. Komárek, *The Place of Constitutional Courts in the EU*, in *European Constitutional Law Review*, 9, 2013, 420-450 and from the same author, *Constitutional Courts in the European Constitutional Democracy*, in *International Journal of Constitutional Law*, (12) 3, 2014, 525-544.

[6] CJEU (Grand Chamber) 27 February 2018, Case 64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*.

[7] On the same topic we can also consider the Hungarian case: CJEU (First Chamber) 6 November 2012, Case 286/2012, *Commission v. Hungary*.

Focusing on the Charter of Fundamental Rights, it is worth to remember that this instrument is meant primarily to bind EU institutions and to restrict their power; this application is uncontroversial. Matters become more problematic when it comes to applying the fundamental rights enshrined within the Charter to the obligations of Member States that are already constrained by the rights contained in their own national constitutions. As general rule, it can be said that the EU Charter has a limited field of application. Indeed, the Charter applies to EU Member States only "when they are implementing Union law" because, in such situations, they are not acting on their own but merely as agents for the EU: in giving effect to EU rules they are obviously also required to respect EU fundamental rights. However, the aforementioned passage "when they are implementing the Union law", contained in Article 51 (1) of the Charter, has been translated by CJEU jurisprudence into a much broader and less clearly defined "when they are acting within the scope of EU law".[8] This broader reading of Article 51 (1) EUCFR has been the subject of intense debate among academics and practitioners, but it still remains a grey area of uncertainty in which it is difficult to orientate.

As we said, it is not always easy to define the boundaries of the Charter's field of application and therefore national judges (as well as parliamentarians and governments) represent the core "Charter agents" that the EU system relies on and that should contribute to the evolution of the EU legal space towards integration. However, the main problem is that they are still – all too often – unaware agents. This observation becomes clearer if we consider, at first, national legislators as core Charter agents. The Italian legislator, for instance, during the last legislature approved a law on the Treatment Advance Directives (an issue that it is quite difficult to link with EU competencies) which in its Article 1 expressly refers to the EUCFR, possibly paving the way for future intrusion of the CJEU outside the scope of EU law.

Then, if we consider the judges as "Charter agents" (or, more generally, natural allies of the EU legal system or again recipients of the European Mandate),[9] their unawareness may produce two different kind of

[8] CJEU 26 February 2013, Case 617/10, *Aklageren v. Akerneg Fransson*; see also CJEU 26 February 2013, Case 399/11, *Melloni v. Ministerio Fiscal*.

[9] The term "Chart agents" is used by the FRA in the Fundamental Rights Report 2018, the term allies is used by B. Schima, *EU Fundamental Rights and Member State Action After Lisbon: Putting the CJEU's Case Law in Context*, in *Fordham*

behaviours. Firstly, judges might refer to the Charter in an inconsistent way, bundling to it together with other legal sources, especially national constitutional provisions and ECHR articles. The Fundamental Right Agency (FRA) justifies this practice as a signal that judges (generally speaking) are aware of the existence of the Charter but not of its potential added value, so that they prefer to «package various human rights sources in order to play it safe».[10] Secondly, judges might use the Charter improperly – without any consideration about its field of application – in order to drive the national legal system towards new frontiers, potentially jeopardising the certainty of the rule of law. Examples of this tendency in the Italian context may be found in the case law concerning the introduction of stepchild adoption by Court of Cassation No. 19962/16 or, even more to the point, in the case concerning the disapplication of national provisions of the criminal procedural code about legal aid, which the Court of Appeal had deemed in conflict with Article 47 EUCFR,[11] without any reference to its field of application.

The latter behaviour is particularly dangerous both at national and at EU level, since it contributes to enhance the internal tensions between Constitutional Courts and ordinary Courts and to trigger a "clash of titans" between national Constitutional courts and the CJEU. Moreover, it is not even useful for European integration.

The above-described context is essential for a better understanding of the jurisprudence of national Constitutional Courts and of their sometimes strained relationship with the CJEU.

A comparative perspective, which implies the contextualization of the selected judgments, becomes therefore important in order to evaluate the different approaches to the Charter and their impact on the EU integration process.

The choice of comparing the effectiveness of the Charter in Italy, Austria and UK in the light of recent jurisprudence of the Supreme/Constitutional Courts can be easily explained. With judgement No.

International Law Journal, 38, Issue 4, 2015, 1097-1133; the term recipients of the European Mandate is deducted from M. Bobek, *The Impact of the European Mandate of Ordinary Courts on the Position of the Constitutional Courts*, in M. De Visser and C. Van De Heyning (eds), *Constitutional Conversations in Europe*, Cambridge, 2012, 287-308.

[10] FRA, Fundamental Rights Report, 2018.

[11] A. Barbera, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di Giustizia*, availabele at: https://www.cortecostituzionale.it/documenti/convegni…/SIVIGLIA_BARBERA.pdf.

269/2017 the Italian Constitutional Court has questioned CJEU competence interpreting the Charter and the constitutional traditions common to the Member States,[12] or, more correctly, has tried to preserve the concept of a centralized constitutional jurisdiction (as the Austrian Constitutional Court did) in order to guarantee higher certainty to the protection of fundamental rights. However, the probably positive intentions of the Court have been misunderstood, and the most obvious reason is that the Constitutional Court has tried to import the model of the Austrian constitutional court judgment, which, as we are going to see in detail, had obtained positive reaction by the EU institutions, without considering the different context.

The judgment at hand has been strongly criticised by the majority of academics and practitioners, who regarded it as an inappropriate interference with, and opposition to, the CJEU. Furthermore (and more in general) it has been argued that the judgment diminishes the role of ordinary judges as recipients of the European Mandate, restricting their freedom to disapply, on their own initiative, a national provision in conflict with the EUCFR.

Choosing Austria as a term of comparison is therefore an obligated choice because of the reference that the Italian Constitutional Court made to the Austrian Constitutional Court's landmark decision. Moreover, this analysis will help to understand why similar decisions had such different outcomes. The choice of the UK as the third term of comparison is not only due to the fact that it represents an interesting and recent example of valorisation of the Charter but also to the similarities that the UK legal system shares with Austria. At a first glance, Austria may not seem to have much in common with the UK in this aspect, but a closer look will reveal that the two systems are more similar than it appears: in both countries, in the absence of a fully national bill of rights (such as the one found in the Italian constitution), the domestic fundamental rights system is in fact based mainly on the ECHR, which – either as a whole or in part – applies at the national level through the Human Rights Act 1998 in UK and through its constitutionalization in Austria.[13] In this scenario,

[12] R. Di Marco, "*The path toward European integration" of the Italian Constitutional Court: The Primacy of EU Law in the light of the Judgment No. 269/17*, in *European Papers* – European Forum, 14 July 2018, inserire pagine.

[13] A. Müller, *An Austrian ménage a trois: The Convention, The Charter and The Constitution*, in K. S. Ziegler, E. Wicks, L. Hodson (eds.), *The UK and the European Human Rights. A strained relationship*, Oxford, 2015, 299-320.

the valorisation of the Charter as a complementary fundamental rights catalogue is therefore very interesting and, at the same time, very challenging for both the national and the European legal orders.

2. *The Application of the Charter of Fundamental Rights in the Light of the Italian Constitutional Judgment No. 269/2017*

Before engaging in an examination of judgment No. 269/2017 of the Italian Constitutional Court, it seems necessary to mention briefly that, in the nine years since the Charter was first proclaimed and before it became legally binding, the Italian Constitutional Court has more than once referred directly to it in order to support its legal reasoning. Hence, in doing so the Court has recognised the importance of the Charter, among other international instruments such as the European Convention of Human Rights (hereinafter ECHR), as an instrument devoted to protect fundamental rights. Even after the entry into force of the Lisbon Treaty, which conferred legally binding force to the Charter, its use in practice by the Italian Constitutional Court has not changed significantly either on the quantitative or on the qualitative point of view. Indeed, on one hand, the number of references has certainly increased, but remains low in proportion to the total number of decision delivered; on the other hand, the quality of the references remains insubstantial since it is usually used *ad adiuvandum* or *ad definendum* without even considering whether the matter is within the scope of the EU law. Leaving aside the so-called Taricco saga, it is worth noting that the trend described here may change due to the shifting approach of the Constitutional Court, as inaugurated by a decision issued at the end of 2017.

Indeed, the Italian Constitutional Court, in a very controversial *obiter dictum* of decision No. 269/2017, describes the "state of the art" of the antinomy between EU law and domestic law. Therefore, (i) when a national law clashes with a European Union law that has direct effect, «it falls to the ordinary judge to evaluate the compatibility of the challenged internal rules with the European law, making use – where necessary – of a reference for a preliminary ruling to the CJEU». Then, in case of noncompliance, the national judges must apply the European rule instead of the national one.

(ii) If the situation of noncompliance regards European rules with no direct effect, the ordinary judge tries to resolve the evaluated incom-

patibility through interpretation; if this fails, the judge must raise the question of constitutionality before the Constitutional court, which is the sole competent Court.

It is with the following reasoning that the Italian Constitutional Court inaugurates a new, and potentially slippery, path:

> It bears considering that the aforementioned Charter of Rights is a part of Union law that is endowed with particular characteristic due to the *typically constitutional stamp of its contents* [italics added]. The principle and rights laid out in the Charter largely intersect with the principles and rights guaranteed by Italian Constitution (and by other Member States). It may therefore occur that the violation of an individual right infringes, at once, upon the guarantees enshrined in the Italian Constitution and those codified by the European Charter (… omissis). Therefore, violations of individual rights posit the need for an *erga omnes* intervention by this Court, including under the principle that places a centralized system of the constitutional review of laws at the foundation of the constitutional structure (Article 134 of the Constitution).

Thus, according with the reasoning of the constitutional judges, (iii) when a national law clashes with the Charter the ordinary national judges must address the Constitutional court, although in principle they remain free to submit a reference for preliminary ruling to the CJEU. It seems quite clear that the reasoning of the Court aims to preserve the concept of a centralized constitutional jurisdiction (as the Austrian Constitutional Court did, although on a different basis) in order to guarantee higher certainty to the protection (*erga omnes*) of fundamental rights. Were it not so, the rights enshrined in the national constitution would enjoy a lesser degree of protection (only among the parts of the proceeding) for the sole reason that they are also protected in the Charter. Nevertheless, the loyal cooperation with the CJEU is not forgotten by the Constitutional Court that expressly recalled it by referring to the importance of judicial dialogue.

However, we can imagine two different scenarios resulting from this reasoning. In the first one, the Constitutional Court upholds the claim based on fundamental rights and the national provision is no longer available in the national legal system. In that case there would be no more reason for the ordinary judge to knock at the door of the CJEU.

In the second scenario, the Constitutional Court dismisses the claim and therefore the interpretation of the Charter by the CJEU might re-

main the last recourse. At this point, however, the ordinary court could be persuaded by the legal arguments of the Constitutional judgment, or simply be discouraged from making another time-consuming reference within the same case. However, if it persevered, and if the European claim based on the EUCFR provisions succeeded (and only in this case), the divergence in interpretation might trigger an overt conflict between the CJEU and the Constitutional Court, which could potentially lead to questioning even the consolidated principle of the primacy of the EU, since many fundamental rights find a counterpart in other rules of EU law.[14]

It is probably with the latter scenario in mind that the Court of Cassation has reacted to the Constitutional judgment at hand and has made references both to the Constitutional Court, for a Charter-based judicial review of legislation, and, in a different case, for a preliminary ruling to the CJEU.[15]

In the first case the Court of Cassation has formally respected the procedural rule specified by judgment No. 269 but at the same time has asked for clarification on the dual preliminarity, highlighting the possible problems connected with this hypothesis. In the second case the Cassation Court has ignored that procedural rule (since it was contained in a *obiter dictum*) and has knocked directly at the door of the CJEU. These two reactions demonstrate that the main problem arising from constitutional judgment No. 269/2017 is not at European level nor does it concern relationships with the CJEU; it is instead at the national level, where national ordinary judges may feel deprived by the Constitutional judges of that "European Mandate" that empowers them to be judges of the European legal space and to enforce EU law,[16] including the Fundamental Rights enshrined in the Charter. It is this element, among others that we will highlight in the next paragraph, which differs from the Austrian case. The conflict between the Con-

[14] B. Schima, *EU Fundamental Rights and Member State Action After Lisbon: Putting the CJEU's Case Law in Context*, in *Fordham International Law Journal*, 38, Issue 4, 2015, 1097-1133. It is quite interesting to notice that the author has forecast, in general terms, the described scenarios.

[15] Court of Cassation., II Civil Section, 16 February 2018, judgment No. 3831 and Court of Cassation, Labour Section, 30 May 2018, judgment No. 13678.

[16] It is worth noting that this European Mandate has been recognized by the Italian Constitutional Court in 1984 (*Granital* decision) where the Court stated that a national piece of legislation which clashes with EU provisions endowed with direct effect must be disapplied in favour to EU law.

stitutional Court and the CJEU is going to be an exceptional case and, moreover, the dialogue concerning the development of rights among these two Courts might eventually turn out to be very fruitful.

Concluding, however, it is important to notice that the aforementioned constitutional judgment leaves some grey areas: is it possible that the violation of an individual right infringes only those rights codified by the European Charter? If so, who is going to decide over this case? And is it even possible, in this case, to forgo the "constitutional content" of the Charter?

3. *The Austrian Approach to the Charter of Fundamental Rights in the Light of the 2012 Constitutional Decision*

Since Austria's accession to the European Community in 1995, the *Verfassungsgerichtshof* (hereinafter VfGH), which has sole jurisdiction to declare general acts invalid and is responsible for the protection of constitutionally guaranteed rights, has recognized the supremacy of EU norms having direct effect. However, even though EU law was considered by the same VfGH as applicable law, it was not deemed to have constitutional status and therefore it could not be used as a standard of review of legislative or administrative acts before the Constitutional Court. Indeed, as the VfGH stated for example in 2000, "the compatibility of the statute with community law as such cannot be subject of the Court's control".[17]

The decision of 14 March 2012, the one that the Italian Constitutional Court refers to, deviates from the above-mentioned view on the role of EU law in the Austrian legal system and therefore represents a landmark decision.[18]

The case before the Constitutional Court concerned an issue of asylum law: the applicants, two Chinese citizens who had applied for international protection (Asylum), were claiming a violation of their right to an effective remedy and to a fair trial as enshrined in Article 47 of the Charter (not in a constitutional norm) because they had been denied an oral hearing before the Asylum Court.[19] The applicants' decision

[17] VfGH, 15753/2000 but also VfGH 19496/2011.

[18] VfGH, 14 March 2012, U466/11.

[19] The piece of legislation under constitutional review was the Austrian Asylum Act (2005), which indeed omitted to provide an oral hearing before a national asylum court.

not to rely on the almost corresponding provision of Article 47 EUCFR, i.e. Article 6 of the ECHR, which – by the well-established logic of the VfGH – would have constituted the surest way to see their claim considered, is due to the fact that this convention provision was of no avail, since jurisprudence of the European Court of Human Rights had already made it clear that proceedings regarding asylum do not concern civil rights and obligations within the meaning of Article 6 ECHR.[20]

Therefore, Article 47 of the Charter, with its broader content, was the exclusive source of law invoked as a yardstick for constitutional complaint, and thus the Court could not avoid to verify whether the Charter itself would qualify as a standard of review for proceedings under Article 144a of the Federal Constitutional Law (B-VG).

It may be useful to follow the arguments of that decision to better understand its outcomes as well as its context. First of all, the VfGH referred to Article 6 (1) TEU and held that the Charter is a part of EU primary law, but it concluded that its previous case law could not be applied to the examined case because "the Charter is an area that is markedly distinct from the Treaties".[21]

Having said this, the Court referred to the principle of equivalence and effectiveness and concluded that "rights which are guaranteed by directly applicable Union law must be enforceable in proceedings that exist for comparable rights deriving from the legal order of the Member States".[22] The VfGH equated the Charter rights with constitutionally guaranteed rights pursuant to Articles 144 and 144a B-VG and argued that many Charter rights are modelled on the ECHR, which has in Austria constitutional rank.[23] Therefore, in order to preserve the concept of a centralized constitutional jurisdiction, a core concept of the Austrian Constitution, the VfGH concluded that it is competent to decide on Charter rights identical in content to the Austrian counterparts.[24]

[20] The same VfGH considers the issue in order to estabilish that article 47 and article 6 have different meaning.

[21] VfGH, 14.03.2012, U466/11, para. 25.

[22] VfGH, 14.03.2012, U466/11, para. 27 which refers to the CJEU case law and in particular to CJEU 1 December 1998, Case 326/96, *Levez v. T.H. Jennings (Harlow Pools) Ltd.*

[23] Austria acceded to the Council of Europe in 1956 and ratified the Convention in 1958. In 1964 the dispute about the legal status of the ECHR was solved (with reatroactive effects) by the (constitutional) legislator which elevated the Convention to the rank of constitutional law (Budesgesetzblatt 121/1956).

[24] VfGH, 14 March 2012, U466/11, para. 34.

> … it follows from the equivalence principle that the rights guaranteed by the Charter of Fundamental Rights may also be invoked as constitutionally guaranteed rights pursuant to Articles 144 and 144a respectively, Federal Constitutional Act (B-VG) and they constitute a standard of review in general judicial review proceedings in the scope of application of the Charter of Fundamental Rights, in particular under Articles 139 and 140, Federal Constitutional Act (B-VG)".[25]

However, the Court seems to restrict this view to those Charter rights corresponding to constitutionally guaranteed rights under Austrian law: "this is true if the guarantee contained in the Charter of Fundamental Rights is similar in its wording and purpose to rights that are guaranteed by the Austrian Federal Constitution". Therefore, not the whole Charter is elevated to serve as a yardstick for constitutional complaints. To identify the relevant parts of the Charter that may be considered as standard of review, one must establish, on a case-by-case basis, which rights guarantee the same wording and purpose as those enshrined in the Austrian Federal Constitution and in the ECHR, which – as already mentioned – has the same constitutional rank. The VfGH explained that some provisions, such as e.g. Articles 22 or 37 of the Charter, do not resemble constitutionally guaranteed rights so much as "principles" and thus cannot be regarded as standard of review, since they cannot be compared to a detailed catalogue of rights and duties.[26] One may object to this approach on the basis of legal certainty: actually, aside of course from Article 47, on which the VfGH has already made its (not fully satisfactory) evaluations, it remains unclear which other Charter rights will qualify as constitutionally guaranteed rights. For instance, following that leading decision, Article 21 (1) and (2) has also already been afforded this "constitutional" status.

Moreover, the VfGH recognized the importance of CJEU case law for interpreting the Charter rights and expressly stated that, in the case of doubts on the interpretation of those rights enshrined in the Charter provisions, it would have initiated a preliminary reference procedure according to Article 267 TFEU.

> In summary, the Constitutional Court – after having referred a matter for a preliminary ruling to the Court of Justice of the European Union according to article 267 TFEU as appropriate – takes the Charter of

[25] Ibidem, para. 35.
[26] Ibidem, para. 36.

> Fundamental Rights in its scope of application as a standard for national law (article 51(1) EUCFR) and sets aside contradicting general norms according to Article 139 and/or Article 140 Federal Constitutional Act (B-VG). In this manner, the Constitutional Court *fulfils its obligation to remove from the domestic legal order provisions incompatible with Community law*, which is also postulate by the Court of Justice of the European Union".[27]

The Court goes further in its argumentations by offering a distinctive interpretation of the obligation of reference for preliminary ruling under Article 267 (3) TFEU. In particular, the Court states that, as far as the Charter is concerned, if a constitutionally guaranteed right (especially one of those of the ECHR) has the same scope of application as a right of the Charter, the Court has no obligation to bring the matter to the attention of the CJEU, since it can base its decision upon the Austrian Constitution alone. In the wording of the VfGH, the rationale for this lack of obligation is linked with the interpretation of Articles 52 and 53 of the Charter: indeed, fundamental rights are recognized in the Charter as they result from the constitutional traditions common to the Member States and, therefore, must be interpreted in accordance with those traditions. "In so far as this Charter contains rights which correspond with rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention" (Article 52(3) EUCFR).

The Court then, after having addressed the general issue, applied (or at least attempted to apply) these arguments to the specific field of the case. It stressed that Article 47 EUCFR has a broader scope of application than the corresponding Article 6 ECHR. However, this remark did not prevent the VfGH from deciding on whether an oral hearing may be restricted in accordance with Article 47 EUCFR without referring the issue to the CJEU, as it was, instead, quite reasonable to expect on the basis of the above-mentioned arguments. The Court, therefore, concluded that:

> In the light of this case, the Constitutional Court neither holds any reservation as to the constitutionality of sec 41 (7) 2005 Asylum Act, nor does it find that the Federal Asylum Tribunal subsumed an un-

[27] Ibidem, para. 39. The italics is added in order to emphasize the statement of the Court.

> constitutional content under this provision by desisting from holding an oral hearing. Desisting from holding a hearing in cases in which the facts seem to be clear from the case-file in combination with the complaint, or where investigations reveal beyond doubt that the plea submitted is contrary to the facts, is consistent with article 47 EUCFR, if preceded by administrative proceedings in the course of which the parties were heard.[28]

The principle of coherence demands that the Court can also review alleged violations based on the Charter and this argument seems to be a very important point on the relationship between the Austrian and the EU legal orders. However, an important condition for allowing an EU Charter complaint before the Austrian Constitutional Court is that the Charter right be similar to a national human right under the ECHR, which – as we have already noted – has constitutional rank and represents the main catalogue of rights. The EUCFR might therefore play a pivotal role in Austria as a constitutional yardstick for ordinary law, which can be declared null and void in case of incompatibility, but in principle only when the Charter right is at least "similar" to those protected within the ECHR.

The decision has received mixed reactions from the Austrian legal academia,[29] which has generally criticized the reasoning of the Constitutional Court, and from the jurisprudence of other national courts such the Supreme Administrative Court. The latter, in particular, with its judgment of 23 January 2013[30] repealed, based on a violation of Article 47 EUCFR, a decision of the independent Tax Panel, which had denied the applicant an oral hearing. The main point here, at least for our purposes, does not so much concern the outcome of the decision, which we may agree on, as the relationship between the courts. In fact, the Supreme Administrative Court has find itself obligated to implement the Charter without considering that the Constitutional Court in the examined judgment had qualified the rights of the Charter (certainly including Article 47 EUCFR) to be equivalent to constitutionally guaranteed rights for which it is the sole competent judge. This evaluation seems especially relevant if we consider the data on the impact

[28] Ibidem, para. 64.

[29] K. Lachmayer, *The Austrian approach toward European human rights*, in *Vienna J. on Int'l Const. L.*, 2013, 105-107.

[30] Austrian Supreme Administrative Court (VwGH), 23 January 2013, judgment No. 2010/15/0196.

of the Charter at national level presented by the Fundamental Rights Agency (FRA) in 2018. The report of the Agency shows that in Austria the Constitutional Court referred to the Charter 34 times, whereas the Supreme Administrative Court did so 140 times.[31]

However, the most interesting reaction came from the CJEU: Vassilios Skouris, the former President of the CJEU, sent a congratulatory note to the President of the VfGH, Gerart Holzinger. According to this note, the decision at hand can be read as a substantial contribution to transforming the EUCFR into a shared asset of the EU and to further developing the cooperation between the CJEU and the national constitutional courts to the benefit of Fundamental Rights protection in Europe.[32] Of course, this positive reaction might be influenced by the ongoing cooperative approach that the Austrian Constitutional Court has developed since its first preliminary reference to the CJEU back in 1999.[33]

In the light of this positive reaction, we may also look favourably to CJEU decision *A v. B and others*, which the Luxembourg Court delivered in 2014, and consider it as one more step forward in the constructive dialogue between the two Courts.[34] Indeed, the CJEU held that, according to VfGH case law, ordinary courts must apply to the Constitutional Court if they consider a statute to be contrary to the Charter. However, the obligation to refer the case to the Constitutional Court for the general striking off of statutes does not affect the right of ordinary courts (as correctly expressed by the VfGH in wording borrowed from the CJEU judgment) to refer any question they consider necessary to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they might deem appropriate, even at the end of the interlocutory procedure for the review of constitutionality. While a divergence of interpretation leading to potentially dangerous conflicts between the CJEU and the VfGH remains possible, it seems a rather marginal risk *vis a vis* the benefits of a fruitful relationship with the VfGH.

[31] FRA, Fundamental Rights Report 2018. The data considered only cases where the reference to the Charter is within the reasoning of the court and not cases where the Charter is considered merely in order to report that the parties had refer to it.

[32] Letter of 25th May 2012. The reference to the letter can be found in A. Müller, *An Austrian ménage a trois: The Convention, The Charter and The Constitution*, in K.S. Ziegler, E. Wicks, L. Hodson (eds.), *The UK and the European Human Rights. A strained relationship*, Oxford and Portland, 2015, 307 ss.

[33] VfGH, 10 March 1999, judgment No. B 2251/87.

[34] CJEU (Grand Chamber) 11 September 2014, Case 112/13, *A v. B and others*.

Facts seem to support this statement for the time being. Indeed, the FRA reported that in Austria the Charter does not have a decisive overall impact on the outcome of the judgments. This might indicate that, after all, the added value of the Charter is overall still limited, especially compared to other sources of law and the ECHR *in primis*.

4. *The Strange Case of the UK Application of the Charter of Fundamental Rights. Recent Developments*

It can be noted that the European Charter of Fundamental Rights has met a rather frosty reception in the United Kingdom. Under the Human Rights Act, in which parliamentary sovereignty is protected, the courts may only issue a declaration of incompatibility, rather than a proper remedy, but the Charter can be directly enforced and any incompatible national law set aside due to the supremacy of EU law.

From the start, i.e., from the solemn proclamation of the Charter in Nice, the British government had taken a rather dim view of the Charter, which it only tolerated insofar as it remained a non-legally binding statement of policy. It worth noting that by the time it obtained binding legal effect in 2009 with the entry into force of the Lisbon Treaty, the Charter had already made its first steps in the European legal order through the jurisprudence of the CJEU.[35]

In 2007 the UK, through a joint UK and Poland Protocol, had negotiated an opt-out from the Charter, but this document, Protocol 30 to the Treaty of Lisbon, showed the full extent of its weakness and ambiguity when the Treaty entered into force in December 2009.

UK judges, at first, stated that applicants could not rely on the Charter, which was not applicable in UK, but at the same time argued that, in spite of this, the Charter still had an indirect influence as an aid to interpretation.[36]

The Government subsequently began to soften its (op)position to the Charter, admitting that Protocol 30 did not altogether prevent the Charter from applying within the UK, but only served to explain its effect. As one would expect, this position was endorsed by the European Court of Justice (CJEU) in its case law. Indeed, in the wording of the CJEU:

[35] The first decision that refer to the Charter is CJEU (Grand Chamber) 27 June 2006, Case 540/03, *Parliament v. Council of the European Union*.

[36] See *R (Saeedi) v. Secretary of State for the Home Department* [2010] EWHC 705.

> Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, (… *omissis*) Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.[37]

In 2012, the UK Supreme Court had the occasion to confirm that the Charter takes effect in national law, binding Member States when they are implementing EU law.[38] However, although some steps in the direction of embracing the Charter had been taken, the issue of the legal status of the Charter was still unresolved and the state of uncertainty regarding its effect on the UK national order persisted for several years. In this regard it is worth noting, for example, that key government officials – including Secretary of State for Justice Chris Grayling in 2013 and Home Secretary Theresa May in 2014 – kept opposing the EUCFR by saying that it should not apply to the UK and that it had merely declaratory value. Amid this contradictory scenario, the House of Commons European Scrutiny Committee in its 2014 report issued a very strong recommendation to adopt primary legislation aiming to exclude the applicability of the Charter in the UK, without considering the fact that the UK could not unilaterally alter EU law nor disapply the Charter, which is EU law as well.

However, the fortunes of the Charter were going to change shortly afterwards. The wind of change turned in 2015, when the Court of Appeal delivered two decisions which recognized that some provision of the Charter of Fundamental Rights not only have effect in the national legal order but also have a horizontal, direct effect; on this basis, the Court disapplied the primary UK legislation in contrast with those provisions.

The first case, *Benkharbouche v. Sudanese Embassy*, concerned claims brought by foreign domestic workers employed by the London Embassies of Sudan and Libya. Ms Benkharbouche, a Moroccan citi-

[37] CJEU 21 December 2011, Case 411/10, *N.S. v. Secretary of State for Home Department*, para. 119.

[38] *Rugby Football Union v. Consolidated Information Services* [2012] UKSC 55, paras. 26-28.

zen, was employed as a cook at the Sudanese embassy in London before her dismissal. She brought a claim against the embassy for wrongful dismissal, failure to pay the minimum wage and breach of working time regulation (which incorporated Directive 2003/88/EC). Ms Janah, also a Moroccan citizen, was instead fired from her post as a member of the domestic staff at the Libyan embassy in London. Her claim against the Libyan embassy was based on wrongful dismissal, racial discrimination and harassment (relying on law incorporating the Race Discrimination Directive) as well as breach of working time regulation. As it will be clear shortly, the reference to the substance of the claims is a very important point.

Both States claimed to be covered by immunity under section 1 of the State Immunity Act (hereafter SIA) and thus they relied on the fact that UK Courts had no jurisdiction. The claimants, on the contrary, argued that the grant of immunity under the SIA infringed their own right to access to a court, as enshrined in Article 6 ECHR as well as in Article 47 EUCFR. The Court of Appeal held that indeed Article 47 EUCFR (right to a Court and right to effective remedies) had horizontal effect and, therefore, the SIA (especially sections 4 (2) and 16 (1), which granted the embassies immunity from employment claims) had to be disapplied.

> Article 47 must fall into the category of Charter provisions that can be the subject of horizontal effect. It follows from the (CJEU's) approach in *Kucukdeveci* and *AMS* that EU Charter provision which reflect general principles of EU law will do so. (… *omissis*) The order of this court will disapply sections 4 (2) (b) and 16 (1) (a) to the extent necessary to enable employment claims falling within the scope of EU law by members of the staff service, whose work does not relate to the sovereign function of the mission staff.

It is worth noting that here the English judges referred to CJEU jurisprudence and developed it. Indeed, the CJEU judgments mentioned by the Court of Appeal had concluded that the Charter was capable to have horizontal direct effect, but they did not recognize it in the examined provisions (Articles 27 and 31 EUCFR).

In the second case, *Vidal-Hall v. Google Inc.,* three claimants alleged that Google Inc. had misused their private information and acted in breach of confidence and in breach of its statutory duties under Data Protection Act 1998, by tracking and collating, without their consent or knowledge, information relating to their internet usage on Apple Safari internet browser. In particular, they claimed damages for the

acute distress they reportedly suffered when they realised that sensitive data information might be revealed to those who saw targeted advertising on the claimants' screens. The Court of Appeal concluded that the Data Protection Act 1998 (especially section 13 (2), which expressly limited damages for pure distress to specific circumstances) had to be disapplied because of Articles 7 (right to private and family life) and 8 (right to protection of data) of the EUCFR, which not only have effect in UK, but also have horizontal direct effect.

Both these decisions seem to open up a new and more effective path for human right protection in the UK: while ECHR provisions, which have become national through the Human Rights Act, may produce only a declaration of incompatibility, the Charter empowers judges to enforce a proper remedy (a legislative disapplication), although only in a restrictive range of cases i.e. to the extent necessary to satisfy claims falling within the scope of EU law.

The abovementioned jurisprudence had a positive impact on the valorisation of the Charter by the lower courts, which have actually used the Charter to disapply legislation, and (surprisingly) by the Government, which has stated to accept both that claimants can rely on the EUCFR in UK courts when the claim is within the scope of EU law, and that violations of the EUCFR must be resolved by disapplication of divergent national provisions. Even the Supreme Court intervened on the EUCFR issue shortly afterwards.

In July 2017, the Supreme Court noted that the fees introduced by the *Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013*, which required payment of an issue fee when a claim form is presented and of a hearing fee prior to the hearing of the claim (which for a single claimant would cost roughly up to £1,200 each), contravened EU law's guarantee of an effective remedy before a court as enshrined in Article 47 EUCFR.[39] Since the fees were unaffordable in practice, the Fees Order was deemed a disproportionate limitation of Article 47 EUCFR in light of Article 52 (1) EUCFR. In this case the decision was made easier by the fact that the domestic provision conflicting with the EUCFR was an Order and not a piece of primary legislation; nevertheless, this can be considered the first step in the direction of a full recognition.[40]

[39] UKSC, 26.07.2017, Case 2015/0233, *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)*.

[40] It is interesting to notice that the FRA in its 2018 Report has named the UK as

However, only in October 2017 did the EUCFR reach the highest degree of recognition, when the Supreme Court, dealing with the appeal of *Benkharbouche* case, confirmed, very briefly, that the EU Charter could be used as a stand-alone cause of action in order to disapply primary legislation:

> The scope of article 47 of the Charter is not identical to that of article 6 of the Human Rights Convention, but the Secretary of State accepts that on the facts of this case if the Convention is violated, so is the Charter. (… omissis) The only difference that it makes is that a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied; whereas the remedy in case of inconsistency with article 6 of the Human Rights Convention is a declaration of incompatibility.[41]

This judgment is highly interesting not only because of the outcome but also because of its timing: in fact, the case was heard after the so-called Brexit and after the famous *Miller* case, which – in a certain way – "restored" the sovereignty of Parliament and confirmed the primacy of EU law over domestic legislation. Reading the *Benkharbouche* case in light of the *Miller* one, we can argue that accepting disapplication as a standard (to the extent this is required by UK legislation – namely European Communities Act 1972) does not challenge the key principle of parliamentary sovereignty. Indeed, when judges disapply a domestic provision, they merely endorse the real will of Parliament not to contradict directly effective EU law.

Of course, we can only wonder now if disapplication will have a future after the exit day (which will depend on the content of the Withdrawal Bill) and if it will be possible to have a form of disapplication beyond EU law. But this is perhaps not the right place to discuss this very complex issue.

5. *Concluding Remarks*

It is important not to underestimate the Charter's reformatory potential: for instance the UK, after a long period of time in which the

one of the few Member States where the Charter had played a substantial and a decisive role, and has referred to UNISON case.

[41] *Benkharbouche* Case, para. 78.

EUCFR was considered of merely declaratory value, has started to use it as a stand-alone cause of action in order to guarantee highly effective remedy through the disapplication of domestic primary legislation that violates the Charter. It is indeed worth noting that the Fundamental Rights Agency, in its last report, has named the UK as one of the few Member States where the Charter had played a substantial and decisive role in the considered period (2017).

At the same time, however, one must also remember that (re)arranging the balance of EU and domestic fundamental rights may strain relationships between institutional bodies within the State. On this specific point the situations of Italy and Britain are more similar than it appears at first glance. Indeed, the main problem arising from an examination of the jurisprudence of the Italian Constitutional Court and of the UK Supreme Court concerns the relationship with other judges in the Italian context, and with the Parliament in the British context. The relationship with the CJEU may be considered safe, or at least confined to the border of the "dialogue", where the CJEU is not the only party involved in the discussion on fundamental rights. Such dialogue, of course, can only be productive as long as the relationship between these courts is defined by loyal cooperation. As a good example of this we have considered the Austrian case, where, indeed, the choice to give the EUCFR an important role as a constitutional yardstick for ordinary law has been praised by the CJEU, due to the enduring cooperative approach that this constitutional court has developed through the years.

In conclusion, we can highlight the one point which all the "constitutional" courts seem to agree on, i.e. that the issue of fundamental rights needs clear and consistent protection. While the specific instruments may vary from country to country because of the different contexts, the Charter has to be considered an operational tool, emplaced alongside the national catalogues of rights, that can express its added value only within the scope of EU law.

The Prominence of the EU Charter of Fundamental Rights in the Light of the CJEU Case Law and the Application of the Dublin System

Andrea Crescenzi*

1. *Introduction*

Regulation 604/2013 (Dublin III Regulation)[1] establishes 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.[2]

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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), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=IT

[2] The Dublin Convention was signed on June 15, 1990 (Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities). In particular, it was signed by Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom. However, when we talk about the first phase of the a Common European Asylum System (CEAS) we refer to the three Directives (on Asylum Procedures, Reception Conditions, Qualification) and the two Regulations (Dublin II and Eurodac) adopted by the EU and transposed into national legislation by the Member States Between 1999 and 2005. Lastly, the second phase of the harmonisation process started at the end of 2011 when was adopted the revised Qualification Directive. As concerning the Dublin III Regulation, it was adopted by the Council on June 26, 2013. Cfr. M. Groen, *The Dublin Regulation: an Analysis of the Dublin Regulation and its Effects on the Degree of Solidarity Between EU Member States During the Refugee Crisis*, University of Leiden, 2015, pp. 1-77.

The Dublin III Regulation refers to the Charter of Fundamental Rights both in general and in specific terms. In fact, Regulation 604/2013 "respects the fundamental rights and observes the principles which are acknowledged, in particular, in the Charter of Fundamental Rights of the European Union". Moreover, it reaffirms the need to ensure full respect of the right to asylum enshrined in Article 18 of the Charter, as well as the rights afforded under Articles 1 (Human dignity), 4 (Prohibition of torture and inhuman or degrading treatment or punishment), 7 (Respect for private and family life), 24 (The rights of the child), and 47 (Right to an effective remedy and to a fair trial) of the Charter.[3]

The aim of this paper is to analyse some of the most critical aspects in the case law of the Court of Justice of the European Union (CJEU) concerning the application of the Dublin Regulation in the light of the Charter of Fundamental Rights. Special attention will be given to the measures adopted by the Council (temporary relocation mechanism) and the Commission (proposed change to the Dublin III Regulation) to manage the crisis that started in the Mediterranean in 2015, checking whether they comply with the case law of the Court and with the Charter.

2. *The Dublin System and the EU Charter*

Despite the protections provided in the Regulation, it cannot be ruled out that an asylum seeker may be treated in a manner incompatible with his or her fundamental rights when transferred to the Member State responsible under the Dublin criteria. This is what emerges from the decision of the Court of Justice of the European Union in *N.S. and Others* (pp. 79-81).[4]

In particular, the CJEU held that if the infringement of a fundamental right by the competent Member State were considered sufficient to prevent the transfer of an asylum seeker, this would relieve the Member State responsible from the obligations arising under the Dublin Regulation (Paras. 83-84).[5] The potential effects of this statement

[3] S. Peers, *Reconciling the Dublin System with European Fundamental Rights and the Charter*, 2014, Springer, p. 485-494.

[4] CJEU, Grand Chamber, *Secretary of State for the Home Department and N.S. and Others*, Joined Cases C-411/10 and C-493/10, 21 December 2011.

[5] According to the European Court of Justice "At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular,

were noticed by the Court itself, which immediately pointed out that at issue was the "raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights" (Paragraph 83). Those potential effects would "deprive those obligations of their substance and endanger the realisation of the objective of quickly designating the Member State responsible for examining an asylum claim lodged in the European Union" (Paragraph 85).

It should be remembered that the principle of mutual confidence has always been considered an essential element of cooperation between Member States.[6] Based on mutual confidence, in fact, each Member

the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights" and also "it would be not be compatible with the aims of Regulation No 343/2003 were the slightest infringement of Directives 2003/9, 2004/83 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible. Regulation No 343/2003 aims – on the assumption that the fundamental rights of the asylum seeker are observed in the Member State primarily responsible for examining the application – to establish, as is apparent inter alia from points 124 and 125 of the Opinion in Case C-411/10, a clear and effective method for dealing with an asylum application. In order to achieve that objective, Regulation No 343/2003 provides that responsibility for examining an asylum application lodged in a European Union country rests with a single Member State, which is determined on the basis of objective criteria".

[6] As mentioned in Article by Prechal "Although the notion of mutual trust is not mentioned in the Treaties, it has become an essential building block of the Union legal system and, in the meanwhile, has been assigned the status of a principle, arguably a structural principle of EU constitutional law" and "the principle of mutual trust is mainly related to the Area of Freedom, Security and Justice (hereinafter AFSJ), and it is in particular the fields of judicial cooperation in civil and criminal matters which have largely contributed to the development of this principle. This is basically due to the fact that in the AFSJ, the principle of mutual recognition of judgments and of certain decisions in extrajudicial cases is the cornerstone of judicial cooperation in civil and criminal matters. Mutual recognition, whereby a decision of one Member State is more or less automatically accepted in another Member State and obtains legal force, presumes, in turn, trust in the sense that the rules of the first Member State are adequate, that they offer equal or equivalent protection and that they are applied correctly. In this way mutual recognition is based on mutual confidence. This has been confirmed many times in the case law and, not surprisingly, mutual trust is emphasized in the preamble of various instruments concerning judicial cooperation in civil and criminal matters". Cfr. S. Prechal, *Mutual Trust Before the Court of Justice of the European Union*, in *European Papers*, Vol. 2, 2017, No 1, 75-92.

State accepts and implements the decision adopted by the authorities of the other Member States, including those granting international protection. In the judgement in question, the CJEU stated that the principle of mutual confidence is the foundation of the Common European Asylum System (CEAS), which was "was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard" (Paras. 76-80). However, differently from the past, the Court held that the premises whereby all asylum seekers are treated in a way that complies with fundamental rights must be regarded as rebuttable (Para. 104).[7] Hence, these considerations led the CJEU to argue that "Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Dublin III Regulation where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment if transferred" (Para. 106).

For these reasons, it should be verified that the transferring State is capable of assessing the respect for the fundamental rights of an asylum seeker in the receiving Member State. This issue, raised by Belgium, Italy,

[7] In this way, the Court aligned with the case-law of the European Court for Human Rights. In particular to the M.S.S. Case Law (European Court of Human Rights, *M.S.S. v. Belgium and Greece* [GC], Application No. 30696/09, 21 January 2011). For this reason the European Court declared that "In a situation similar to those at issue in the cases in the main proceedings, that is to say the transfer, in June 2009, of an asylum seeker to Greece, the Member State responsible within the meaning of Regulation No 343/2003, the European Court of Human Rights held, inter alia, that the Kingdom of Belgium had infringed Article 3 of the ECHR, first, by exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece, since the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities and, second, by knowingly exposing him to conditions of detention and living conditions that amounted to degrading treatment. The extent of the infringement of fundamental rights described in that judgment shows that there existed in Greece, at the time of the transfer of the applicant M.S.S., a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers" (Paras 88-99).

and Poland in *N.S. and Others,* was solved by the Court making reference to the reports that may be provided by NGOs. In this sense, the CJEU used the *M.S.S.* case before the European Court of Human Rights (ECtHR) as a reference to highlight that "information such as that cited by the European Court of Human Rights enables the Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate those risks" (paras. 90-91).[8] However, these statements did not give rise to an obligation for Member States to seek an opinion from the UNHCR before making a transfer under the Dublin Regulation. This discretionary power of the Member States to seek or not to seek an opinion from the UNHCR was clear in *Halaf.* In this decision, the CJEU held that "the Member State in which the asylum seeker is present is not obliged, during the process of determining the Member State responsible, to request the UNHCR to present its views where it is apparent from the documents of that Office that the Member State indicated as responsible by the criteria in Chapter III of the Regulation is in breach of the rules of European Union law on asylum".[9]

3. *The Protection of Fundamental Rights and the EU Principle of Mutual Confidence*

Certainly, the *N.S.* judgment is a major development for the Dublin system. By this decision, the CJEU subjected the transfer of asylum

[8] "In finding that the risks to which the applicant was exposed were proved, the European Court of Human Rights took into account the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental rights (*M.S.S. v Belgium and Greece*, Paras 347-350). Thus, and contrary to the submissions of the Belgian, Italian and Polish Governments, according to which the Member States lack the instruments necessary to assess compliance with fundamental rights by the Member State responsible and, therefore, the risks to which the asylum seeker would be exposed were he to be transferred to that Member State, information such as that cited by the European Court of Human Rights enables the Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate those risks".

[9] CJEU, *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet*, C-528/11, 30 May 2013, para. 47.

seekers from a Member State to a preliminary check of the systemic deficiencies in the asylum system of the receiving Member State.

Both the CJEU and the ECtHR tried to limit the negative impacts of the notion of "safe Member country", even though they started from a different assumption. The Court of Justice tied Member States' obligations not to transfer an asylum seeker to the systemic deficiencies in the reception systems of some Member States (Decision *N.S.*, obligation stated in Article 3(2) of Dublin III Regulation). Instead, the Court of Strasbourg considered that having doubts on the capacity of the system to protect the fundamental rights of an individual asylum seeker was enough to stop his or her transfer. This different approach to the notion of mutual confidence that the two Courts had for a long time seems to have been overcome by the most recent case law of the CJEU.

In the Case *C.K. and Others* of 16 February 2017, in fact, the Court reaffirmed that, under Article 4 of the Charter, an asylum seeker cannot be transferred if there is a real risk of being subjected to inhuman or degrading treatment.[10] However, the existence of substantial grounds for believing that there are systemic flaws in the Member State responsible within the meaning of the Dublin criteria does not seem to be an essential condition (para 73).[11] Making reference to the case law of the ECtHR (paras. 65-69),[12] the Court held that the transfer of an asylum

[10] C.K., a national of the Syrian Arab Republic, and H.F., a national of the Arab Republic of Egypt, entered the territory of the European Union by means of a visa validly issued by the Republic of Croatia. After a short stay in that Member State, they crossed the Slovenian border equipped with false Greek identification. C.K. and H.F. were subsequently admitted to the reception centre for asylum seekers in Ljubljana (Slovenia) and each submitted an asylum application to the Ministry of the Interior of the Republic of Slovenia. On 28 August 2015, the Slovenian authorities, taking the view that the Republic of Croatia was, pursuant to Article 12(2) of the Dublin III Regulation, the Member State responsible for examining the application for asylum of the appellants in the main proceedings, sent a request to the authorities of that Member State to take charge of them. By reply of 14 September 2015, the Republic of Croatia accepted its responsibility in regard to those persons. CJEU, *C.K. and Others v. Republika Slovenija*, C-578/16, 16 February 2017.

[11] S. Imamovic, E. Muir, *The Dublin III System: More Derogations to the Duty to Transfer Individual Asylum Seekers?*, in *European Papers*, 2017, pp. 719-728.

[12] The Court declared "It follows from the case-law of the European Court of Human Rights relating to Article 3 of the ECHR, which must be taken into account when interpreting Article 4 of the Charter, that the suffering which flows from naturally occurring illness, whether physical or mental, may be covered by Article 3 of the ECHR if it is, or risks being, exacerbated by treatment, whether flowing from

seeker with a particularly serious mental or physical condition would indeed be inhuman or degrading treatment, as that would entail a real risk of the applicant's health significantly and irremediably deteriorating. There again, the Court held that it is for the authorities of the transferring Member State to check the situation, suspend the execution of that person's transfer, and examine his or her application under the so-called 'discretionary clause', if the state of health of the asylum seeker concerned is not expected to improve pursuant to Article 17(1) of the Dublin Regulation (Para. 96).

This decision seems to introduce a crucial change in the case law of the European Court of Justice concerning the relationship between the principle of mutual confidence and the protection of individuals from inhumane and degrading treatment. For the first time, the Court seemed to clearly recognise their interdependence. However, the assumption that the risk of violating other fundamental rights (besides the prohibition of inhumane and degrading treatment) may justify an exception to the principle of mutual confidence does not appear convincing. According to the Court, in fact, "that interpretation fully respects the principle of mutual trust since, far from affecting the existence of a presumption that fundamental rights are respected in each Member State, it ensures that the exceptional situations referred to in the present judgment are duly taken into account by the Member States" (Para. 95).[13]

4. *The Reform of the Dublin System and the EU Charter of Fundamental Rights*

The case law of the Court regarding the application of the Dublin Regulation points to the importance that the Charter of Fundamental Rights has acquired at a European level. At the same time, the decisions of the ECJ had a significant impact on the definition of the Dublin Regulation. In fact, the current Dublin III Regulation incorporated the most significant decisions of the ECJ and of the ECHR, establishing

conditions of detention, expulsion or other measures, for which the authorities can be held responsible, provided that the resulting suffering attains the minimum level of severity required by that article". In particular, the Court referred to *Paposhvili v. Belgium Case Law* (ECtHR, no. 41738/10,13 December 2016, paras. 174-175).

[13] V. Petralia, *La presunzione di sicurezza degli Stati dell'Unione europea nel sistema di Dublino: recenti sviluppi*, in *Federalismi*, 2017, pp. 23-24.

that "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, … the determining Member State shall become the Member State responsible" (Article 3(2)).

In this sense, the proposal that the Commission put forward in 2016 to reform the Dublin system leaves Article 3(2) unchanged, providing for an assessment of systemic shortcomings in the asylum procedure and reception conditions before carrying out the transfer of an asylum seeker.[14] In contrast, the 2017 proposal of the European Parliament does not make any reference to the notion of systemic shortcomings, but refers to "a real risk of a serious violation of his or her fundamental rights".[15] It is clear that the European Parliament tried to expand the possibilities of suspending the application of the Dublin Regulation when faced with a real risk of violation of fundamental rights, following the latest decisions of the European Court of Human Rights in *Tarakel*[16] and of the Court of Justice of the European Union in *CK and Others.*

[14] Regulation of the European Parliament and of the Council, *Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (Recast)*, COM(2016) 270 Final, 4 May 2016.

[15] European Parliament, *Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (Recast)*, A8-0345/2017, 6 November 2017: "Where it is impossible to transfer an applicant to the Member State designated as responsible because there are substantial grounds for believing that the applicant would be subjected to a real risk of a serious violation of his or her fundamental rights, the determining Member State shall continue to examine the criteria set out in Chapters III and IV in order to establish whether another Member State can be designated as responsible" and "Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapters III and IV the Member State responsible for examining the application for international protection shall be determined in accordance with the corrective allocation mechanism set out in Chapter VII"(Amendments 50- 51).

[16] The applicants, Golajan Tarakhel, his wife and their six minor children are Afghan nationals who live in Lausanne (Switzerland). On 2 February 2012 the applicants appealed to the Federal Administrative Court against the decision of Federal Migration Office who requested the Italian authorities to take charge of the applicants

I would like to recall that the Court of Justice in its proceedings has not defined the notion of "systemic deficiencies" and that the case law following the *N.S.* Decision has given a restrictive interpretation. For instance, in the opinion in *Puid*, Advocate General Jaaskinen argued that the Court, by the *N.S.* decision, "has aimed at establishing a high barrier against the setting aside of the principle of mutual trust underlying Regulation No 343/2003".[17] Moreover, in the *Abdullahi* judgement, the Court strengthened the presumption of security of Member States, limiting the possibility for a person to contest his or her transfer only on account of systemic deficiencies entailing the risk of violating Article 4 of the Charter.[18]

The considerations made by the European Council of Refugees and Exiles (ECRE) concerning Article 3(2) are also interesting.[19] The ECRE pointed out that the scope of Article 3(2), limited to asylum seekers and not including beneficiaries of international protection, is in conflict with Member States' obligations. In this respect, the ECRE echoes the latest case law of national courts blocking transfers of bene-

(they arrived in Italy on 16 July 2011). In support of their appeal they submitted that the reception conditions for asylum seekers in Italy were in breach of Article 3 of the Convention and that the federal authorities had not given sufficient consideration to their complaint in that regard. In a letter of 10 May 2012, the applicants applied to the European Court of Human Rights; ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12, 4 November 2014. Cfr. E. Benz, *Commentary on the European Court of Human Rights' Judgment of 4 November 2014 in the case of Tarakhel v. Switzerland*, 2015, pp. 291-302, http://studzr.de/medien/beitraege/2015/2/pdf/StudZR-WissOn_2015-2.pdf.

[17] CJEU, *Bundesrepublik Deutschland v. Puid*, *Opinion of Advocate General Jääskinen*, Case C-4/11, 18 April 2013, para. 62.

[18] "In the present case, the decision at issue is the decision of the Member State in which Ms Abdullahi's asylum claim was lodged not to examine that claim and to transfer her to another Member State. That second Member State agreed to take charge of Ms Abdullahi on the basis of the criterion laid down in Article 10(1) of Regulation No 343/2003, namely, as the Member State of Ms Abdullahi's first entry into EU territory. In such a situation, in which the Member State agrees to take charge of the applicant for asylum, and given the factors mentioned in paragraphs 52 and 53 above, the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter"; CJEU, *Shamso Abdullahi v. Bundesasylamt*, Case C-394/12, 10 December 2013, para. 60.

[19] ECRE Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270, October 2016, p. 18, https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf

ficiaries of international protection when faced with a risk of violation within the meaning of Article 3 ECHR.[20]

The rationale of the ECRE is that non-refoulement may arise in relation to violations of Article 3 ECHR and Article 4 of the Charter, regardless of whether these are caused by systemic or non-systemic flaws in the asylum system. According to the ECRE, the assessment of compatibility of transfers with any of the fundamental rights protected by the Charter or by other human rights instruments must be conducted independently by the courts.

However, ECRE's proposal to expand the recipients of Article 3(2) to include beneficiaries of international protection was not acknowledged by either the Commission or by the European Parliament.[21] The proposals of both the Commission[22] and the European Parliament,[23] in fact, refer to asylum seekers only.

[20] German Constitutional Court, Decision 2 BvR 273/16, 21 April 2016; Osnabrück Administrative Court, Decision of 4 January 2016, Az.5 A 83/15; Saarland Administrative Court, Decision of 4 January 2016, Az. 3K 86/ 15; Oldenburg Administrative Court, Decision of 4 November 2015, 12 A 498/15; Osnabrück Administrative Court, Decision of 17 December 2015, 5 B 432/15;

[21] ECRE's Proposal on Article 3.2 states "Where it is impossible to transfer an applicant for or beneficiary of international protection to the Member State primarily designated as responsible because there are substantial grounds for believing that the applicant would be subjected to a real risk of a serious violation of [deleted provision] fundamental rights, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible, provided that this does not prolong the procedure for an unreasonable length of time. Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible", pp. 18-20.

[22] "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible".

[23] "Where it is impossible to transfer an applicant to the Member State designated as responsible because there are substantial grounds for believing that the applicant would be subjected to a real risk of a serious violation of his or her fundamental rights, the determining Member State shall continue to examine the criteria set out in Chapters III and IV in order to establish whether another Member State can be designated as responsible".

Finally, even though the Commission's proposal to amend the Dublin Regulation confirms the derogation from the Dublin criteria when there are substantial grounds for believing that there are systemic flaws, it restricts the possibility of resorting to the sovereignty clause to family grounds in relation to wider family only (new Article 19).[24]

The text of the new Article (19, no longer 17) of the Commission's proposal on Discretionary Clauses established that "By way of derogation from Article 3(1) and only as long as no Member State has been determined as responsible, each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person based on family grounds in relation to wider family not covered by Article 2(g), even if such examination is not its responsibility under the criteria laid down in this Regulation".

5. *The mass influx of persons in need of international protection and the failure of Dublin System: Final Remarks*

The most recent events have clearly shown that at present the Dublin Regulation is anachronistic and is not a suitable solution for the periods of intense migration pressure. The current asylum system results in an overload of applications in the countries at EU external borders, with a negative impact on reception standards and on the protections provided for in the relevant European legislation. Under the most recent case law of the Court of Justice, the risk of being subject to inhumane and degrading treatment may also derive from the exceptionally large number of third-country nationals wishing to obtain international protection in the Member State responsible. In the light of this remark, a transfer might, therefore, not be effected if, following the arrival of an exceptionally large number of third-country nationals wishing to obtain international protection, that transfer entails a real risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that Article 4 of the Charter.[25]

[24] G. Caggiano, *Are You Syrious? Il diritto europeo delle migrazioni dopo la fine dell'emergenza alla frontiera orientale dell'Unione*, in *Freedom, Security & Justice: European Legal Studies*, 2017, p. 11.

[25] "It must be noted that, pursuant to Article 3(2) of the Dublin III Regulation and Article 4 of the Charter of Fundamental Rights of the European Union, an applicant for international protection must not be transferred to the Member State responsible if

The above makes it possible to make some final remarks on the measures adopted to tackle the unprecedented arrivals of migrants within EU internal borders.

5.1. *The Relocation Mechanism*

The most significant measures adopted for managing the migration emergency include the relocation mechanism set up by the Council by two Decisions in September 2015.[26] That mechanism was a temporary *and mandatory derogation from the responsibility criteria under the Dublin system*.[27] The legal basis of these measures is found in Article 78(3) TFEU, establishing that "in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned". Undoubtedly, the choice to set up the relocation mechanism was partly influenced by the decisions in *M.S.S.* and *N.S.*, by the ECHR and the ECJ respectively, concerning reception conditions of asylum seekers in first-entry countries.

The Council, referring to the particular crisis situation in the Medi-

that transfer entails a real risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that Article 4 (see, to that effect, judgment of 16 February 2017, C.K and Others, C-578/16 PPU, EU:C:2017:127, paragraph 65). A transfer might, therefore, not be effected if, following the arrival of an exceptionally large number of third-country nationals wishing to obtain international protection, such a risk existed in the Member State responsible"; ECJ, Case C-490/16, *A.S. v. Republika Slovenija*, 26 July 2017, para. 41.

[26] Council Decision (EU) 2015/1523 of 14 September 2015 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 of Greece*; Council of the European Union, *Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece*, COM(2015) 286 final, 27 May 2015; Cfr. Guild E., Costello C., Garlick M., Moreno Lax V., *Enhacing the Common European Aylum System and Alternatives to Dublin*, in *CEPS Paper in Liberty and Security in Europe*, n. 83, 2015, pp. 40 ss., www.ceps.eu.

[27] The relocation system was a first implementation of the principle of solidarity and fair sharing of responsibility between Member States. The mechanism established that a set quota of refugees were to be transferred from the Member State of entry to a second Member State. The latter would become responsible for examining the asylum application, making an exception to the Dublin III Regulation; Cfr. Maiani F., *Hotspots and Relocation Schemes: the Right Therapy for the Common European Asylum System?,* in *EU Immigration and Asylum Law and Policy*, 2018, http://eumigrationlawblog.eu

terranean as well as to the principle of solidarity and sharing of responsibilities between Member States (Article 80 TFUE),[28] "establishes provisional measures in the area of international protection for the benefit of Italy and of Greece, in view of supporting them in better coping with an emergency situation characterised by a sudden inflow of nationals of third countries in those Member States".[29] The relocation mechanism established that a set quota of refugees (160,000) were to be transferred from the Member State of entry to a second Member State. The latter would become responsible for examining the asylum application, by way of derogation from the Dublin III Regulation. However, final data shows that the Commission's expectations were not met[30] and that the principle of solidarity, at the basis of the two Council decisions, was undermined by a lack of cooperation from a considerable number of Member States.[31]

[28] Strengthened solidarity and responsibility between Member states was one of the action lines proposed by the European Agenda on Migration (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An European Agenda on Migration*, COM(2015) 240 Final, 13 May 2015; https://ec.europa.eu/home-affairs/what-is-new/news/news/2015/20150513_01_en). The new approach to the management of the migration crisis has a strong reference to the principle of solidarity and sharing of responsibility between Member States, as set out in Article 80 of the Treaty on the Functioning of the European Union (TFEU). On the basis of which "The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle" (Art. 80). Cfr. Vanheule D., Van Selm J., Boswell Chr., *The Implementation of Article 80 TFUE on the Principle of Solidarity and Fair Sharing of Responsibility, including its Financial Implications, between the Member States in the field of Border Checks, Asylum and Immigration*, European Parliament Study, Civil Liberties, Justice and Home Affairs, 2011, pp. 39 ss.; Betts A., *Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory*, in *Journal of Refugee Studies*, No. 16, 2003, pp. 274-296.

[29] Council Decision (EU) 2015/1601 of 22 September, Art. 1.

[30] Available data shows that only 34.691 relocations were implemented by June 2018, as against a planned figure of 160,000 (12.692 from Italy and 21,999 from Greece); EU Commission, Member States' Support to Emergency Relocation Mechanism, June 2018, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf.

[31] In particular, the Visegrad countries repeatedly proposed "flexible solidarity", applied on a voluntary basis, to replace the mandatory character of the decisions taken by the Council; Cfr. Joint Statement of the Heads of Governments of the V4

5.2. *The Dublin IV Proposal*

A few months after adopting the relocation measures, the Commission submitted a draft reform to the Dublin Regulation (April 2016).[32] In particular, the Commission took stock of the need to move from the current system that, by design or poor implementation, placed a disproportionate responsibility on certain Member States.

That document contained two possible options. The first proposal was based on the system set out in the Council decisions of September 2015, supplemented with a corrective fairness mechanism to be triggered as soon as a predefined threshold in the number of asylum applications (150%) was reached in a given Member State.[33] The second proposal was intended to overcome the criterion of State of first entry and to introduce a mechanism for distributing asylum seekers among all Member States, based on some criteria, such as the Member States' size, wealth, and absorption capacities.[34]

Despite the good intentions, the final proposal adopted by the Commission, currently under discussion, does not change present criteria.[35] It imposes two preliminary obligations on the States of first entry. First, they have to check that applicants do not come from countries of first asylum or safe countries of origin. Second, they have to examine the applications made by all applicants from 'safe countries' and by those who present a threat for the security of the State or for public order, or by those who were previously returned on those grounds.[36]

I would like to recall that another proposal was put forward by the Committee on Civil Liberties, Justice and Home Affairs (LIBE), and approved by a majority vote by the European Parliament on Novem-

Countries, Bratislava, 16 September 2016, https://euractiv.com/wp-content/uploads/sites/2/2016/09/Bratislava-V4-Joint-Statement-final.docx.pdf.

[32] European Commission, *Communication from the Commission to the European Parliament and the Council Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM(2016) 197 Final, 6 April 2016; Cfr. F. Maiani, *The Reform of the Dublin III Regulation*, *Study by the Directorate General for Internal Policies*, Policy Department C for the Committtee for Civil Liberties, Justice and Home Affairs, 2016, pp. 28 ss.

[33] *Ibidem*, p. 7.

[34] *Ibidem*, p. 8.

[35] P.G. Van Wolleghem, *If Dublin IV Were in Place During the Refugees Crisis…A Simulation of the Effect of Mandatory Relocation*, 2018, pp. 1-19.

[36] *Ibidem*, p. 10.

ber 2017.[37] The proposal of the LIBE Committee, unlike the Commission's, gives full implementation to the principle of solidarity and fair sharing of responsibility between Member States (Article 80 TFEU). This proposal is intended to overcome the criterion of State of first entry and to distribute asylum seekers among all Member States, based on a permanent quota system. In particular, under the proposed mechanism, the State of first entry is given responsibility for registering migrants, making a preliminary assessment of eligibility criteria and providing immediate transfer. It is, then, for the reception Member State to examine the asylum application.[38]

However, the failure of the relocation mechanism and the difficulties encountered in finding a compromise between the interests of Member States make the reform proposal not very likely to succeed. A similar remark is found in the opinion of Advocate General Bolt in *Slovak Republic and Hungary v Council of the European Union*, concerning relocation measures.[39]

According to the Advocate General, in fact, opposition to the relocation mechanism and a partial application by the Member States "may give the impression that, behind what is by common consent called the '2015 migration crisis', another crisis is concealed, namely the crisis of the European integration project, which is to a large extent based on a requirement for solidarity between the Member States which have decided to take part in that project".[40]

It is therefore clear that the principle of solidarity and fair sharing of responsibility was overshadowed by the national interests of the States. It should be remembered, however, that even though the prin-

[37] Committee on Civil Liberties, Justice and Home Affairs, *Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (Recast)*, COM(2016)0270 – C8-0173/2016 – 2016/0133(COD), 6 November 2017; http://www.europarl.europa.eu.

[38] *Ibidem*, Amendment 128, Article 19, para. 2.

[39] After the adoption of the relocation mechanism, Slovakia and Hungary, supported by Poland, decided to refer to the European Court of Justice, seeking annulment of Council Decision (EU) 2015/1601, on both procedural and substantive grounds. The case, based on sixteen pleas, was rejected by the Court. CJEU, Joined Cases C-643/15 and C-647/15, *Slovak Republic, Hungary v. Council of the European Union*, *Opinion of Advocate General Bot*, 26 July 2017.

[40] Ibidem, Paras. 24–25.

ciple of solidarity does not appear in Article 2 TEU among the fundamental values of the Union, it is a fundamental pillar of the European integration process.[41] The same point was also made, in the above case, by Advocate General Bolt: "Solidarity is both a pillar and at the same time a guiding principle of the European Union's policies on border checks, asylum and immigration".[42] It should not be forgotten, in fact, that the principle of solidarity is referred to in the EU Charter of Fundamental Rights among the indivisible and universal values on which the Union is founded, together with human dignity and equality (Preamble). Moreover, since the 1970s, the case law of the European Court of Justice has repeatedly suggested that solidarity is a general principle of the European legal system, accepted by the Member States as a result of their accession.

[41] According to Advocate General "Although surprisingly absent from the list in the first sentence of Article 2 TEU of the values on which the Union is founded, solidarity is, on the other hand, mentioned in the Preamble to the Charter of Fundamental Rights of the European Union as forming part of the 'indivisible, universal values' on which the Union is founded"; Ibidem, Para 19.

[42] Ibidem, Para. 20.

Asylum and Article 47 of the Charter: Scope and Intensity of Judicial Review

Marcelle Reneman*

1. *Introduction*

Should judges assess the credibility of the asylum seekers' asylum account and their need of international protection in appeals against asylum decisions? Should they replace the assessment of the determining authority with their own judgment? Do they need to have the power to grant international protection? Or must they limit themselves to a review of the asylum decision and refer it back to the determining authority, if it is not taken carefully or is insufficiently reasoned? How intensive should this review be? What does an *ex nunc* examination exactly include and is a judge required to hear the asylum seeker?

These are all questions European courts are struggling with. Article 46(3) of the Recast Asylum Procedures Directive (RAPD) contains rules regarding judicial review of asylum decisions.[1] However, it does not give answers to the questions mentioned above. As a result, judges from Bulgaria, Hungary, the Netherlands and Slovakia have referred preliminary references to the Court of Justice of the European Union (CJEU). Some of these preliminary references ask how Article 46(3)

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[1] 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) [2013] OJ L 180/60.

RAPD should be interpreted in the light of the right to an effective remedy laid down in Article 47 of the Charter of Fundamental Rights of the European Union (the Charter). In several recent judgments the CJEU has given some first answers.[2]

This contribution will focus on the current developments regarding the scope and intensity of judicial review. It will show that the national context in which questions concerning this issue are raised differ and that the answers to these questions may have a major impact on the legal systems of the Member States. It will address the meaning of the term 'full and ex nunc examination' mentioned in Article 46(3) RAPD and the question whether this provision requires judges to offer a public hearing to asylum seekers. However, first some general remarks will be made on Article 47 of the Charter and how it should be interpreted in the context of asylum procedures.

2. *Interpreting Article 47 of the Charter in Asylum Cases*

Article 47 of the Charter provides for the right to an effective remedy and fair trial before an independent and impartial tribunal. This provision is based on both Article 6 and Article 13 of the European Convention of Human Rights (ECHR).[3] According to the European Court of Human Rights (ECtHR) the right to a fair trial laid down in Article 6 ECHR does not apply to asylum cases.[4] Article 47 of the Charter thus provides broader protection than the ECHR, where it concerns asylum procedures.

The RAPD is unique, because it provides for detailed procedural rules and guarantees concerning in particular the administrative and appeal phase of the asylum procedure. However, as was mentioned above, the meaning of the RAPD's provisions is not always clear. Then Article 47 of the Charter can be used by the CJEU and national courts to interpret these provisions. In order to be able to do that, the meaning of Article 47 of the Charter should be constructed.

[2] CJEU 25.07.2018, Case C-585/16, *Alheto*; CJEU 27.07.2017, Case C-348/16, *Moussa Sacko*.

[3] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ C 303/17.

[4] ECtHR *Maaouia v France*, Appl. No. 39652/98, Judgment of 5 October 2000.

2.1. *Common Procedural Principles*

First of all, this can be done on the basis of common procedural principles which have been derived from the right to an effective remedy by the CJEU in earlier cases, often concerning other fields of EU law than asylum. The CJEU has for example ruled on the rights of the defence, which are part of the right to an effective remedy, in cases concerning amongst others free movement of EU citizens, EU sanction cases and competition cases.[5]

It is evident that procedural principles which have been developed under Article 47 of the Charter in a completely different field of EU law cannot directly be applied to asylum cases. In order to understand how the CJEU interprets Article 47 of the Charter in a particular field of EU law or even an individual case it is helpful to look at three basic concepts: the overall fairness of the procedure, the balancing of conflicting interests and the nature of the rights at stake and the characteristics of the persons concerned.[6]

The CJEU has developed common procedural principles both under Article 47 of the Charter and the principle of effectiveness. The exact relationship between the right to an effective remedy and the principle of effectiveness remains unclear.[7] The CJEU may address the same procedural issues under both and applies the three basic concepts in a similar way. I will therefore also refer to case law regarding the principle of effectiveness when explaining the three basic concepts.[8]

The three basic concepts have been developed in the case law and also follow logically from the limitation clause of Article 52(1) of the Charter, which states:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of

[5] A.M. Reneman, *EU Asylum Procedures and the Rights to an Effective Remedy*, Hart Publishing, 2014, p. 298-341.

[6] A.M. Reneman, *EU Asylum Procedures and the Rights to an Effective Remedy*, ibid, p. 101-110 and 378-382.

[7] J. Krommendijk, *Is there light on the horizon? The distinction between "Rewe effectiveness" and the principle of effective judicial protection in Article 47 of the Charter after Orizzonte*, in CMLRev 2016, p. 1395-1418; A.M. Reneman, *EU Asylum Procedures and the Rights to an Effective Remedy*, Hart Publishing, 2014, pp. 76-79.

[8] A.M. Reneman, *EU Asylum Procedures and the Rights to an Effective Remedy*, Hart Publishing, 2014, p. 77-79.

> those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

First, the CJEU looks at the overall fairness of the procedure at issue. Some procedural flaws directly lead to a violation of Article 47 of the Charter. An example is the lack of an appeal with suspensive effect in appeals against asylum or expulsion decision, which may directly lead to the expulsion of a person in violation with the principle of non-refoulement.[9] Such a procedural flaw may be considered to violate the essence of Article 47 of the Charter. However, in many cases a limitation of the right to an effective remedy in one stage of the (asylum) procedure may be compensated by procedural guarantees in another stage of the procedure. In *H.I.D* the CJEU considered that the fact that decisions of the Irish Refugee Appeals Tribunal could be appealed before the High Court and the Supreme Court could "be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members".[10]

Secondly the CJEU often balances conflicting interests at stake when applying Article 47 of the Charter. In the case of *ZZ* for example, which concerned the use of secret information, the CJEU had to strike a balance between the rights of the defence of the person concerned and the interest of the State to protect national security.[11] Similarly in *Danqua* the CJEU assessed in the context of the principle of effectiveness whether a time-limit of 15 working days to lodge an application for subsidiary protection was justified by the State's interest in the proper conduct of the proceedings and effective return proceedings. It concluded that the time-limit was "capable of compromising the ability of applicants for subsidiary protection actually to avail themselves of the rights conferred on them by [the Qualification] Directive".[12]

[9] CJEU 18.12.2014, Case C-562/13, *Abdida*, para 53; CJEU 17.12.2016, Case C-239/14, *Tall*, para 58.

[10] CJEU 31.01.2011, Case C-175/11, *H.I.D and B.A.*, para 103.

[11] CJEU 04.06.2013, Case C-300/11, *ZZ*, paras 53-54.

[12] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12. CJEU 20.10.2016, Case C-429/15, *Danqua,* para 48.

Thirdly, when balancing these interests, the CJEU takes into account the nature of the rights at stake and the characteristics of the persons concerned. In different cases the CJEU has stressed the importance of the principle of *non-refoulement*. In *Danqua* for example the CJEU considered that "the procedure for examining applications for subsidiary protection is of particular importance inasmuch as it enables applicants for international protection to safeguard their most basic rights by the grant of such protection".[13] In *Salahadin Abdullah* the CJEU stated that the extent of the risk of persecution "must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union".[14] The principle of *non-refoulement* thus requires a high level of procedural protection.

Also, the characteristics of the group 'asylum seekers' may require important procedural protection. In *Danqua* the CJEU found the 15-day time-limit for lodging an application for subsidiary protection too short amongst others because of "the difficulties such applicants may face because of, inter alia, the difficult human and material situation in which they may find themselves".[15]

2.2. *The Case Law of the European Court of Human Rights*

When interpreting Article 47 of the Charter the case law of the ECtHR under Article 6 and 13 ECHR is an important source of inspiration. According to Article 52(3) of the Charter the guarantees offered by Article 47 of the Charter may not be lower than the guarantees offered by Article 6 and 13 ECHR. Article 47 of the Charter may provide more extensive protection than the ECHR.

The CJEU has referred to the ECtHR's case law in several cases where it applied Article 47 of the Charter. In *Abdida* for example it based its decision that a right to a remedy with automatic suspensive effect amongst others on the ECtHR's judgment in *Grebemedhin v France*.[16] In *DEB*

[13] Ibid., para 45.

[14] CJEU 02.03.2010, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdullah*, para 90.

[15] CJEU 20.10.2016, Case C-429/15, *Danqua,* para 46. See also CJEU 29.10.2009, Case C-63/08, *Pontin*, paras 62 and 65.

[16] ECtHR, *Gebremedhin v France*, Appl. No. 25389/05, Judgment of 26 April 2007. CJEU 18.12.2014, Case C-562/13, *Abdida*, para 52.

the CJEU referred to the ECtHR's case law under Article 6 ECHR in order to answer the question whether the right to an effective remedy included a right to legal aid for a legal person.[17]

When Article 47 of the Charter is applied to an asylum case, the CJEU and national court should take into account the ECtHR's case law concerning procedural guarantees developed under Article 3 and 13 ECHR. The ECtHR requires a high level of procedural protection in expulsion cases under Article 3 and 13 ECHR. In this context it has referred to "the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materializes".[18] However, as was mentioned before, also the ECtHR's case law under Article 6 ECHR is relevant when interpreting Article 47 of the Charter in an asylum case.[19]

3. *Scope and Intensity of Judicial Review in Asylum Cases*

This next section will address the scope and intensity of judicial review. The CJEU has recently given its first rulings on the required scope and intensity of judicial review in asylum cases.[20]

The scope and intensity of judicial review performed by national courts depends very much on the national legal system, the nature of the field of law at issue and, for example, the ideas about the role of courts in relation to the role of the administration. It is very difficult to get a clear understanding of the scope and intensity of judicial review without thorough knowledge of a national legal system. This may be the reason why the ECtHR and, until recently, also the CJEU have not developed clear standards on the required scope and intensity of judicial review in asylum cases. It is difficult to apply the standards developed in other fields of law to asylum cases, because of the very different nature of these cases. It is for example much more difficult to

[17] CJEU 22.12.2010, Case C-279/09, DEB, para 37, 45-52.

[18] ECtHR, *M.S.S. v Belgium and Greece*, Appl. No. 30696/09, Judgment of 21 January 2011, para 293.

[19] See references to Art. 6 ECHR case law in CJEU 26.06.2017, Case C-348/16, *Moussa Sacko*, para 40

[20] CJEU 25.07.2018, Case C-585/16, *Alheto,* CJEU 27.07.2017, Case C-348/16, *Moussa Sacko.*

establish the facts in asylum cases than in other administrative cases, due to a lack of evidence.

In the original Asylum Procedures Directive (APD),[21] Article 39 provided for the right to an effective remedy before a court or tribunal. This provision did not address the scope or intensity of the review, which should be carried out by this court or tribunal. In *Samba Diouf* the CJEU considered that Article 39 and the principle of effective judicial protection require that the reasons which led the competent authority to reject the asylum application as unfounded should be the subject of "a thorough review by the national court".[22] However, it did not explain what a thorough judicial review entails.

The ECtHR has held that Article 13 ECHR requires "a close scrutiny by a national authority and independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 ECHR".[23] In very few cases the ECtHR found a violation of Article 3 and 13 ECHR because of a lack of a rigorous scrutiny by a national court.[24]

The ECtHR itself also carries out a rigorous scrutiny of the risk of a violation of Article 3 ECHR upon the expulsion of the applicant. This requires a "full and *ex nunc* evaluation.. where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken".[25] According to the ECtHR such evaluation is necessary as the situation in a country of destination may change over the course of time. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive.[26]

[21] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13.

[22] CJEU 18.07.2011 Case C-69/10, *Samba Diouf*, para 53

[23] ECtHR, *M.S.S. v Belgium and Greece*, Appl. No. 30696/09, Judgment of 21 January 2011, para 293.

[24] In *M.S.S. v Belgium and Greece* the ECtHR held that the judicial review carried out by the Belgian court in the extremely urgent procedure did not comply with Art. 13 ECHR. ECtHR, *M.S.S. v Belgium and Greece*, Appl. No. 30696/09, Judgment of 21 January 2011, paras 389-390.

[25] ECtHR, *X v the Netherlands*, Appl. No. 14319/17, Judgment of 10 July 2018, para 73. See also eg ECtHR, *Salah Sheek v the Netherlands*, Appl. No. 1948/04, Judgment of 11 January 2007, para 136.

[26] ECtHR, *Tershiyev v Azerbaijan*, Appl. No. 10226/13, Judgment of 31 July 2014, para 50.

It is thus clear that the *ex nunc* evaluation requires national courts to take into account new information concerning the situation in the asylum seeker's country of origin. However, the ECtHR has not made explicit for example, whether the *ex nunc* evaluation should also include new grounds for asylum or how intensive a "full evaluation" should be. The requirement of a "full and ex nunc evaluation" is reflected in Article 46(3) RAPD.[27]

3.1. *Requirement of a Full and Ex Nunc Examination*

Article 46(1) RAPD, like Article 39(1) APD provides for a right to an effective remedy before a court or tribunal against a negative decision on the asylum application. Article 46(3) RAPD specifies that in order to comply with Article 46(1), Member States shall ensure that an effective remedy provides for a full and ex nunc examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance.

Judges in different States have been struggling with the interpretation of Article 46(3) RAPD. They had questions concerning their role and powers under this provision. In the next sections three aspects of Article 46(3) RAPD will be addressed: 1. the requirement of a "full examination of both facts and points of law", 2. the requirement of an *ex nunc* examination and 3. the right to be heard by the court or tribunal.

3.2. *Full Examination of Both Facts and Points of Law*

The term 'full. examination of both facts and points of law' relates to the scope and intensity of judicial review and should be interpreted by the Member States in a uniform manner.[28] This section will pay attention to the interpretation of this term by the Dutch Administrative Jurisdiction Division of the Council of State (henceforth AJD, the highest court in asylum cases in the Netherlands). The AJD refused to refer questions for preliminary ruling to the CJEU about the interpretation of the term 'full examination'. Furthermore, it will discuss

[27] Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), COM(2011) 319 final, p. 4.

[28] CJEU 25.07.2018, Case C-585/16, *Alheto*, para 107.

the preliminary questions posed by Bulgarian, Hungarian and Slovak courts about the interpretation of Article 46(3) RAPD. It will be shown that the Bulgarian, Hungarian and Slovak courts addressed the issue of the scope and intensity of judicial review from a completely different perspective than the Dutch AJD. Finally, the first ruling on this issue by the CJEU in the *Alheto* case will be addressed.

3.2.1. *The Netherlands*

In the Netherlands the discussion concerning the scope and intensity of judicial review by administrative courts revolve around the separation of powers (the administration is the primary decision-maker and the court checks its decisions)[29] and the expertise of the administration and judges. In the Dutch administrative system, courts review the decision of the administration (in asylum cases the Immigration Service, henceforth IND). They assess on the basis of the grounds of appeal whether a decision "satisfies all legal requirements and procedural safeguards, in particular with regard to the requirements of due care and accuracy, its merits, and the contents and sufficiency of reasoning in that decision".[30] The courts do not have the power to change the administrative decision or to grant asylum. If the decision does not fulfil the mentioned requirements, the courts usually quash the decision and refer it back to the administration. This prevents that the judge takes the role of the administration.

Before the implementation of Article 46(3) RAPD, the intensity of judicial review carried out by the Dutch first instance courts and the AJD varied according to the part of the decision, which was reviewed. Whereas the courts could fully review the IND's decision about the risk upon return, they had to limit the review of the credibility assessment to a reasonability test. This limited type of judicial review was criticised in the Netherlands.[31]

After the implementation of Article 46(3) RAPD, the question whether the Dutch courts should be able to assess credibility themselves and whether the reasonability test of the credibility assessment could

[29] See eg the annotation of Vermeulen with AJD 27 January 2003, ECLI:NL:RVS:2003:AF5566 in *Administratiefrechtelijke Beslissingen,* nr. 2003/286.

[30] AJD 13 April 2016, ECLI:NL:RVS:2016:890 and ECLI:NL:RVS:2016:891, para 7.

[31] See eg T.P. Spijkerboer, B.P.V. Vermeulen, *Vluchtelingenrecht*, Ars Aequi Libri, Nijmegen 2005, p. 296; H. Battjes, *Annotation with AJD 11 December 2003*, in *Rechtspraak Vreemdelingenrecht* 2003, nr. 17.

be maintained, came before the Dutch courts. In two judgments of 13 April 2013 the AJD ruled that the Dutch courts still could not replace the IND's decision with their own. It also held that the intensity of the judicial review of the IND's credibility assessment had to increase, but that the judge should still leave some discretion to the IND.[32]

The AJD considered that the system of the RAPD nor the case law of the CJEU or ECtHR require national courts to replace the administrative decision with their own. Moreover, in the view of the AJD the text nor the system of the RAPD provide clear standards as to the intensity of judicial review. It read Article 46(3) RAPD in the light of Article 47 of the Charter and Articles 6 and 13 ECHR. It concluded that both the CJEU and the ECtHR have accepted under these provisions that the administration sometimes enjoys some discretion as a result of the nature and subject-matter of a decision and that this influences the intensity of the judicial review.[33]

The AJD considered that such discretion should be granted to the IND, where it assesses the credibility of the asylum seeker's statements, which are not supported by evidence (usually most statements in an asylum claim). According to the AJD, the courts are not better placed to make a credibility assessment than the IND. It noted that both the IND and the courts cannot establish whether the asylum seeker's statements are true. However, unlike the court, the IND is able to compare all asylum decisions (those granted and those rejected) and to use its previous experiences to make the credibility assessment.[34] The other parts of the asylum decision can be subjected to a full judicial review. The AJD refused to refer a question to the CJEU, amongst others because most of the first instance courts agreed with the AJD's interpretation.[35]

3.2.2. *Hungary, Slovakia and Bulgaria*

Courts from Hungary and Slovakia asked the CJEU whether they should have the power under Article 46(3) to grant asylum or to amend

[32] AJD 13 April 2016, ECLI:NL:RVS:2016:890 and ECLI:NL:RVS:2016:891. Unofficial translations of the judgment are available at www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=87365 and www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=87361 accessed 24 July 2018.

[33] AJD 13 April 2016, ECLI:NL:RVS:2016:890, paras 5.3.1, 5.3.2 and 8.2

[34] AJD 13 April 2016, ECLI:NL:RVS:2016:890, para 8.1.

[35] Ibid, paras 10-11.

the asylum decision.[36] The Slovak court also asked whether the higher appeal court should have the power to grant international protection. The Hungarian and Slovak courts do not have this power under national law. In Hungary the courts are no longer able to change the asylum decision of the competent authority as a result of an amendment of national law, which entered into force on 15 September 2015.[37] They can only quash the decision and order the competent authority to take a new decision. They do not have the power to order the administrative authority to grant international protection or to punish it, if it does not comply with the judgment. In Slovakia the national court is required to refer the case back to the administrative authority, also if new elements or findings come up during the appeal, which have not been taken into account by this authority.[38]

The questions referred to the CJEU by the Hungarian and Slovakian courts concern cases, in which the national courts have quashed the asylum decision several times in appeal. However, each time the immigration authorities rejected the asylum application again, resulting in another appeal. In the Hungarian case the administrative authority had ignored the court's judgment for the third time. The applicant had been in an insecure situation during a period of four years.[39] In the Slovakian case the asylum applicant had already waited seven years for the final result of his asylum application at the moment the preliminary questions were referred to the CJEU.[40]

The courts wanted to know whether they should be able to amend the asylum decision[41] and/or grant international protection[42] themselves, in order to guarantee the right to an effective remedy provided in Article 46 RAPD

[36] CJEU, Case 556/17, *Torubarov* (Hungary); Case 113/17 as summarised in Dutch by the Expertise Centre on European Law of the Dutch Ministry of Foreign Affairs, www.minbuza.nl/ecer/hof-van-justitie/nieuwe-hofzaken-inclusief-verwijzingsuitspraak/2018/c-zaaknummers/c-556-17.html, *QJ* (Slovakia), as summarised in Dutch by the Expertise Centre on European Law of the Dutch Ministry of Foreign Affairs, www.minbuza.nl/ecer/hof-van-justitie/nieuwe-hofzaken-inclusief-verwijzingsuitspraak/2017/c-zaaknummers/c-113-17-qj.html accessed 24 July 2018.

[37] This amendment aimed to ensure unity of law.

[38] See § 250q (3) of the Slovak Law nr. 99/1963.

[39] CJEU, Case 556/17, *Torubarov* (Hungary).

[40] CJEU, Case 113/17, *QJ,* as summarised in Dutch by the Expertise Centre on European Law of the Dutch Ministry of Foreign Affairs, www.minbuza.nl/ecer/hof-van-justitie/nieuwe-hofzaken-inclusief-verwijzingsuitspraak/2017/c-zaaknummers/c-113-17-qj.html accessed 24 July 2018.

[41] CJEU, Case 556/17, *Torubarov* (Hungary).

[42] CJEU, Case 556/17, *Torubarov* (Hungary); Case 113/17, *QJ*.

and Article 47 of the Charter.[43] The Hungarian court is of the opinion that the law, which has taken away its power to amend the asylum decision, does not comply with the right to effective judicial protection.[44] According to the Slovak court a national provision, which only allows the national court to quash the decision and refer it back to the authorities is not sufficient to achieve the goal of Article 46(3) RAPD to ensure an effective remedy.[45]

3.2.3. *The Case of Alheto*

In the case of *Alheto* the CJEU gave some first answers concerning the scope and intensity of judicial review. In this case the administrative authority did not assess the admissibility of the asylum claim of a Palestinian asylum seeker, who travelled via Jordan (a possible first country of asylum) to Bulgaria. It also failed to address the question whether return to the Gaza strip would violate the principle of *non-refoulement*.[46] The Bulgarian court asked the CJEU whether the national court should be able to examine the admissibility of the asylum application and the risk of *refoulement* itself during the appeal phase.

The CJEU held that the national court should be able to examine a ground for inadmissibility itself (if national law has implemented the grounds for inadmissibility) and to hear the asylum on this ground for inadmissibility.[47] It is not clear whether the court is required to do this of its own motion, but it clear that it is allowed to do so. In *Alheto* the Bulgarian authorities did not plead before the national court that the admissibility should be examined before the court.[48]

[43] The Hungarian court explicitly mentions Art. 47 of the Charter in its preliminary question. Case C-556/17, *Torubarov* (Hungary).

[44] Preliminary reference in Case C-556/17, *Torubarov*, available in Dutch translation at www.minbuza.nl/binaries/content/assets/ecer/ecer/import/hof_van_justitie/nieuwe_hofzaken_inclusief_verwijzingsuitspraak/2018/c-zakennummers/c-556-17-verwijzingsbeschikking_redacted.pdf.

[45] CJEU, Case 113/17, *QJ*.

[46] Preliminary reference in Case C-585/16, *Alheto*, available in Dutch translation at www.minbuza.nl/binaries/content/assets/ecer/ecer/import/hof_van_justitie/nieuwe_hofzaken_inclusief_verwijzingsuitspraak/2017/c-zakennummers/c-585-16-verwijzingsbeschikking_redacted.pdf.

[47] CJEU 25.07.2018, Case C-585/16, *Alheto*, para 120.

[48] Preliminary reference in Case C-585/16, *Alheto*, para 11, available in Dutch translation at www.minbuza.nl/binaries/content/assets/ecer/ecer/import/hof_van_justitie/nieuwe_hofzaken_inclusief_verwijzingsuitspraak/2017/c-zakennummers/c-585-16-verwijzingsbeschikking_redacted.pdf

The national court should "rigorously examine" whether the conditions for declaring an asylum application inadmissible have been satisfied "by inviting, where appropriate, the determining authority to produce any documentation or factual evidence which may be relevant".[49] The CJEU thus grants the national courts extensive powers to independently examine the asylum case, without being bound by the decision of the administrative authority or the grounds of appeal.

According to the CJEU, Article 46(3) RAPD does not "govern what happens after any annulment of the decision under appeal" and therefore does not grant national courts the power to grant or reject international protection.[50] It is up to Member States to decide whether the court should refer the decision back to the administrative authority or not. However, Article 46(3) RAPD and Article 47 of the Charter do require that the administrative authority takes a new decision "within a short period of time" and that this decision "complies with the assessment contained in the judgment annulling the initial decision".[51]

3.3. *Ex Nunc Examination*

The CJEU has first addressed the meaning of the term '*ex nunc* examination' in the case of *Alheto*. It considered that the expression '*ex nunc*' points to the court or tribunal's obligation to make an assessment that takes into account, should the need arise, new evidence which has come to light after the adoption of the decision under appeal. Such an assessment makes it possible to deal with the application for international protection exhaustively without there being any need to refer the case back to the determining authority.[52]

The CJEU also held that national courts should take into account arguments for rejection (inadmissibility) of the asylum claim, which were not examined by the administrative authority.[53] In such situation the courts should hear the asylum seeker themselves (see further section 3.4).

Both the Dutch AJD and the Bulgarian administrative court of Sofia have asked the CJEU whether the national court should take into

[49] CJEU 25.07.2018, Case 585/16, *Alheto*, para 121.
[50] Ibid, para 145.
[51] Ibid, para 148.
[52] CJEU 25.07.2018, Case 585/16, *Alheto*, paras 111-112.
[53] Ibid, para 118.

grounds for protection which were first brought forward during the appeal phase by the asylum seeker.[54] The AJD wanted to know whether the national court may refer such new grounds for protection to a subsequent asylum procedure. It has also asked whether it makes a difference whether a ground is (intentionally) withheld in administrative phase or has been submitted in the appeal phase for justified reasons and whether it concerns the appeal in a first or subsequent asylum procedure. Moreover, it has asked whether the court may exclude a new asylum ground from the *ex nunc* examination in the interest of the proper conduct of proceedings or the prevention of undue delay.[55]

The two Dutch cases concern Palestinian asylum seekers, of whom one had submitted a new ground for protection, which came up after the administrative decision. The other asylum seeker failed to give a good reason for mentioning a ground for protection first during the administrative phase.

Dutch law has provided for an *ex nunc* judicial review in asylum cases since 2001. However, the AJD has held that (most) grounds for protection (for example a conversion or sexual orientation) which have first been brought forward during the appeal phase, do not fall within the scope of the *ex nunc* examination. Only asylum grounds, which are based on facts or circumstances, which existed at the moment of the decision of the IND and were submitted during the appeal phase for justified reasons, can be examined by the appeal court.[56] According to the AJD, a subsequent asylum procedure is better suited to examine new grounds for asylum. This relates to the AJD's opinion regarding the distinctive roles of the administration and the courts as set out in section 3.2.1. Moreover, the AJD noted that if new grounds for asylum have to be examined during the appeal phase this could lead to long delays. Also, it could encourage asylum seekers to withhold asylum grounds during the administrative phase. Excluding those grounds from the ex nunc examination would thus prevent abuse.[57]

The Bulgarian case concerns a woman, who asked for international protection on the basis of the activities of the husband. Later in the legal proceedings she stated that she also feared prosecution on personal grounds. In his opinion with this case, Advocate General Mengozzi in-

[54] AJD 4 October 2017, ECLI:NL:RVS:2017:2669, Case 652/16, *Ahmedbekova*.
[55] AJD 4 October 2017, ECLI:NL:RVS:2017:2669.
[56] AJD 21 June 2013, ECLI:NL:RVS:2013:35, para 3.
[57] CJEU, Case 586/17, *D. and I*, AJD 4 October 2017, ECLI:NL:RVS:2017:2669.

dicated that the question concerning the *ex nunc* judicial review should be considered inadmissible. He stated nevertheless that, if the woman submitted in her application that she herself had a well-founded fear of persecution (and did not only ask for a dependent residence permit on the basis of national law), the national court should take into account new facts, circumstances and documents, which the woman has submitted in support of her personal fear for persecution. If she did not state that she had a personal fear for persecution at the time of the application, her statements concerning her personal fear should be considered a new asylum application, which the court is not required to examine under Article 46(3) RAPD.[58]

It may be derived from these considerations that if a person adds new grounds for a (personal) fear of persecution to those mentioned in the original application during the appeal phase, these must be taken into account by the court. This would also be in line with the *Alheto* case, which requires judges to examine the admissibility of an asylum application on their own motion. The AJD has explicitly asked the CJEU to take into account the general interests at stake. The case the CJEU thus may have to assess whether the exclusion of new asylum grounds from the *ex nunc* judicial review constitutes a limitation of the right to an effective remedy laid down in Article 46(1) RAPD and Article 47 of the Charter, which is justified in accordance with Article 52(1) of the Charter. It then has to balance the interests of the State to avoid delays and prevent abuse against the interests of the individual to have access to an effective remedy.

3.4. *The Right to a Hearing*

A question, which is closely related to the scope and intensity of judicial review is whether the national court should offer the asylum applicant a hearing during the appeal phase. In its judgment in *Moussa Sacko* the CJEU answered the question whether Articles 12, 14, 31 and 46 RAPD precludes a national court hearing an appeal against a decision rejecting a manifestly unfounded application for international protection from dismissing the appeal without hearing the applicant, in particular where the applicant has already been interviewed by the administrative authorities and where the factual circumstances leave

[58] Opinion of AG Mengozzi in Case 652/16, *Ahmedbekova*, paras 75-78.

no doubt as to whether the decision rejecting the application was well founded.[59]

According to Italian legislation and case law of the Italian courts it was possible to omit a hearing, where the asylum application was considered inadmissible.[60]

The CJEU first considered that "failure to give an applicant the opportunity to be heard in an appeals procedure.. constitutes a restriction of the rights of the defence, which form part of the principle of effective judicial protection enshrined in Article 47 of the Charter". In its assessment whether such limitation is justified, the CJEU referred to the ECtHR's case law under Article 6 ECHR, which allows for exceptions to the obligation to hold a public hearing.[61] The CJEU also reiterated that it should take into account the specific circumstances of the case, including the nature of the act at issue, the context in which it was adopted and the legal rules governing the matter in question. Moreover, it needs to look at the context of the procedure for the examination of applications for international protection as a whole, taking into account the close link between appeal proceedings before a court or tribunal and the proceedings at first instance preceding those proceedings, during which the applicant must be given the opportunity of a personal interview on his or her application for international protection, as required by Article 14 of the directive.[62]

The CJEU concluded that the national court may only omit a hearing if it considers that it is in a position to carry out a full and *ex nunc* examination solely on the basis of the information in the case file, including the report or transcript of the asylum seeker's personal interview. According to the CJEU, in such circumstances the possibility of not holding a hearing is in the interest of both the Member States and asylum seekers to have a decision made as soon as possible on the asylum application.[63] If the court thinks that a hearing is necessary to comply with Article 46(3) RAPD, it cannot be dispensed with on the grounds of speed and it may not be prevented by national legislation.[64]

In principle an appeal against a decision to declare an asylum application manifestly unfounded may be decided on the basis of the case-

[59] CJEU 27.07.2017, Case C-348/16, *Moussa Sacko*, para 23.
[60] Ibid., paras 12-17.
[61] Ibid., paras 40, 47.
[62] Ibid.., para 42.
[63] Ibid., para 44.
[64] Ibid., paras 45, 48.

file. However, the court should assess this on a case-by case basis.[65] This also applies to cases which are considered inadmissible.[66]

In its judgment in *Alheto*, the CJEU further explained that where "new evidence comes to light after the adoption of the decision under appeal, the court or tribunal is required, as follows from Article 47 of the Charter, to offer the applicant the opportunity to express his views when that evidence could affect him negatively".[67] The court also needs to conduct a hearing, if it is of the opinion that the admissibility of the asylum application should have been examined and the asylum applicant has not been interviewed about this by the determining authority. The applicant must receive the services of an interpreter during this hearing whenever necessary in order to present his or her arguments.[68]

4. *Conclusion*

The CJEU has developed common procedural principles in its case law concerning Article 47 of the Charter in various fields of EU law. In order to apply these procedural principles to the asylum context and an individual case the CJEU looks at the overall fairness of the procedure, identify the different interests at stake and to take into account the nature of the right at issue (the absolute prohibition of *refoulement*) and the (often difficult) position of asylum seekers. Furthermore, Article 47 of the Charter may not offer less procedural guarantees than Article 6 and 13 of the ECHR. For that reason, the ECtHR's case law should be taken into account when interpreting Article 47 of the Charter.

The scope and intensity of judicial review carried out by national courts is a sensitive topic, which depends very much on national legal systems and contexts. The national courts have very recently received some guidance concerning the required scope and intensity of judicial review in asylum cases from the CJEU. However, it is difficult to create common procedural EU principles on this topic, which apply to all fields of law, because here particularly the nature and subject-matter of the decisions influence the scope and intensity of judicial review.

[65] Ibid., para 46.
[66] CJEU 25.07.2018, Case C-585/16, *Alheto*, para 126.
[67] Ibid., para 114. See also para 124.
[68] Ibid, paras 127-128.

National courts are struggling with the interpretation of several aspects of the requirement of 'a full and ex nunc examination of both fact and points of law'. The Dutch AJD has refrained from making a preliminary reference concerning the scope and intensity of judicial review. It ruled that Article 46(3) RAPD and 47 of the Charter allow a system, in which the administrative courts can only review whether the IND's decision satisfies all legal requirements and procedural safeguards. In the Netherlands courts are not allowed to replace the administrative decision with their own. They can only quash the decision and refer it back to the IND. Moreover, they should leave discretion to the IND where it concerns its assessment of the credibility of unsupported statements. The AJD thus refused to extend its own powers and that of the first instance courts on the basis of Article 46(3) RAPD, taking into account the distinctive roles of the administration and the court and the expertise of the IND.

The AJD did ask the CJEU whether the national court is allowed to refer new grounds for asylum, which have first been brought forward during the appeal phase, to a subsequent asylum procedure. Also here, the AJD argues that the distinctive roles of the administration (primary decision-maker) and the court (who checks these decisions), should be maintained. Moreover, it points at the risk of delays and abuse by asylum seekers. Likewise, the Italian courts wanted to have the opportunity to omit a public hearing in manifestly unfounded asylum cases in the interest of the speed of the asylum procedure.

In contrast the Bulgarian, Hungarian and Slovak courts argued before the CJEU that their powers should be extended on the basis of Article 46(3) RAPD and Article 47 of the Charter. These courts found that the fact that they do not have the power to amend the administrative decision or to grant international protection violates the right to an effective remedy. The reason for that was that the administrative authorities failed to comply with their judgments (Hungary and Slovakia) or to adequately examine the asylum claim (Bulgaria). In particularly in the first situation, this failure led to long delays in the asylum procedure and insecurity for the asylum seeker.

It its first judgments the CJEU it makes clear that national courts should have extensive powers to examine the asylum claim apparently without being bound by the administrative decision or the grounds of appeal. They should be able to replace the decision of the administrative authority with their own decision on the admissibility of the asylum claim. It is not entirely clear yet whether the national courts

should also make an independent assessment of the credibility of the applicant's statements. Chances are very real that the Dutch the appeal system in asylum cases needs to be changed on the basis of the CJEU's judgments.

At the same time, the CJEU does not go as far as to impose on Member States that they grant national courts the power to grant or refuse international protection. The CJEU has held that after the annulment of the administrative decision by the court, a new decision has to be taken by the administrative authority within a short period of time and in compliance with that judgment. It is questionable however, whether this judgment will improve the situation in Hungary and Slovakia, where the administrative authorities may not obey judgments of the court and cannot be punished for that.

In its judgments on the pending preliminary questions concerning the scope and intensity of judicial review, the CJEU should take into the different legal systems at issue. Does the State's and the asylum seeker's interest in a speedy asylum procedure for example have to lead to a limitation or extension of the powers of the courts, or does this depend on the situation? In any case, also the outcome of the cases still pending before the CJEU could have important impact on the administrative systems of all Member States.

Overview and Summary of the Obligations of the EU Institutions and State Authorities with regard to the Charter in the Field of Asylum. Proposals for Possible Improvements in EU Legislation and Policies

Chiara Favilli*

1. *The EU Competence in the Field of Asylum*

The EU asylum policy is one of the constituent parts of the "Area of freedom, security and justice", i.e. the area made up by all the territories of the member States where the freedom of movement must be enjoyed in conditions of security and justice accessible to all.[1]

It has been established as a shared competence that can be exercised through the adoption of any legislative acts, including measures to harmonise national laws, in compliance with the principles of proportionality and subsidiarity.

The current legal framework is the result of the progressive overcoming of the traditional reluctance of States to accept sovereign restrictions on the treatment of foreigners. However, it was first necessary to go through the phase of the three pillars of the post-Maastricht Union, through the intermediate phase post-Amsterdam and also making use of international law agreements, like the 1985 Schengen Con-

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[1] Since 1 December 2009, rules on migration and asylum have been placed in the Treaty on the Functioning of the European Union, and in particular in Title V, entitled "Area of Freedom, Security and Justice" (Articles 67 to 89 of the TFEU), Chapter 2 of which covers "Policies on border checks, asylum and immigration" (Articles 77-80), which follows chapter 1 on *General provisions* (Articles 67-76).

vention and the 1990 Dublin Convention, both now incorporated into EU law, but only thanks to an articulated differentiated application. Indeed, we have EU member States that are not bound by EU rules, except for a decision to this effect (United Kingdom and Ireland); a member State that is only bound by international law (Denmark); associated third States through the conclusion of specific international agreements (Switzerland, Liechtenstein, Norway and Iceland).[2] In short, a 'Variable-geometry' Europe both for the involved States and for the legal nature of the existing obligations.

As is apparent from the first documents published by the European Commission following the conferral of competence to the Union in this field, expectations about the positive role that the Union could have played were very high. The same emerges from the conclusions of the European Council agreed at Tampere in 1999,[3] where it is stated that the freedom typical of the European area acts as a draw for all those people who elsewhere may not enjoy similar freedom, and that "the aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union". In following European Council meetings and especially after the terrorist attacks of 11 September 2001 and 11 March 2004, the working agenda agreed in Tampere was radically changed, giving priority to the fight against terrorism and international crime, and influencing the contents of all the other measures, especially those relating to asylum and migration. This approach has not changed, and, indeed, the so-called "migrant crisis" has strengthened it, also because of a certain prevalence of officials

[2] See the protocols attached to the Treaties, in particular *Protocol no. 21 on the position of the United Kingdom and Ireland with respect to the area of freedom, security and justice* and *Protocol no. 22 on the position of Denmark*.

[3] General political guidelines adopted by *consensus* by the European Council establish the trajectory along which the other political institutions must necessarily move. Thus were adopted the programmes of Tampere (1999-2004); Hague (2004-2009); Stockholm (2009-2014) and the development strategies for the area of freedom, security and justice (2014-2019) approved on 27 June 2014; finally, on 13 May 2015, the European Agenda on Migration was adopted, which defined the strategy for the immigration and asylum policies of the Juncker Commission, endorsed by the European Council: COM(2015)240.

of the national Home Offices in the European institutions and bodies dealing with migration and asylum policies.[4]

2. *The Applicable Standard of Protection of Fundamental Rights*

Following the guidelines adopted by the European Council, the EU institutions have created a European asylum system – developed through two successive phases – gradually harmonising national legislations regarding all the relevant aspects of the protection system: reception, procedures, qualifications and determination of the responsible State.[5]

The existence of a competence of the Union makes the EUCFR applicable, which binds the Union and the member States when they act within the scope of EU law (Article 51, as interpreted by the Court in the *Fransson* ruling).[6] Therefore, the CJEU has already given various interpretations of the European asylum system in light of the EUCFR and the European Convention on Human Rights.[7]

[4] Campesi, *Polizia della frontiera. Frontex e la produzione dello spazio europeo*, Rome, 2015; Savino (ed.), *La crisi migratoria tra Italia e Unione europea*, Napoli, 2017.

[5] Directive 2001/55/EC, *Minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, OJ 2001 L 187, 45 ss.; Directive 2013/32/EU of 26 June 2013 *laying down common procedures for granting and withdrawing international protection*, OJ 2013 L 180, 60-95; Directive 2013/33/EU of 26 June 2013 *laying down standards for the reception of applicants for international protection*, OJ 2013 L 180, 96-116; Directive 2011/95/EU of 13 December 2011 *on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, OJ 2011 L 337, 9 ss.; regulation 604/2013 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*, OJ 2013 L 180, 31-59. Cherubini, *Asylum Law in the European Union*, London, 2015.

[6] CJEU 26 February 2013, Case 617/10, *Åkerberg Fransson*. See Lazzerini, *La Carta dei diritti fondamentali dell'Unione europea. I limiti di applicazione*, Milano, 2018.

[7] See the judgements applying the EUCFR available on the website of the Fundamental Rights Agency, catalogued article by article: http://fra.europa.eu/en/charterpedia/article/18-right-asylum. See also the ECRE report, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, 2014, www.ecre.org; ACTIONES, *Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter*, www.eui.eu.

In addition to the rights specifically related to international protection, such as Article 18 (right to asylum), Article 19 (protection against collective expulsions) and Article 4 (protection against expulsion), others are equally relevant. That is especially the case for Article 7 (respect for private and family life), Article 1 (right to dignity), Article 24 (protection of minors), Article 41 (right to good administration) and Article 47 (right to an effective remedy and to a fair trial). These rights are generally protected also within the European Convention on Human Rights and, at national level, by the national Constitutions. Hence, the applicable standard is a key issue that should be addressed by applying the so called horizontal clauses of the EUCFR.

The meaning and scope of the rights enunciated in the EUCFR that correspond to the rights of the ECHR are the same as those conferred by that Convention, unless the law of the Union grants more extensive protection (Article 52.3); moreover, where the EUCFR recognises fundamental rights as they result from the constitutional traditions common to the member States, these rights are interpreted in harmony with these traditions (Article 52.4). Finally, based on Article 53, the EUCFR cannot lead to a reduction in the level of protection guaranteed to a right in the respective scope of application. Therefore, in the case of multiple sources relevant to the same right, the criterion of the most favourable standard is applied. However, with regard to the relationship between the EUCFR and national constitutional rights, in the well-known case *Melloni* and more recently in the *MAS* ruling (better known as *Taricco bis*) the CJEU made it clear that the highest constitutional standard can be applied in the absence of a harmonised law and without prejudice to the primacy and effectiveness of Union law.[8] A similar orientation was expressed by the CJEU in the Opinion 2/13 on Accession of the EU to the ECHR.[9]

The right to asylum reveals a paradox in the application of the *Melloni* principle, namely that what ultimately determines the identification of the applicable standard is the presence or absence of an EU legislative act aiming to harmonise national laws. In order to avoid a conflict between norms and the race to the bottom of protections, "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and tra-

[8] CJEU 26 February 2013, Case 399/11, *Melloni*, points 62-63; 5 December 2017, Case 42/17, *M.A.S. and M.B.*, points 45-46. TORRES PÉREZ, *Melloni in Three Acts: From Dialogue to Monologue*, in *European Constitutional Law Review*, 10, 2014, 308-331.

[9] CJEU 18 December 2014, Opinion 2/13.

ditions of the Member States" (Article 67 TFEU). Indeed, in the impact assessments prepared by the European Commission before the submission of a proposal for a legislative act, the impact on human rights is properly considered. However, in the following phases and especially during the negotiations between Parliament and Council, the need to find an agreement between the two institutions may prevail over the duty to respect the national standards on fundamental rights.

It could even happen – and this is precisely the case with asylum – that a representative of a Government in the Council is in favour of adopting an act aiming to harmonise national laws that clashes with a cumbersome fundamental principle of its Constitution, like the constitutional right of asylum. The Union could thus become the place to impose the decrease of the standard deriving from national constitutions in the name of the European harmonisation.

It is clear that the only way to combine the principle of primacy of EU law and the protection of fundamental rights is to guarantee the application of the most favourable standard. In the crisis of values and identity of the Union, the revival of the principle of harmonisation pursuing the improvement of national standards, now little more than a memory of the golden age of the Union, could be a way to relaunch the same process of integration in which it is difficult to recognise the merit of ensuring the advancement of the collective well-being of the European peoples, including their fundamental rights.

3. *The Right to an Effective Remedy*

The right to an effective remedy is the main instrument to guarantee the effective enjoyment of all the rights granted to persons, whether citizens or foreigners. In fact, even foreigners have the right to access to justice, so that the actions of public bodies affecting them are subject to an external and impartial control. The right to an effective remedy plays an essential role because its exercise can make a difference in the status of the person in relation to the host State: from regular to irregular, from present in the territory to deported or, in any case, from "visible to invisible". In other words, for foreigners the right to an effective remedy and to a fair trial may be the only right they can exercise, instrumental to the exercise the other rights connected to their status.

In European Union law, the right to an effective remedy is an integral part of the human rights protection system, originally recognised

by the CJEU as a general principle of constitutional traditions common to the legal systems of the member States.[10] The emphasis on the effectiveness of the remedy leads the ECtHR on the one hand, and the CJEU on the other, to assess whether the protection is effectively guaranteed, without stopping at the formal existence of the right but making sure that in its practical application it ensures the effective protection against the infringement of rights. This is in full harmony with the principle of effectiveness of rights that is emblematic of the very essence of European Union law: a system in which substance is often prevalent over form; in which the tension towards the effective achievement of the objectives and towards the effective protection of rights pervades most of the activities of the institutions and becomes a prevailing rule in the interpretation of EU norms.[11]

The right to an effective remedy was then codified and expanded on by Article 47 of the EUCFR of Fundamental Rights of the European Union, entitled "Right to an effective remedy and to a fair trial", corresponding to articles 13 ("Right to an effective remedy") and 6 ("Right to a fair trial") of the ECHR but which offers a more extensive discipline of both.[12]

Article 47.1 recognises the right to effective remedy before a "judge" and not "only" in front of a national court as provided by Article 13 ECHR. As for the right to due process, Article 47.2, has a general application and not limited to disputes relating to civil rights and obligations in contrast with Article 6 ECHR. Article 47.2 was deliberately extensively formulated so that the guarantees of due process find a general application in all cases of remedy aimed at ascertaining a right deriving from the European Union's legal system. As the "explanations" of the EUCFR make clear, this extension "is one of the consequences of the fact that the Union is a community of law… However, with the exception of the scope, the guarantees offered by the ECHR apply similarly in the Union".

[10] CJEU 25 July 2002, Case 50/00, *Unión de Pequeños Agricultores*, point 39.

[11] The principle of effectiveness has multiple applications in Union law. Consider, among others, the principle of substantive qualification of the act against formal qualification (CJEU 29 January 1985, Case 147/83, *Binderer*, point 12), or the "Effet Utile" principle (CJEU 9 October 2004, Case 200/02, *Chen*, point 45; 28 April 2011, *El Dridi*, Case 61/11, point 55).

[12] Safjan, *A Union of Effective Judicial Protection. Addressing a multi-level challenge through the lens of Article 47 CFREU*, in http://www.kcl.ac.uk/law/research/centres/european/Speech-KINGS-COLLEGE.pdf.

It is therefore necessary to apply the principles developed by the ECtHR in relation to articles 6 and 13 also to asylum.[13] As is known, one of the constituent elements of due process is the right to have the case publicly examined, i.e. through a public hearing that, as a rule, also includes the right to be heard.[14] The public nature of the hearing and listening to the interested party are however not absolute and may be limited where the limitation of the right is proportionate and justified by the particular nature of the subject matter of the judgement, but not by economic needs or efficiency of the judicial system that can never limit the exercise of fundamental rights.

A trial without a hearing at least in one level of judgement would be contrary not only to Article 6 ECHR but also to Article 14 of the ICCPR, according to which "In the determination… of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice…". Article 10 of the UDHR is very clear on this point: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

According to international standards, as well as to the case law of the ECtHR, it appears that the admissible exemptions are almost always *in bonam partem* or, in any case, exemptions justified by reasons of public order. In particular, according to the ECtHR, a hearing is

[13] ECtHR, *Jabari v. Turkey*, Appl. No. 40035/98, 11 July 2000; 5 February 2002, *Čonka v. Belgium*, Appl. No. 51564/99; 26 April 2007, *Gebremedhin v. France*, Appl. No. 25389/05; 28 July 1999, *Selmouni v. France*, Appl. No. 25803/94. The necessity for individual assessment and the different impact of the same conduct on different parties was underlined by the ECtHR, particularly in the ruling of 7 July 1989, *Soering v. United Kingdom*, Appl. No.14038/88 and then confirmed with a consistent orientation. See the accurate study carried out by Reneman, *EU asylum procedures and the right to an effective remedy*, Leiden, 2013.

[14] ECtHR 23 October 1995, *Schmautzer v. Austria*, Appl. No.15523/89; 23 November 2006, *Jussila v. Finland*, Appl. No. 73053/01; 9 October 1979, *Airey v. Ireland*, Appl. No. 6289/73; Zagrebelsky, Chenal, Tomasi, *Manuale dei diritti fondamentali in Europa*, Bologna, 2016, 203-204.

indispensable when the Court decides on important issues, when there are facts to be ascertained of considerable complexity or when the credibility or personal experience of the applicant plays a crucial role in the decision. Furthermore, the ECtHR considered the omission of the hearing in the field of social security to be legitimate, where the judgement is based mainly on legal medical reports and a hearing was not requested.[15]

The CJEU has ruled on the right to be heard in judicial remedies on international protection in the *Sacko* case, decided on 26 July 2017 with a preliminary ruling referred by an Italian Court.[16] The CJEU has clarified the interpretation of Article 46 of the Procedures Directive in order to provide the national Court with the necessary information to assess whether the provision of Italian law that allows rejecting a remedy without listening to the applicant in the event of a manifestly unfounded petition is compatible with this provision, as well as with Article 47 of the EUCFR. No exemption or limitation is in fact allowed in the directive procedures concerning the judicial protection that must always be effective, regardless of the qualification of the petition as unfounded or inadmissible.

However, according to the CJEU, such a limitation may be allowed when the court decides a case manifestly unfounded and when it can rely on written submissions and the minutes of the administrative procedure. The Court justifies this restrictive interpretation of a fundamental right (as expressly also referred to in recital 50 of the same directive) in light of the relevant case law of the Court, without however exploring thoroughly the relevant case law, to the point that the principle of interpretation appears apodictic, also because the judgements of the ECtHR referred to do not seem entirely consistent. In particular, the Court has not given any interpretative indication on how to apply the conditions that may legitimise the exclusion of the hearing in light of the ECtHR case law. Although the *Sacko* case concerns only appeals against applications that are manifestly unfounded, and although the CJEU has stated that a court must always be able to order the hearing of the applicant where it considers it necessary, the restriction of a fundamental right must be grounded and justified in light of general applicable criteria.

[15] ECtHR, *Dory v. Sweden*, Appl. No. 28394/95, judgement of 12 November 2002.

[16] CJEU 28 July 2011, Case 69/10, *Samba Diouf*; 31 January 2013, Case 175/11, *HID*; 17 December 2015, Case 239/14, *Tall*.

On the contrary, the Court considers as relevant certain topics that do not emerge in the case law of the ECtHR, like the close connection between the appeal procedure and the "first instance procedure" that precedes it. The Court merely repeats the unfortunate wording in the procedures directive whereby the administrative procedure, rather than simply being qualified as such, is defined as a "first instance procedure", even if there is no "second administrative instance procedure". However, what is not admissible, as it is ontologically incorrect, is to qualify a judicial proceeding as a second instance of the administrative procedure. In fact, judicial protection does not afford only a control over the administrative activities but it is also another chance to recognise the fundamental right to international protection by a judge. On the other hand, the argument used by the Court of the close connection between the appeal procedure and the procedure of first instance that precedes it is ineffective, since such a connection always exists in any appeal against an administrative act: could there not be a close link between the appeal and the procedure leading to the adoption of the challenged act?[17]

The *Sacko* ruling does not allow finding a justification for limiting the rights of due process that is consistent with the consolidated orientation of the ECtHR. In fact, the latter considers relevant the importance of the protected right, the difficulty in ascertaining the facts, the relevance of the individual declarations and the credibility of the asylum seeker, all criteria being assessed. Precisely in light of ECtHR case law, it must be held that in judicial remedies for asylum there must be not only a hearing but at least one oral hearing in one of the stages of the judicial proceedings, and certainly when there is doubt about the credibility of the applicant. In fact, the *Jussila* ruling, referred to also by the CJEU in *Sacko*, the ECtHR affirmed the "… the obligation to hold a hearing is not absolute… There may be proceedings in which an oral hearing may not be required: for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials".[18] The ECtHR has also always stated that the right to the hearing is satisfied if there is at least one hearing in the

[17] Recently, the CJEU has affirmed the right to an effective remedy in relation to the refusal to issue a visa by an embassy of a member State; CJEU 13 December 2017, Case 403/16, *El Hassani*.

[18] ECtHR, *Jussila v. Finland*, Appl. No.73053/01, Judgement of 23 November 2006, para. 41.

context of a judicial remedy, namely that there must not necessarily be a hearing at all stages of the appeal, but that there must be at least one. On the contrary, the ECtHR has never stated that the right to a hearing, including an oral hearing, can be satisfied if there has been a hearing in the administrative procedure that is being challenged, as instead it seems to derive from the ambiguous language of the *Sacko* judgement.

In the absence of consistent and legally established criteria, the justification for limiting fair trial rights can only be found in choices of legal policy, primarily aimed at reducing the number of pending cases, as clearly indicated in the same question referred by the Tribunal of Milan and from which the *Sacko* judgement originated. If it is true that decisions on asylum, as well as all decisions and all judgements, must be taken as soon as possible, it is equally undeniable that, as the Court itself recognises, States and judges cannot limit the guarantees referred to in Article 47 of the EUCFR and reduce the effectiveness of judicial protection of foreigners for reasons related to the number of appeals and to the speed of administrative and jurisdictional procedures.[19] *Speed* and *efficiency* are values that take on meaning only if they are not contrasted with the *quality* of the administrative decision, the judicial appeals and the rulings. In fact, efficiency without quality reduces the number of pending appeals but also the level of guaranteed rights.

4. *The Elephant in the Room: the "Dublin regulation"*

4.1. *The Reasons for a Failure*

The Dublin regulation is an emblematic case of the application of the right to an effective remedy. The "Dublin system" was born as an international agreement, closely connected to the Schengen agreement, both becoming the two pillars around which the European asylum and migration policies have been developed.[20] Despite the fact that the Dublin

[19] Ibidem, points 44-45.

[20] Chapter VII of Title II of the Schengen Agreement precisely defined the criteria for determining the State responsible for examining asylum applications, which were later merged into the Convention on determining the member State responsible for examining an asylum application submitted in one of the member States of the European Communities, signed in Dublin on 15 June 1990 and entered into force in 1990, OJ 1997 C 254.

Convention was replaced in 2003 by a Union regulation, last amended in 2013, the criteria for determining the responsible State remained substantially unchanged with the residual, but primarily applicable, criterion of the State of first entry into the EU.[21] This rule causes an imbalance in the responsibility of EU member States and overburdens those countries that are subjected to the twofold responsibility of controlling borders in the interest of all member States and also receiving a large number of asylum seekers. The CJEU has thus far maintained a restrictive interpretation of the notion of the first irregular entry referred to in Article 13 of the regulation, including all the hypotheses of entry without prior authorisation.[22] On the other hand, it can be argued that at least those who enter the territory of a member State following a search and rescue operation at sea should be exempt from the application of Article 13, not being technically an irregular entry in a strict sense.

Between asylum seekers who try to escape the application of the criteria, States that do not cooperate and judgments of the ECtHR, Dublin is now a classic case of a patient with multiple illnesses, with governments determined to apply techniques of therapeutic obstinacy instead of accompanying it towards a peaceful end of life.

One of the factors that led to the collapse of Dublin were several cases brought before the ECtHR. Starting with the *M.S.S.* ruling, the Court condemned those member States that, in implementation of the Dublin Regulation, had transferred asylum seekers to Greece and Italy. The ECtHR did not implement the so-called presumption of safety of EU member States, which is an expression of the principle of mutual trust in national asylum systems and reiterated the traditional stance, according to which transfers from one State to another should not put people to a real risk of suffering a violation of the rights guaranteed in the Convention, especially the right not to suffer torture or inhuman and degrading punishment and treatment set out in article 3. There is no exception to this principle if the transfer is done to execute an obligation arising from the European Union and in application of the Dublin Regulation, despite the fact that the ECtHR duly takes into consideration the existence of special links between EU member States.

[21] The Dublin Convention was replaced by EU Regulation No. 343/2003, for this reason commonly called "Dublin II regulation", OJ 2003 50, 1 ss. This was followed by the so-called Regulation No. 604/2013, called "Dublin III", of 26 June 2013, OJE 2013 L 180, 31-59.

[22] CJEU 26 July 2017, Case 646/16, *Jafari*.

In summary, to ensure compliance with the ECHR, States should ensure that there is no risk of violation of rights through the transfer, and, in any case, since the presumption of safety must be understood in a relative and not absolute manner, each person must be able to challenge the risk of violation of their rights through an effective remedy as required by Article 13 ECHR. The right to appeal against transfer decisions, which corresponds to the obligation to examine each individual situation on a case-by-case basis, is the most specific result of the jurisprudence of the ECtHR concerning the so-called *Dublin cases*. Although it is a minimum guarantee, it has had a significant impact on the efficiency of the Dublin system, which was already very low.

The CJEU has then given a restrictive interpretation of the principle expressed by the ECtHR.[23] Almost the same reasoning has been transposed into the amended article 2 of the Dublin III Regulation, according to which the transfer may be impossible "[…] because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the EUCFR […]". The different approach of the two Courts, reflected also in the text of the amended Dublin regulation, was echoed also in the already mentioned CJEU Opinion on EU accession to the ECHR.[24] The CJEU deemed the agreement not to comply with EU Treaties as it was not enough to guarantee the peculiarities of EU law, which also include those legal instruments, such as the Dublin Regulation, that are based on mutual trust between member States and that, in order to work, must involve the existence of absolute presumptions of safety in their respective legal systems.

More recently, the CJEU seems to have aligned itself with the orientation of the ECtHR. The Court affirmed that the lawfulness of the transfer must be assessed not only in light of the risk of systemic flaws in the destination country, but also considering the risk inherent in the transfer *per se*, "regardless of the quality of reception and the treatment available in the member state responsible for examining the application… Secondly, it would be manifestly incompatible with the absolute character of that prohibition if the Member States could disregard a real and proven risk of inhuman or degrading treatment affecting an asylum

[23] CJEU 21 December 2011, Case 411/10, *N.S.*, para. 94.

[24] CJEU 18 December 2014, Opinion 2/13.

seeker under the pretext that it does not result from a systemic flaw in the Member State responsible".[25]

Another relevant interpretation by the CJEU on the Dublin Regulation concerned the determination of the competent State in the case of requests made by unaccompanied minors.[26] The Court held that the member State in which the child finds himself is required to examine the application for international protection, even though the minor himself has already applied in another member State; the Court underlined the vulnerability of minors and the existing obligation requiring the States to act in their superior interests by virtue of Article 24 of the EUCFR. In order to comply with the latter ruling of the CJEU, in 2014 the European Commission presented a proposal to amend Article 8 of the Dublin III regulation,[27] which, however, was not approved due to lack of agreement between the institutions. Indeed, in accompanying the proposal to amend the Dublin III regulation presented in 2016, it is stated that "given that this provision differs from the provisions of the Commission proposal of June 2014, the Commission intends to withdraw the latter, on which it has been impossible to reach an agreement until now", in complete disregard for the fundamental right of the child's best interests.

The other reason of the Dublin regulation crisis is the increase in the number of applications for international protection partly due to the worsening situation in the countries of origin, and partly due to the gradual closure of legal channels of entry to EU countries.[28] The Dublin crisis has thus rapidly spread to the Schengen system with some States that have reintroduced internal border checks because of the threat posed by the massive influx of migrants and asylum seekers.[29] It has been evident that the member States would have preferred to renounce the free movement of persons in order not to admit any more migrants, including asylum seekers. This scenario has had a negative impact on the whole area of freedom, security and justice and may be devastating

[25] CJEU 16 February 2018, Case 578/16, *CK*, paras. 90-93.

[26] CJEU 6 June 2013, Case 648/11, *M.A.*.

[27] COM (2014) 382 of 26 June 2014. See Del Guercio, *Superiore interesse del minore e determinazione dello Stato competente all'esame della domanda di asilo nel diritto dell'Unione Europea*, in *Diritti umani e diritto internazionale*, 2014, p. 243-248.

[28] See the data published by EASO since 2010, www.easo.europa.eu.

[29] European Commission, *Notifications of the Temporary Reintroduction of Border Control*, available at www.ec.europa.eu/dgs/home-affairs/.

for the already weakened European integration process. On the other hand, an area of free movement that implies the absence of border controls on people, citizens or foreigners is incompatible with the prohibition of secondary movements, with the prohibition of choosing the State in which to apply for international protection and, lastly, with the non-recognition of a right of residence in other member States to third-country nationals, at least to beneficiaries of international protection.[30] On the contrary, these are the fundamental rules around which the EU asylum system has been created.

4.2. *Relocations and that Strange Way of Understanding Solidarity*

In this scenario, institutions and governments have tried to implement measures to solve the crisis, with the aim of interpreting the principle of solidarity enshrined in Article 80 TFEU in terms other than technical and financial assistance.[31]

Thus the decisions on relocation of persons in evident need for international protection have been adopted.[32] The most innovative feature of the decisions was the setting of mandatory quotas on the basis of which to distribute asylum seekers between member States, with the exception of the United Kingdom, Ireland and Denmark. It is noteworthy that for the first time objective criteria were established to identify the number of people that each member State can potentially accept, depending on the country's population, the number of applicants already present, the gross domestic product and the unemployment rate. On the contrary,

[30] See Favilli, *Reciproca fiducia, mutuo riconoscimento e libertà di circolazione di rifugiati e richiedenti protezione internazionale nell'unione europea*, in *Rivista di diritto internazionale*, 2015, 3, 701-747.

[31] Vanheule, Van Selm, Boswell, *L'attuazione dell'articolo 80 del TFUE sul principio di solidarietà ed equa ripartizione della responsabilità, anche sul piano finanziario, tra gli Stati membri nel settore dei controlli alle frontiere, dell'asilo e dell'immigrazione*, Study drafted on behalf of the European Parliament, 2011.

[32] Council Decision 2015/1523 of 14 September 2015 establishing temporary measures in the field of international protection for the benefit of Italy and Greece, in OJ 2015 L 239, 146; Council Decision 2015/1601 of 22 September 2015 establishing temporary measures in the field of international protection for the benefit of Italy and Greece, OJ 2015 L 248, 80. Morgese, *La solidarietà tra gli Stati membri dell'Unione europea in materia di immigrazione e asilo*, Bari, 2018; Caggiano, *Alla ricerca di un nuovo equilibrio istituzionale per la gestione degli esodi di massa: dinamiche intergovernative, condivisione di responsabilità fra gli Stati membri e tutela dei diritti degli individui*, in *Studi sull'integrazione europea*, 2015, 465 ss.

the definition of mandatory quotas is the point on which there has been the greatest conflict between member States, with Romania, Czech Republic, Slovakia and Hungary who voted against and the action for annulment brought by the Slovakia and Hungary before the CJEU.[33]

However, instead of easing the burden of reception in Greece and Italy, they caused a net increase in asylum seekers in these countries. In fact, thanks to the two relocations' decisions, the Governments of northern Europe and the Commission have succeeded in imposing on Italy and Greece the obligation to identify irregular migrants and asylum seekers. That requirement was already in force but largely disregarded due to Italy's lack of interest in tracking the passage of those who only want to cross Italy to reach another European destination.[34] This has led to the creation of reception and first care facilities managed according to the hotspot approach, in other words closed centres to ensure the effective implementation of identification, registration and fingerprinting procedures.[35]

4.3. *Towards Dublin IV*

It is not surprising, therefore, that after the expiry of the term of their application,[36] given the divisions between the States and the limited success in terms of their intended purpose, the Commission has abandoned this sort of measures and presented a proposal to amend the Dublin Regulation that left the current system unchanged, in particular as regards the criterion of the State of first arrival.[37]

[33] The Court, with a comprehensive and thoroughly reasoned judgement, dismissed all the grounds of appeal and also reiterated the centrality of the principle of solidarity referred to in article 80 of the TFEU. CJEU 6 September 2017, Case 643/15, *Slovak Republic and Hungary v. Council of the European Union*.

[34] See Article 7 common to both decisions. In November 2017, the people relocated from Italy were 10,842 with 2,363 still waiting, and from Greece 21,524 with 516 waiting. The reason is that the decisions identified as eligible subjects only people belonging to those nationalities who obtain a status in at least 75% of cases based on data provided by the member States and processed by the EASO.

[35] *Hotspot, accoglienza e ricollocamento – Circolare del Ministero dell'interno e Road map italiana*, www.asgi.it.

[36] As of 19 September 2017 two years have elapsed since the decision on relocation came into force: this can still be invoked but only for people who came to Italy or Greece before 19 September 2017.

[37] Maiani, *The Reform of the Dublin III Regulation*, European Parliament, 28 June 2016, www.europarl.eu, 2016, 53-56.

Except for some extension to the application of the criterion of the presence of family members in other member states (not just spouses and minor children, but also brothers and sisters, and the express consideration of family ties that arose after leaving the country of origin), the reform proposal was presented as a general tightening of the criteria and rules already laid down, particularly in order to prevent secondary movements; in fact, it clearly set out the obligations over applicants for international protection and the consequent sanctions for non-compliance, including the exclusion from the reception system.[38]

A new provision is the introduction of the corrective mechanism of distribution of asylum seekers when a member State has a disproportionate influx of applicants for international protection and resettled people, namely greater than 150% of the national quota defined for each State through a reference key based on two criteria: the number of inhabitants and the gross domestic product. States are allowed not to participate in the redistribution mechanism by declaring their opposition and paying the sum of € 250,000 for each person not accepted. On 16 November 2017 the European Parliament in its first reading adopted by a large majority numerous amendments on the basis of which the criterion of the country of first arrival is replaced with the introduction of an automatic transfer system using a method of fixed distribution, not conditional on exceeding 150% of the quota considered sustainable for each State. In addition, the choice of the country of transfer should be based on the relevance of existing social ties between applicants and the destination country: family ties (extended to dependent adult children, brothers and sisters), having taken a course of study in the country or even just having lived there should be taken into account when choosing the country where to transfer the applicant for international protection. Transfers of people, even in the case of extradition or expulsion, tend to always be very difficult to achieve, even more so when they cover tens of thousands of people. For this reason, the voluntary participation of applicants for international protection is essential, and the Parliament's proposal to introduce additional criteria enhancing the links with the competent State is a step in the right direction, the only viable one remaining within the logic of the Dublin system.

Agreement between the Parliament and the Council imposed by ordinary legislative procedure will be difficult to achieve given the

[38] COM(2016)197 of 6 April 2016, *Reform of the common European asylum system and enhancing legal avenues to Europe*.

considerable distance between the positions of the two institutions, to which also that of the Commission can be added. The Council, which represents EU governments, locked in a restrictive approach aimed at tightening and eliminating all the derogations in the Regulation to ensure that the criteria are finally applied in a rigorous way. The Parliament, on the other hand, which represents the people of the EU, proposes to abandon the traditional system and innovates it profoundly.

5. *Conclusions*

The creation of a Common European Asylum System has showed all the contradictions and ambiguities of the European Union: an international organisation that is different from all the other ones as regards the extension of the powers and the impact of legislative measures into national law, which aims at regulating policies like those of migration and asylum without, however, that those powers prove to be sufficient.

The objective inadequacy of this hybrid structure has been further worsened by the inability of both governments and the Commission to develop measures inspired by a forward-looking vision. This explains the persistent centrality of the Schengen and Dublin systems, which were agreed in the international arena, outside the European Union, without significant changes brought by their incorporation into the EU legal order.

In fact, an extremely important game with two different visions is playing out over the Dublin dossier: that of the governments, divided and chasing short-term objectives that are almost always determined by electoral calculations and, at times, by the ambition to neutralise xenophobic waves; and that of the European Parliament, representing the peoples of Europe, which adopted amendments supported by a large majority, made up by MPs belonging to different political groups and also to different countries in Southern and Northern, in Western and Eastern Europe. A sign that a common and radically different vision on asylum in Europe is possible because it already exists.[39]

[39] Ambrosi, *The Unbearable Lightness of Leadership*, in *EU*Observer, 18 October 2017.

SECTION II

The Right to an Effective Remedy and the Protection of Particularly Vulnerable Persons as Asylum Seekers in Light of the Charter of Fundamental Rights

Rosita Forastiero*

Contents: 1. Introduction. – 2. The Right to an Effective Remedy and the International and European Legal Framework. – 3. 'Protection of Vulnerable Asylum Seekers' and 'Right to an Effective Remedy' throughout the Development of the Common European Asylum System (CEAS). – 4. The Right to Effective Judicial Protection and the Concept of Vulnerability: the Contribution of the Case-Law of the European Court of Human Rights and the Court of Justice of EU. – 5. Concluding Remarks.

1. *Introduction*

The right to an effective remedy is a fundamental element of the broader right to effective protection. The right to effective protection has in fact a twofold dimension, in that it serves to guarantee not only the protection of individuals, but also the correct application of the law. This right was included in the very first international human rights instruments and, starting from 1950, the right to effective judicial protection has also found application, at regional level, in the human rights protection system established by the European Convention on Human Rights (ECHR). At regional level, a significant milestone was the recognition of the right to effective judicial protection in the Treaty on European Union (TEU) and the adoption of Article 47 of the Charter of Fundamental Rights of European Union (EUCFR), which enshrined the right to an effective remedy. Through the EUCFR, the right to an effective remedy has been consolidated within the EU's legal system. The interpretation of the right to an effective remedy enshrined in Article 47 of the Charter must take into account changes introduced by the Lisbon Treaty in EU primary law, whereby the EUCFR has achieved the same legal value as the Treaties and has therefore become legally binding.

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In the field of asylum, the right to an effective remedy is a cornerstone of the protection of asylum seekers, and in this regard, Article 47 of the EUCFR is the norm that national courts most frequently invoke, despite the fact that asylum is but one of many fields of application of this important Charter provision.[1] As for the right to an effective remedy and asylum, it is also essential to take into account the evolution of the Common European Asylum System (CEAS).

Major changes have taken place in the current legal context, due in part to the last few years' increase of migratory flows, largely comprised of asylum seekers and refugees. In this respect, it should be observed that change is still underway, following the 2016 proposal adopted by the European Commission to reform the European asylum system.

Within the development of this legal framework, the protection of particularly vulnerable asylum seekers must be considered. In fact, when discussing the right to an effective remedy in the field of asylum, the concept of vulnerability comes to the fore in all its complexity. In light of the right to asylum, the concept of vulnerability takes on a different meaning and dimension. On one hand, it serves to identify asylum seekers as a vulnerable category *per se* and, on the other, identifies certain groups of applicants who, due to their characteristics or individual situations, are subject to disadvantage, prejudice and stereotyping. Accordingly, some asylum seekers can be seen as especially vulnerable, such as, among others, minors, unaccompanied minors, elderly people, persons with disabilities, pregnant women, persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, and lesbian, gay, bisexual, transgender and intersex (LGBTI) people. Some of these persons have special needs that require treatment and particular support.

This twofold dimension of the concept of vulnerability makes it a priority to guarantee a higher level of protection for the human rights of vulnerable asylum seekers.

Here the role played by the case-law of the Court of Human Rights (ECtHR) and the Court of Justice of European Union (CJEU) takes

[1] In this regard, see European Union Agency for Fundamental Rights (FRA), *Fundamental Rights Report 2018*, June 2018, 38 ss. Available at: http://fra.europa.eu/en/publication/2018/fundamental-rights-report-2018. Accessed July 15, 2018. Furthermore, see European Union Agency for Fundamental Rights (FRA), *Handbook on European Law relating to Access to Justice*, 2016. Available at: https://publications.europa.eu/en/publication-detail/-/publication/1034ed26-1f53-11e7-84e2-01aa75ed71a1/language-en. Accessed July 30, 2018.

centre stage, since both Courts, by interpreting and implementing the right to effective judicial protection and the concept of vulnerability, have increased and strengthened the existing protection available to vulnerable asylum seekers.

2. *The Right to an Effective Remedy and the International and European Legal Framework*

The right to an effective remedy constitutes a fundamental element of effective protection. In this regard, it must be said that the right to effective protection has a broader scope, because it is an instrument that guarantees not only the protection of individuals, but also the correct implementation and application of the law.[2] This dual concept of effectiveness has accompanied the human rights discourse from the very beginning, becoming a cornerstone of international and European legal framework. We can already find a codification of effective judicial protection in the first international human rights instruments. The very first step dates back to the adoption of the Universal Declaration of Human Rights of 1948, which in its Article 8 establishes the right of every individual "to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

This right is then reaffirmed in numerous international human rights treaties adopted at both universal and regional level.[3] Among others, a reference to this right can be found in Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1965 and in Article 2, para. 3, of the Interna-

[2] To this regard, see, among others, O. Porchia, *L'effettività del diritto dell'Unione tra tutela del singolo e salvaguardia dell'ordinamento*, in A.A.V.V., *Scritti in onore di Giuseppe Tesauro*, Napoli, 2014, 2311 ss.; M. Romito, *La tutela giurisdizionale nell'Unione europea tra effettività del sistema e garanzie individuali*, Bari, 2015; G. Tesauro, *The Effectiveness of Judicial Protection and Cooperation between the Court of Justice and National Courts*, in *YB Eur. Law*, 1993, 3 ss.; A. Arnull, *The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?*, in *Eur. Law Rev.*, 2011, 50 ss.; D. Leczykiewicz, *'Effective Judicial Protection' of Human Rights After Lisbon: Should National Courts be Empowered to Review EU Secondary Law?*, in *Eur. Law Rev.*, 2010, 326 ss.

[3] See D. Shelton, *Remedies in International Human Rights Law*, Oxford, New York, 2015.

tional Covenant on Civil and Political Rights (ICCPR) of 1966, which enshrine the commitment of States Parties to guarantee the right to an effective remedy to any person whose fundamental rights or freedoms have been violated.[4] In this line, we must also mention Articles 9 and 14 of the ICCPR. These provisions broaden the scope of the right to an effective remedy by conflating it with, among others, the right to a fair and public hearing before a competent, independent and impartial tribunal established by law; the right to defence and, if applicable, to legal aid; and the right to compensation. Likewise, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) of 1984 also partly references the right to an effective remedy as elaborated in the first international human rights treaties and, in Article 14, extends its scope by affirming the right of the victim of an act of torture to obtain redress and to have "an enforceable right to fair and adequate compensation".

As is the case with other human rights treaties, the Convention on the Rights of Persons with Disabilities (CRPD) of 2006 also mentions the right to effective judicial protection. Article 13 of the CRPD places upon the States an obligation to guarantee effective access to justice for persons with disabilities, on a basis of equality with others, and provides that States must set in place all necessary procedural adjustments to afford disabled persons full enjoyment of the right to judicial protection.[5]

[4] In particular, Article 6 of the ICERD affirms that: «States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination». In the same line, Article 2, para. 3, of the ICCPR establishes that: «Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted».

[5] For a deep analysis on Article 13 of the CRPD, see E. Flynn, *Article 13 [Access to Justice]*, in V. Della Fina, R. Cera, G. Palmisano (eds.), T*he United Nations Convention*

Starting from 1950, the right to effective judicial protection is also reflected, at regional level, in the human rights protection system established by the ECHR, particularly within the joint statement of Articles 6 (right to a fair trial) and 13 (right to an effective remedy). Therefore, this framework has undergone a substantial evolution over time, facilitated in turn by the action of the bodies monitoring the human rights treaties and by the jurisprudence of the ECtHR, which have contributed to affirming the right to effective judicial protection as an international human rights standard.

However, at regional level, a significant milestone was the recognition of the right to effective judicial protection in Article 19 of the TEU, followed by the adoption of certain acts of EU law and by the action of the CJEU. Article 19, para. 1, stipulates the States' obligation to establish the legal remedies necessary to ensure effective judicial protection in areas within the competence of the Union.[6]

Through the EUCFR, the right to an effective remedy is further consolidated within the EU's legal system. In particular, with the reform of EU primary law following the Lisbon Treaty, by virtue of which the TEU and the TFEU entered into force on 1 December 2009, the EUCFR achieved the same legal value as the EU Treaties, thus becoming a legal binding instrument. Specifically, Article 47 of the Charter establishes the right to an effective remedy, substantiating it as the right of access to an independent, impartial judge pre-established by law; the right to a fair trial within a reasonable timeframe; and the right of every person to be defended and represented, and, when necessary, to be granted free legal aid.

It must be said that Article 47 takes over the system of protection outlined by the ECHR.[7] However, Article 47 contains important and novel elements when compared with Articles 6 and 13 of the ECHR. First of

on the Rights of Persons with Disabilities. A Commentary, The Netherlands, 2017, 281 ss.

[6] On Article 19 of the TEU, see, among others, G. Tesauro, *Articolo 19*, in A. Tizzano (ed.), *Trattati dell'Unione europea*, Milano, 2014, 195 ss.

[7] See, among others, AA.VV., *Article 47*, in S. Peers, T. Hervey, J. Kenner, A. Ward (Eds.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford, Portland, 2014, 1197 ss; T. Tridimas, *The General Principles of European Union Law*, Oxford, 2016, 456 ss.; R. Barents, *EU Procedural Law and Effective Legal Protection*, in *Common Market Law Review*, 1437 ss.; S. Prechal, *The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?*, in C. Paulussen, T. Takacs, V. Lazić, B. Van Rompuy (Eds.), *Fundamental Rights in International and European Law. Public and Private Law Perspectives*, The Hague, The Netherlands, 2016, 143 ss.

all, Article 47 merges the rights and principles enshrined in the ECHR into a single provision. A second aspect concerns the scope of protection provided for by Article 47, which, according to the Explanations to the Charter, is broader, as it guarantees the right to an effective remedy before a judge rather than a national instance, as provided for instead by Article 13 of the ECHR. Lastly, Article 47 of the Charter applies to both the disputes relating to civil and criminal rights and obligations, and to administrative proceedings. This is another new element compared to Article 6 of the ECHR, which only applies to civil and criminal disputes.

Nevertheless, the complementarity of the Charter and the ECHR remains significant, *in primis*, as it concerns the interaction between the CJEU and the ECtHR, but also in light of Article 52, para. 3, of the Charter, whereby whenever the rights of the Charter correspond to those laid down by the ECHR, their meaning and scope correspond likewise. The Explanations to the Charter add that the jurisprudence of the ECtHR must also be taken into account in this case, and it is thanks to the jurisprudence of both Courts, the CJEU and the ECtHR, that the scope of Article 47 has been progressively clarified and expanded.

Although asylum constitutes only one of the many fields of application of this important provision of the Charter, the right to an effective remedy remains a key element of the protection of asylum seekers.

Focusing on the most relevant acts of secondary law, one should recall Directive 2013/32/EU, also known as the "Procedures Directive",[8] which introduced a few substantial changes to the previous legal framework adopted with Directive 2005/85/EC.[9] In particular, Directive 2013/32/EU established common procedures regulating the fundamental guarantees for the presentation of asylum applications; the possibility for applicants to remain on the territory of the Member State until their application has been decided on; the individual, objective and impartial character of the decision; the admissibility examination procedures; the merit examination procedures; and the appeal procedures, whereby the asylum seeker is entitled to the right to appeal against any decision on the admission, or merit, of the application. Furthermore,

[8] 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)*, OJ 29 June 2013, L 180. This Directive introduced a number of substantive changes to the Directive 2005/85/EC. In the interest of clarity, that Directive has been recast.

[9] Council Directive 2005/85/EC of 1 December 2005, *On Minimum Standards on Procedures for Granting and Withdrawing Refugee Status*, OJ 13 December 2005, L 326.

the Directive aims to state the principles concerning the designation of a safe third country and a safe country of origin.

It is interesting to note that the Preamble of the Directive makes repeated, express references to the EUCFR[10] and the right to an effective remedy,[11] which constitute the interpretative criteria for the implementation of the Directive in national legal systems. Consequently, we should consider some of the most relevant provisions of Directive 2013/32, interpreting them in light of Article 47 of the EUCFR.

When examining the legal regime introduced by Directive 2013/32, one must first consider its Article 46, para. 1, whereby Member States must ensure that the applicant has the right to an effective remedy before a judge in the cases listed by the provision and, in particular, against: a decision to consider the application unfounded in relation to refugee status and/or subsidiary protection status; a refusal to reopen the examination of a suspended application pursuant to Articles 27 and 28; a decision to withdraw international protection.[12]

On this basis, Member States have an obligation to ensure an adequate, complete and *ex nunc* appraisal of the circumstances that are pre-

[10] In this regard, see paras. 33, 39 and 60 of the Preamble of the Directive 2013/32/EU. Specifically, para. 60 of the Preamble recalls, among others, Article 47 of the Charter. It states that: «This Directive respects the fundamental rights and observes the principles recognised by the Charter. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 18, 19, 21, 23, 24, and 47 of the Charter and has to be implemented accordingly».

[11] The Preamble of the Directive 2013/32/EU, para. 50, establishes that: «it reflects a basic principle of Union law that the decisions taken on an application for international protection, the decisions concerning a refusal to reopen the examination of an application after its discontinuation, and the decisions on the withdrawal of refugee or subsidiary protection status are subject to an effective remedy before a court or tribunal».

[12] Article 46, para. 1, of the Directive 2013/32/EU states: «Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:

(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;

(ii) considering an application to be inadmissible pursuant to Article 33(2);

(iii) taken at the border or in the transit zones of a Member State as described in Article 43(1);

(iv) not to conduct an examination pursuant to Article 39;

(b) a refusal to reopen the examination of an application after its discontinuation pursuant to Articles 27 and 28;

(c) a decision to withdraw international protection pursuant to Article 45.»

sented. The judge is then called upon to carry out an individual assessment based on both objective and subjective preconditions. In this line, the 'right to be heard' becomes an essential procedural requirement that must be met in order to safeguard the right to an effective remedy.

The right to be heard is enshrined, *in primis*, in Directive 2013/32, but further important references are also found in Article 6 of the ECHR and in Articles 47 and 41 of the EUCFR, the latter concerning the 'right to good administration'. In fact, Article 41, para. 2, of the EUCFR provides that the right to good administration includes, *inter alia*, the right of every person to be heard before any individual measure that would affect him or her adversely is taken.[13]

In the case of *Moussa Sacko v. Commissione Territoriale per il riconoscimento della protezione internazionale di Milano* of 26 July 2017, the Court clarified the scope of the right to be heard within the particular field of asylum.[14] According to the CJEU, neither Directive 2013/32 nor the EUCFR place any obligation on the appeal judge to hold a hearing so that the applicant may be heard. This is possible if the factual circumstances leave no doubt as to the merits of the decision, and if during the first instance procedure the applicant has been offered an opportunity to hold a personal interview on his application for international protection. On the other hand, the judge must always retain the faculty to grant a hearing to the applicant seeking international protection, if he/she should consider it essential for the purpose of issuing a judgment. In this regard, as the CJEU said about the Moussa ruling, procedural speed and economic requirements are irrelevant concerns. In this framework, one must therefore point out that the requirement to implement claims for an effective remedy does not, by itself, imply that States have an obligation to provide for both sets of proceedings.[15]

[13] CJEU 11 December 2014, Case C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*.

[14] CJEU 26 July 2017, Case C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*. In particular, the CJEU had already been called «to ascertain, in essence, whether Directive 2013/32, in particular Articles 12, 14, 31 and 46 thereof, is to be interpreted as precluding a national court hearing an appeal against a decision rejecting a manifestly unfounded application for international protection from dismissing the appeal without hearing the applicant, in particular where the applicant has already been interviewed by the administrative authorities and where the factual circumstances leave no doubt as to whether the decision rejecting the application was well founded».

[15] In this respect, the Italian reform introduced by Law Decree No. 13/2017,

Lastly, in 2016, the European Commission initiated a process of reform of the Common European Asylum System. In particular, it presented a first set of proposals to reform the CEAS, aiming to establish a "sustainable and fair Dublin system" for determining the Member State responsible for examining asylum applications; to reinforce the Eurodac system, in order to better monitor secondary movements and prevent irregular migration; and to establish a European Agency for Asylum to ensure the correct functioning of the European asylum system.[16]

The reform package elaborated by the European Commission also presents interesting innovations regarding the issue of the right to an effective remedy. With a second reform package, the Commission has completed the reform of the CEAS by adopting four additional proposals intended to supersede the existing directives (including the 'Procedures Directive' 2013/32) through directly applicable acts of EU secondary legislation, such as regulations. The Proposal from the EU Commission for a Regulation on a common procedure for international protection is a relevant act, which would bridge the existing gaps between the procedural regimes of the Member States and lead to

converted with amendments by Law 13 April 2017, No. 46, which has abolished appeal in the procedures on international protection applications, is therefore fully consistent with European Union law. In this respect, see M. Acierno, M. Flamini, *Il dovere di cooperazione del giudice, nell'acquisizione e nella valutazione della prova*, in *Diritto, Immigrazione e Cittadinanza*, 2017, No. 1. Available at: https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-2017-n-1/62-il-dovere-di-cooperazione-del-giudice-nell-acquisizione-e-nella-valutazione-della-prova. Accessed July 28, 2018.

[16] See Proposal from the European Commission of 4 May 2016 for a *Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, COM(2016) 270 final; Proposal from the European Commission of 4 May 2016 for a *Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast)*, COM(2016) 272 final; Proposal from the European Commission of 4 May 2016 for a *Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010*, COM(2016) 271 final.

establishing quicker, simpler and clearer procedures. In this line, the Directive 2013/32 is not so much a definitive end point, as merely the last stage of a process of reform *in fieri*.

3. *'Protection of Vulnerable Asylum Seekers' and 'Right to an Effective Remedy' throughout the Development of the Common European Asylum System (CEAS)*

When discussing the right to an effective remedy and, particularly, the procedural aspects of guaranteeing it, the concept of vulnerability comes to the fore in all its complexity. In light of human rights law, vulnerable groups may be described as specific groups of individuals who often face discriminatory treatment, or who need a degree of special attention by the State to avoid being exploited or exposed to harmful environments, in order to bring them on a substantially equal footing with all persons.[17]

However, the concept of vulnerability takes on a different meaning and dimension in the framework of the right to asylum. In this context, in fact, the concept of vulnerability has a twofold value: on the one hand, it is useful to identify asylum seekers as a vulnerable category *per se* and, on the other, identifies certain groups of applicants who, due to their characteristics or individual situations, are subject to disadvantage, prejudice and stereotyping. In this regard, it is worth stressing that some of these persons, such as, among others, minors, unaccompanied minors, elderly people, persons with disabilities, pregnant women, persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, LGBTI people, have special needs that require treatment and/or support. Therefore, this twofold dimension, both universal and particular, of the concept of vulnerability requires a greater guarantee of protection for human rights.[18]

[17] On the definition of the notion of vulnerable groups and its complexity, see, among others, R. Forastiero, *The Charter of Fundamental Rights and the Protection of Vulnerable Groups: Children, Elderly People and Persons with Disabilities*, in G. Palmisano (ed.), *Making the Charter of Fundamental Rights a Living Instrument*, Leiden, Boston, 2014, 165 ss.; S. Fredman, *Discrimination Law*, Oxford, New York, 2011, 25 ss.; L. Peroni, A. Timmer, *Vulnerable Groups: the Promise o Fan Emerging Concept in European Human Rights Convention Law*, in *Int. Jnl. of Constitutional Law*, 2013, 1056 ss.; S. Fredman, *Human Rights Transformed: Postive Rights and Positive Duties*, Oxford, New York, 2008, 180 ss.

[18] On this twofold dimension of vulnerability consisting in a both a universal and

This is the framework wherein the CEAS has operated ever since its inception with the Tampere European Council in 1999 and throughout its implementation with the changes introduced by the Treaty of Nice of 2001 and the EUCFR, which have completed the legal framework.[19] It is worth pointing out that, at that time, the EUCFR had no legally binding effect. This initial phase, marked by the adoption of three directives constituting the *building blocks* of the European asylum system, comprised an explicit reference to the concept of vulnerability in relation to the existence of specific groups of asylum seekers.

In that respect, the first generation of legislative instruments adopted under the CEAS did not primarily include a definition of vulnerability, recalling instead the concept of vulnerability in relation to material reception conditions and health care.[20] Therefore, the notion of vulnerability was taken into consideration insofar as it affected an applicant's physical and mental integrity, and the State's obligation to take the special situation of such asylum seekers into account was restricted to the case of applicants who had been found to have special needs.[21]

particular dimension, see, among others, F. Ippolito, *La vulnerabilità come criterio emergente per una maggiore tutela del migrante nel contesto internazionale*, in G. Nesi (ed.), *Migrazioni e diritto internazionale: verso il superamento dell'emergenza?*, Napoli, 2017, 447 ss.

[19] On the Common European Asylum System, see, among others, S. Marchisio, *Rifugiati, profughi e altre esigenze di protezione nel diritto comunitario*, in U. Leanza (ed.), *Le migrazioni: una sfida per il diritto internazionale comunitario e interno*, Napoli, 2005, 327 ss.

[20] In this respect, see among others, European Council on Refugees and Exiles (ECRE), *The concept of vulnerability in European Asylum Procedures*, in *Asylum Information Database (AIDA)*, Available at: file:///D:/RESEARCH%20PAPER/aida_vulnerability_in_asylum_procedures.pdf. Accessed August 3, 2018.

[21] In this regard, see Council Directive 2003/9/EC of 27 January 2003 *laying down minimum standards for the reception of asylum seekers*, OJ 6 February 2003, L 31. In particular, Article 17 of the 2003 Reception Conditions Directive states that: «1. Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in the national legislation implementing the provisions of Chapter II relating to material reception conditions and health care. 2. Para. 1 shall apply only to persons found to have special needs after an individual evaluation of their situation». In the same line, see also Article 13 of the Council Directive 2001/55/EC of 20 July 2001 *on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such*

In addition, in this first phase of CEAS, certain basic procedural guarantees for particularly vulnerable applicants were still missing, with the only exception of unaccompanied minors, for whom Directive 2005/85 provided, in Article 17, specific procedural guarantees on account of their vulnerability.

With the reform of EU primary law following the Lisbon Treaty, new rules on asylum and immigration were introduced, with an additional focus on vulnerable asylum seekers. This second phase of CEAS was characterized by the introduction of common rules in the fields of asylum, procedures, reception and qualifications of international protection and by the revision of existing directives.[22]

As for the development of this regulatory framework, one should recall that the Charter, in Article 18, guarantees the right to asylum with due respect for the rules of the Geneva Convention of 1951, and in accordance with the TUE and the TFUE. Furthermore, the Charter provides enhanced protection of the rights of vulnerable people, based on the principles of equality and non-discrimination enshrined in Articles 20 and 21. Equality and non-discrimination can be considered as a unique, comprehensive principle that underpins the protection offered by the Charter to some groups of vulnerable people, such as enshrined in Article 24 (protection of the rights of the child), Article 25 (protection of the rights of the elderly), Article 26 (principle of integration of persons with disabilities).[23]

With the second phase of harmonization of national legislations, the European asylum legal framework was strengthened with basic procedural guarantees for such asylum seekers who may be seen as

persons and bearing the consequences thereof, OJ of 7 August 2001 L 212.

[22] For a deep analysis on the EU legal framework in the field of asylum, see K. Hailbronner and D. Thym (eds.), *EU Immigration andAsylum Law. Commentary*, 2nd edition, Portland, 2016; see also, among others, D. Acosta Arcarazo and C.C. Murphy (eds), *EU Security and Justice Law. After Lisbon and Stockholm*, Portland, 2014; S. Marchisio, *Article 10*, in *Codice dell'immigrazione e asilo*, D. Manzione (ed.), Milano, 2017, 3 ss.; F. Cherubini, *Asylum Law in the European Union*, London-New York, 2015; L. Azoulai and K. de Vries (eds), *EU Migration Law. Legal Complexities and Political Rationales*, New York, 2014; E. Cannizzaro, *L'armonizzazione delle politiche di asilo in sede comunitaria e la Convenzione di Ginevra sui rifugiati del 1951*, in *Rivista di diritto internazionale*, 2001, 440 ss.; L. Manca, *L'immigrazione nel diritto dell'Unione europea*, Milano, 2003.

[23] In this line, see R. Forastiero, *The Charter of Fundamental Rights and the Protection of Vulnerable Groups: Children, Elderly People and Persons with Disabilities*, ibid. footnote 17.

particularly vulnerable. Directive 2013/32, whilst not providing a definition of 'vulnerable asylum seekers', introduces in Article 2, lett. d), a definition of "applicant in need of special procedural guarantees", namely, an applicant whose ability to benefit from rights and comply with obligations is limited due to individual circumstances. Secondly, it places specific obligations on Member States to provide such applicants with adequate support, so that they may effectively access asylum procedures to submit their international protection application and exercise their right to an effective remedy whenever required.

In particular, Article 24 of Directive 2013/32 requires that within a reasonable timeframe after an application is made, Member States must assess whether the applicant is in need of special procedural guarantees. Said norm establishes that Member States must ensure adequate support, in order to allow applicants in need of special procedural guarantees to benefit from the rights and comply with the obligations provided by the Directive throughout the duration of the asylum procedure.

The broad wording of Article 24 includes, *inter alia*, persons with disabilities, who need both accessibility requirements and/or specific, reasonable procedural accommodation.[24] In such regard, the CRPD,[25] in Article 18 (Liberty of movement and nationality), provides that persons

[24] In this regard, see D. Ferri, *The Role of the European Union in Protecting the Rights of Asylum Seekers with Disabilities,* in S. Baldin and M. Zago (eds.), *Europe of Migrations: Policies, Legal Issues and Experiences*, Trieste, 2017, 89-106. Available at: https://www.openstarts.units.it/bitstream/10077/15216/1/BSA3_Europe_of_Migrations_online.pdf. Accessed August 3, 2018. See also, C. Conte, *What about Refugees with Disabilities? The Interplay between EU Asylum Law and the UN Convention on the Rights of Persons with Disabilities*, in *European Journal of Migration and Law*, 2016, 327ss.; C. Fahy, *Disability and Asylum Law*, 2015, available at: http://www.refworld.org/pdfid/55362e2a4.pdf. Accessed August 3, 2018; M. Crock, *Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities*, in *International Journal of Refugee Law*, 2013, 24 No. 4, 735-764.

[25] The CRPD and its Optional Protocol, adopted by the UN General Assembly on 13 December 2006, were the first human rights treaty to which the EU (at time European Community) was directly involved in the negotiation process and has become a Contracting Party, alongside the EU Member States having ratified it. In fact, in virtue of the clause provided by Article 44, the UNCRPD was the first human rights treaty to be opened for signature by a Regional Integration Organization (RIO). For the EU, the Convention entered into force on 22 January 2011. Since then, it has become an integral part of EU law. In this respect, see, among others, R. Forastiero, *Article 44 [Regional Integration Organization]*, ibid. footnote 5, 679-690. See also R. Forastiero, *Articolo 44 [Organizzazioni d'integrazione regionale],* in S. Marchisio, V. Della Fina, R. Cera, (eds.), *La Convenzione delle Nazioni Unite sui diritti delle persone con disabilità. Commentario*, Roma, 2010, 505-518.

with disabilities must not be deprived, on the basis of their disability, "of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement".[26] Said norm cannot be read in isolation. Accordingly, the scope of Article 18 of the CRPD is significant in light of the Article 13 of the CRPD, which places, as mentioned above, an obligation upon the States to guarantee effective access to justice for persons with disabilities and Article 5 concerning the obligation to provide reasonable accommodation to secure compliance with the principle of non-discrimination, but also Article 21 which recognizes the access to information and communication as a human right. In particular, reasonable accommodation is a crucial substantive equality measure since it serves as a facilitator for the exercise of rights by persons with disabilities, included also asylum seekers with disabilities.[27]

The Asylum Procedures Directive requires applicants to be informed "in a language which they understand or are reasonably supposed to understand" about asylum procedure. This means that applicants with disabilities must be given information in accessible format appropriate to different kinds of disabilities, namely, sign language, braille and/or all other accessible formats of communication. With regard to persons with disabilities, in particular for those with mental health issues who may not be able to participate effectively in the interview, Article 14, para. 2, lett. b), of the Asylum Procedures Directive is especially relevant. In fact, under this provision the personal interview may be omitted where applicants are unfit or unable to be interviewed owing to circumstances that are long-lasting and beyond their control.

In turn, the Directive 2013/32 also requires Member States to prioritise an examination of an application for international protection where the applicant is vulnerable[28] and Article 15 invites them to take appropriate steps "to ensure that the person who conducts the interview is competent to take account of the personal and general circum-

[26] On Article 18 of the CRPD and the interaction of migration with disability, see R. Cera, *Article 18 [Liberty of Movement and Nationality]*, ibid. footnote 5, 339-352.

[27] See R. Cera, *Article 5 [Equality and Non-Discrimination]*, ibid. footnote 5, 157-174. See also, R. Kayess, P. French, *Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities*, in *Human Rights Law Review*, 8 (1), 2008, 1-34.

[28] See Article 31, para. 7, lett. b, of the Directive 2013/32/EU.

stances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability". This is particularly important to ensure that the 'right to be heard' remains effective for vulnerable asylum seekers.

Among the different vulnerable groups of applicants, the Procedures Directive places a special emphasis on minors: in fact, it includes a specific provision setting out the safeguards to be respected when dealing with unaccompanied children. These consist, in particular, in the appointment of a representative and the presence of such representative and/or legal advisor during personal interviews, and in restricting the use of medical examinations for the purpose of age assessment as a last resort only. The Directive also provides norms concerning the examination of applications of unaccompanied children in accelerated and border procedures.

Aside from unaccompanied children, the recast Asylum Procedures Directive only lists the factors that may indicate a need for special guarantees, namely age, gender, sexual orientation, gender identity, disability, serious mental illness or the aftermath of torture, rape or other forms of serious psychological, physical or sexual violence. In fact, said Directive does not include an exhaustive list of asylum seekers presumed to be in need of special procedural guarantees.

Nevertheless, vulnerable persons are listed in Article 21 of Directive 2013/33/UE, the so-called 'Reception Directive',[29] and in Article 3, para. 9, of Directive 2008/115/EC.[30] Both EU legal instruments include "minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence". In addition, the reception directive includes victims of human trafficking, persons with serious illnesses, persons with mental disorders and victims of female genital mutilation.

While official statistics on the number of asylum applications based on sexual orientation or gender identity are still lacking, the persecution of lesbian, gay, bisexual, transgender and intersex people is by no means a new phenomenon. Many asylum countries are aware that per-

[29] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 *laying down standards for the reception of applicants for international protection*, OJ of 29 September 2013, L 180.

[30] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 *on common standards and procedures in Member States for returning illegally staying third-country nationals,* OJ of 24 December 2008, L 348.

sons fleeing persecution due to their sexual orientation and/or gender identity can be granted refugee status under Article 1, lett. A, para. 2, of the 1951 Convention on the Status of Refugees and/or its 1967 Protocol.[31] However, in this regard, it must be mentioned that LGBTI applicants are not listed among vulnerable persons as per Article 21 of Directive 2013/33.[32] Therefore, it is worth stressing that such list is far from exhaustive and could be extended in the future to include further asylum seekers who may be considered especially vulnerable.

The conclusion above, moreover, is confirmed by the European Parliament's position on the Commission's 2016 'Proposal for the reform of the directive on reception conditions' which contains an amendment providing for a larger list of vulnerable persons such as, among others, persons with post-traumatic stress disorders, LGBTI persons, non-believers, apostates and religious minorities.[33]

4. *The Right to Effective Judicial Protection and the Concept of Vulnerability: the Contribution of the Case-Law of the European Court of Human Rights and the Court of Justice of EU*

Having framed the regulatory developments at European level, let us briefly consider the major role played by the case-law of the ECtHR and the CJEU in reinforcing and increasing the protection of the rights of vulnerable asylum seekers. By interpreting and implementing the right to effective judicial protection and the concept of vulnerability, in fact, the ECtHR and the CJEU have extended and strengthened the

[31] For a deep analysis on the migration situation in the EU of LGBTI asylum seekers see European Union Agency for Fundamental Rights (FRA), Report of March 2017, *Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers*. Available at: http://fra.europa.eu/en/publication/2017/march-monthly-migration-focus-lgbti. Accessed August 3, 2018.

[32] The 'Qualification Directive' 2011/95/EU, in Article 10, explicitly refers to sexual orientation and gender identity as possible causes of persecution. According to the Directives 2013/32 and 2011/95, the competent authorities are bound to establish whether the circumstances ascertained represent a threat that would cause the interested person to be justifiably afraid of facing persecution in light of their individual situation. In this regard, see para. 72 of the Judgment of the CJEU 7 November 2013, Case C-199/12 and C-201/12, *X and others*.

[33] European Parliament, Report of 10 May 2017*, On the Proposal for a Directive of the European Parliament and of the Council laying down Standards for the Reception of Applicants for International Protection (Recast)*, A8-0186/2017, Amendment No. 34.

existing protection available to many categories of vulnerable asylum seekers, such as, *inter alia*, minors and LGBTI persons.

Firstly, one should consider the ECtHR case law, which, since its ruling *M.S.S. v Belgium and Greece*, has on a number of occasions referred to asylum seekers as members of a particularly underprivileged and vulnerable population group and, at the same time, has confirmed the particular vulnerability of certain categories of asylum seekers.[34]

In particular, the ECtHR adopted, among others, some important decisions relating to children, whereby it recognised their extreme vulnerability as a decisive factor that must take precedence over any considerations regarding their legal status (or lack thereof).[35]

In that respect, the ECtHR has highlighted the need for strengthened procedural guarantees in order to enable minors, among others, to seek asylum, to obtain legal assistance, to be heard, and, more generally, to be able to exercise their right to an effective remedy, especially if they have been deprived of their personal liberty due to administrative detention.

The above considerations provide a context for the 2016 ECtHR judgment in the case *Abdullahi Elmi and Aweys Abubakar v. Malta*. This case concerned the detention of two asylum seekers in a Detention Centre in Malta for eight months, pending the outcome of age-assessment procedures to determine whether they were minors. In this instance, medical examinations confirmed that both applicants were minors; however, after noting that the applicants' situation of vulnerability as minors must prevail over any considerations of their status as irregular migrants, the ECtHR ruled that their detention was inconsistent with Article 3 of the ECHR. In particular, according to the Court, detention in this case was arbitrary and unlawful, and the two minors had not received adequate procedural guarantees, including proper information about the procedure followed and the possibility of appeal.

Similarly, in the judgment of 5 July 2016 on the case *O.M. v. Hungary*,[36] the ECtHR offered another occasion to reflect on the issue of

[34] See ECtHR (Grand Chamber), *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, Judgement of 21 January 2011, para. 263.

[35] Among others, see ECtHR, *Tarakhel v. Switzerland*, Appl. No. 29217/12, Judgment of 4 November 2014, para. 9; ECtHR, *A.S. v. Switzerland*, Appl. No. 39350/13, Judgment of 30 June 2015, para. 29.

[36] ECtHR (Fourth Section), *O.M. v. Hungary*, Appl. No. 9912/15, Judgment of 5 July 2016.

vulnerability in asylum cases. By this judgment, the Court considered an applicant's sexual orientation to be a factor to be taken into account when assessing the legality of a detention measure. In particular, the ECtHR found that authorities should exercise particular care and assess whether vulnerable applicants such as LGBTI persons were safe or not in custody where many of the detainees included persons from countries with widespread cultural or religious prejudice against such persons. Here too, the Court acknowledged the applicant as a member of a particular vulnerable group.

Closely linked with this ECtHR case-law is the ruling of the CJEU of 25 January 2018 in which the Court addressed the protection of vulnerable asylum seekers as well as the right to an effective remedy enshrined in Article 47 of the EUCFR.[37]

The reference for a preliminary ruling was based on the Decision by the Hungarian Immigration and Citizenship Office to reject the asylum application of a Nigerian citizen who claimed to have fled his country of origin because of a well-founded fear of being persecuted for his homosexuality. In particular, the rejection decision was based on a psychological assessment that the Hungarian authorities had ordered to ascertain the applicant's sexual orientation. According to the appellant, the psychological tests he had had to undergo in order to verify his credibility constituted a serious violation of his fundamental rights and were unsuitable to establish his true sexual orientation.

The reference for a preliminary ruling, therefore, hinged upon two points: a) how the national authorities are to verify the credibility of the statements made by an asylum seeker who invokes, as a ground for granting asylum, a fear of being persecuted for reasons relating to his sexual orientation; and b) whether Article 4 of Directive 2011/95, interpreted in light of Article 1 'Human dignity' of the Charter, precludes the use by those authorities of a psychologist's expert opinion.

This said, in his Opinion delivered on 5 October 2017, the Advocate General Nils Whal exhorted the Court to acknowledge that the Procedures Directive allows national authorities to consult experts on specific aspects such as gender and sexual orientation, if necessary, and to assess the credibility of the applicant in general. However, the admissibility of psychological tests must be subject to the applicant's con-

[37] CJEU 25 January 2018, Case C-473/16, *F v Bevándorlási és Állampolgársági Hivatal*.

sent and to the respect of his/her fundamental rights, such as dignity and the right to respect for private and family life.[38]

In that respect, it is worth pointing out that the CJEU had already previously made several pronouncements on the criteria to be followed in ascertaining the sexual orientation of asylum seekers, by inviting national courts to take particular care in such cases and to avoid the use of techniques that may be deemed invasive. The UNHCR also intervened on this point, releasing in 2012 the *ad hoc* Guidelines concerning the claims to Refugee Status based on sexual orientation and/or gender identity within the context of Article 1A, para. 2, of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.

Moreover, the Advocate General also emphasized that: «Article 46 of Directive 2013/32 – especially when interpreted in the light of Article 47 of the Charter– thus requires national courts to be able to carry out an in-depth, independent and critical review of all relevant aspects of fact and law». That necessarily includes «the possibility of disregarding the findings of experts – which constitutes a piece of evidence to be evaluated with the other evidence – which a judge may find, for example, to be biased, unsubstantiated or based on controversial methods and theories». In particular, according to the Advocate General Whal, the national Courts «are to safeguard their own freedom of assessment in determining whether such proof has been made out to the requisite legal standard». Accordingly, the expert's findings are not binding for national Courts in reviewing the decision on the application. This is because «the contrary position would essentially mean that the judge abdicates his role, rendering ineffective the guarantees expressly provided for in Article 46 of Directive 2013/32».[39]

This is a key point in the Advocate General's Opinion, further confirmed by the CJEU judgment of 25 January 2018.[40] In this ruling, CJEU adopted a similar approach by choosing the EUCFR as an interpretative parameter. On this basis, it addressed the issues referred

[38] Opinion of Advocate General Wahl delivered on 5 October 2017, Case C-473/16, *F v Bevándorlási és Állampolgársági Hivatal*, paras. 39 ss.

[39] Paras. 50-55, ibid. footnote 38.

[40] For a comment on this CJEU judgment, see F. Ferri, *Assessing Credibility of Asylum Seekers' Statements on Sexual Orientation: Lights and Shadows of the F Judgment*, in *European Papers,* 17 July 2018, 1 ss. Available at: http://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2018_I_022_Federico_Ferri_2.pdf. Accessed August 28, 2018.

for a preliminary ruling by underlining that EU law «must be interpreted as meaning that it does not preclude the authority responsible for examining applications for international protection, or, where an action has been brought against a decision of that authority, the courts or tribunals seised, from ordering that an expert's report be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant, provided that the procedures for such a report are consistent with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, that that authority and those courts or tribunals do not base their decision solely on the conclusions of the expert's report and that they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation».

5. *Concluding Remarks*

The Development of the asylum legal framework and the case-law of the ECtHR and the CJEU have, undoubtedly, increased and reinforced guarantees of protection for human rights of asylum seekers and, especially, of particularly vulnerable asylum seekers. In this respect, it is worth noting that the CJEU judicial statistics for 2016 and 2017 show that the field of 'Freedom, Security and Justice', which also includes 'Immigration and Asylum', represents one of the main areas of resolved dispute for the CJEU, and that, in this context, the impact of the reference to preliminary ruling provided by Article 267 of the TFEU is very high. It is known that the reference for a preliminary ruling is the instrument that best suits the unifying tendency of EU law, since it ensures a correct and uniform application of EU law across all Member States so that it has the same effectiveness everywhere. From this perspective, cooperation between the courts takes on particular importance as an indicator of the level of protection achieved for the fundamental rights of asylum seekers and refugees.

It is undeniable that the right to effective remedy, in light of current EU asylum legal system (and particularly in light of the EUCFR's application by the European courts' case-law), constitutes a significant step towards achieving an optimal level of protection for asylum seekers. However, there remain significant shortcomings, particularly with regard to asylum seekers who may be considered as especially vulnerable.

In that respect, as developed in the EU asylum *aquis,* 'vulnerable asylum seeker with special needs' is a complex and multifaceted concept without a clear definition. This ambiguity is reflected in the system of procedural safeguards required to enable vulnerable asylum seekers to enjoy their rights and comply with their obligations in the asylum process. Effective implementation of the special procedural guarantees to vulnerable asylum seekers remains one of the most challenging aspects of the CEAS and a core feature of the ongoing reform of the EU asylum legal framework submitted by the EU Commission in 2016.

A further challenge is the need to streamline the early identification of vulnerable applicants. Some vulnerable persons with special needs are easy to identify, but there are some more complex needs, which are more difficult to identify, such as victims of torture or persons with mental illness. In this respect, overcoming the fragmentation of the EU legal framework for identifying vulnerable asylum seekers will be a crucial step to increase the protection of individuals who are at a disadvantage due to their particular physical, mental or other circumstances.

The asylum legal system of the EU is still evolving within a dynamic framework, in which one of the main points seems to be the 'dialogue between courts'. This dialogue, although not always easy, represents an indispensable tool for bridging the remaining gaps and facilitating the evolution of the regulatory framework, so that Europe may develop a single regional model based upon a 'truly common procedure for international protection which is efficient, fair and balanced', as the 2016 draft regulation requires.

The EU Charter of Fundamental Rights and Asylum Procedures in View of the Recent Developments in Greece Following Implementation of the EU-Turkey Statement

G. Spyropoulou*

1. *Introduction: Two Years on from the Implementation of the EU-Turkey Statement: Short Overview of Developments and Changes in Asylum Procedures and the Current Migration Situation in Greece*

The implementation of the EU-Turkey Statement produced substantial asylum reforms and policy changes. Over the past two years, continuous changes in asylum policy and in practices have called into question the extent to which the right to asylum – as enshrined in Article 18 of the EU Charter of Fundamental Rights (hereinafter EUC-

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FR) and in the 1951 Convention relating to the Status of Refugees – is guaranteed.

The asylum framework has undergone significant reforms, namely with regards to the examination of asylum applications on the Eastern Aegean islands. The adoption of Law 4375/2016 in April 2016 and its subsequent amendments in June 2016, March 2017 and August 2017 constitute four changes in the Greek asylum framework within a period of two years. Law 4375/2016 and its amendments, besides transposing the Asylum Procedures Directive, has introduced, among other changes, a fast-track border procedure applied on the Eastern Aegean islands with the use of the safe third country concept, EASO's involvement in the first and second instance asylum procedure, and shorter time frames, and has altered the composition of the Appeals Committees.[1] The majority of the aforementioned amendments have been challenged before the national and the European Courts.

Following implementation of the EU-Turkey Joint Statement of 18 March 2016, the Hellenic Police and the Asylum Service started imposing geographical restrictions on the movement of all those entering the country across the sea border without formal documents until completion of the asylum procedure or their removal from the country. The vast majority cannot leave the island they arrive at and remain there for several months up to more than a year under precarious conditions in poorly-equipped, overcrowded facilities. Apart from the consequences this policy has on the asylum-seeking population, it also leads to the disruption of social cohesion on the islands. Local societies are radicalizing against refugees. An increase in outbreaks of racist attitudes has been recorded by the Racist Violence Recording Network in its Annual Report for 2017, which explicitly states that "*The Network stresses the link between the rise in xeno-*

[1] Law 4375/2016 "on the Organization and functioning of the Asylum Service, Appeals Authority, Reception and Identification Service, establishment of General Secretariat for Reception, transposition of Directive 2013/32/EU of the European Parliament and of the Council 'on common procedures for granting and withdrawing international protection (recast)' (OJ L 180/29.6.2013), provisions on employment of beneficiaries of international protection" and other provisions. Government Gazette 51/A/3-4-2016, available at: http://www.refworld.org/docid/573ad4cb4.html [Amended by: Law 4399/2016, Government Gazette 117/A/22-6-2016, Law 4461/2017, Government Gazette 38/A/28-3-2017 and by Law 4485/2017, Government Gazette 114/A/4-8-2017]

phobic trends and racist behaviour and the overcrowding of refugees over a long period of time on the islands, as a result of the implementation of the EU-Turkey Statement".[2]

Despite the introduction of the state-run legal aid scheme at second instance, the number of lawyers and legal aid organizations operating on the islands remains insufficient to address the needs of applicants for international protection. Furthermore, different practices are implemented from region to region, most commonly the islands and the mainland, but at times the implementation of certain policies differs even among the Aegean islands. This makes the already complicated asylum procedure extremely convoluted and has led to frustration and anxiety among the people of concern. It also fails to guarantee respect for the applicants' rights.[3]

The changes in the composition of the Appeals Committees has been followed by a drop in recognition rates. In 2017, recognition rates remained low, far below the EU28 average: 1.84% were granted refugee status, 0.99% subsidiary protection, 3.54% were referred for humanitarian protection, and 93.63% were rejected.[4]

During these two years, detention has been re-introduced both on the islands and on the mainland. Third country nationals holding 'low asylum recognition' nationalities are detained upon arrival. This policy has increased the use of administrative detention.

In 2017, 29,718 persons arrived in Greece by sea, compared to 173,450 sea arrivals in 2016; an 83% decrease compared to 2016. Most arrivals were on the islands of Lesvos (12,700), Chios (6,600), and Samos (5,600). Most arrivals by sea in Greece in 2017 originated from the Syrian Arab Republic (42%), Iraq (20%) and Afghanistan (12%). 41% were men, 37% were children, out of which 13% were unaccompanied and separated children, and 22% were women.[5] The Asylum Service registered 51,091 asylum applications in 2016 and 58,661 asy-

[2] Racist Violence Recording Network, *Annual Report 2017*, Greece, available at: http://rvrn.org/wp-content/uploads/2018/03/Report_2017eng.pdf

[3] Joint Agency Briefing Paper: *Transitioning to a government-run refugee and migrant response in Greece*, December 2017, available at: https://rescue.app.box.com/s/vzfrvau723mfq9nxei770w8w073z4gmb

[4] AIDA Country Report Greece 2017, available at: http://www.asylumineurope.org/reports/country/greece

[5] UNHCR, Greece – Sea arrivals dashboard, December 2017, available at: http://bit.ly/2FmOjQD; UNHCR, Refugees and Migrants Arrivals to Europe in 2017, available at: https://data2.unhcr.org/en/documents/download/62023

lum applications in 2017. The number of applications submitted to the Asylum Service rose by 15%.[6]

This report provides a brief overview of the asylum reality in Greece two years on from the implementation of the EU-Turkey Statement with regards to asylum procedures and the rights enshrined in the EUCFR. It highlights the asylum reforms that took place during the aforementioned period and the most persistent fundamental rights challenges.

2. *Access to the Asylum Procedure*

2.1. *Developments and Challenges in Accessing Asylum Procedure*

Accessing the asylum procedure has been a chronic challenge and despite the positive developments in recent years that challenge is still persistent. The Asylum Service registered 51,091 asylum applications in 2016 and 58,661 asylum applications in 2017. The number of applications submitted to the Asylum Service rose by 15%.[7] The number of asylum applications both on the mainland and on the islands has consequently been disproportionate to the capacities of the administrative mechanism set up to handle it. Greece received 8.5% of the total number of applications submitted in the EU, while it was the country with the highest number of asylum seekers per capita among EU Member States.[8] It is worth mentioning that the Greek Asylum Service was established in June 2013 and does not have a long "institutional memory" of processing asylum applications, as do other EU Member States' authorities, and in addition it faced staff shortages and administrative barriers due to the financial straits faced by the country. In the past two years the Service's personnel have significantly increased in number and additional Regional Offices have been established. At the end of 2017, the Asylum Service operated at 22 locations throughout the country, compared to 17 locations at the end of 2016.[9] However, exces-

[6] AIDA Country Report Greece 2016 and 2017, available at: http://www.asylumineurope.org/reports/country/greece

[7] AIDA Country Report Greece 2016 and 2017, available at: http://www.asylumineurope.org/reports/country/greece

[8] Eurostat, *Asylum in the EU Member States*, 47/2018, 20 March 2018, available at: https://bit.ly/2u9hZMU

[9] Asylum Service, *The work of the Asylum Service in 2017*, Greece, 25 January 2018, available at: http://bit.ly/2BsCDGd

sive delays during the registration and examination of the asylum applications have been observed both on the mainland and on the islands.

With regards to access to the asylum procedure on the mainland, the option of submitting an asylum application by physically turning up at Regional Asylum Offices is extremely limited in practice, as the vast majority of applicants are referred to the problematic Skype procedure, which was launched by the Asylum Service in 2015.[10] The Asylum Service launched, in 2015, the Skype procedure, as a technical solution for the issue of access to scheduling appointments to register asylum applications, prior to appearing before the Asylum Service; a procedure which is still implemented to this day. However, this system has exhibited shortcomings in practice as persons have reported unsuccessful attempts to book an appointment via Skype. This is highly problematic since persons in need of international protection who do not manage to lodge their application are not protected from arrest, detention and deportation. As noted by UNHCR, the Skype appointment process *"presents serious deficiencies due to limited capacity and availability of interpretation but also because applicants cannot always have access to the internet"*.[11]

As underlined by the Greek Ombudsman in his special report "Migration flows and refugee protection: Administrative challenges and human rights issues", this restrictive system for the receipt of asylum applications appears to be in contrast with the principle of universal, continuous and unhindered access to the asylum procedure, insofar as the system of registration via Skype cannot respond to a large number of calls. In addition, it poses risks for fundamental rights, because during the period between the scheduling of registration via Skype and the final submission of the asylum application there is a very real risk of "potential asylum seekers" being arrested, detained or returned.[12]

In vulnerable, urgent cases, the Asylum Service implements a flexible system for registration and examination. The Asylum Service's rel-

[10] Aitima NGO, *Asylum seekers on hold: Aspects of the asylum procedure in Greece*, Greece April 2017, available at: http://www.aitima.gr/images/pdf/onholdenglishreport.pdf

[11] UNHCR, *Explanatory Memorandum pertaining to UNHCR's submission to the Committee of Ministers of the Council of Europe on developments in the management of asylum and reception in Greece*, May 2017, available at: http://bit.ly/2BbSrAA

[12] Greek Ombudsman's Special Report, *Migration flows and refugee protection: Administrative challenges and human rights issues*, Greece April 2017, available at: https://www.synigoros.gr/?i=human-rights.en.recentinterventions.434107

evant department accepts referrals from civil society organizations and usually registers the applicants within a period of 15-30 days.[13]

Following the closure of the Western Balkan route, the vast number of applicants for international protection in mainland Greece led to the Asylum Service being placed under significant pressure. Since it was practically impossible to register and examine all the applications in an appropriate manner, the Asylum Service launched the "pre-registration exercise". From 8 June to 30 July 2016, the Asylum Service with the help of UNHCR and EASO pre-registered 27,592 applications which would later be fully registered.[14] The pre-registration exercise granted applicants a card valid for one year, which constituted legal proof of residence in the country, and provided its holders with all the rights enjoyed by asylum seekers, apart from the right to employment. However, the significant delays to family reunification procedures under the Dublin provisions, as well as delays for eligible relocation applicants should be noted as drawbacks.[15]

The implementation of the EU-Turkey Statement also led to a significant increase in persons who arrived on the Eastern Aegean islands after 20 March 2016, wishing to apply for asylum and remaining on the island of arrival under geographical restrictions. Following the adoption of the EU-Turkey Statement, the registration and examination of asylum applications was prioritized based on nationality. More specifically, the applications of Syrian nationals and nationals of countries with a low-recognition rate below 25% were prioritized, leading to a discriminatory practice which created tensions and insecurity between the third-country nationals' communities. For an extensive period, persons belonging to nationalities other than the aforementioned have not had effective access to the asylum procedure, or have had access subject to undue delays, exceeding 6 months. However, as of 2017 the Asylum Service started registering and examining asylum applications for all nationalities.

[13] Aitima NGO, *Asylum seekers on hold: Aspects of the asylum procedure in Greece*, Greece April 2017, available at: http://www.aitima.gr/images/pdf/onholdenglishreport.pdf

[14] Greek Asylum Service, Pre-registration data analysis 8 June-30 July 2016, available at: http://asylo.gov.gr/en/wp-content/uploads/2016/08/Preregistration-data_template_5_EN_EXTERNAL.pdf

[15] AITIMA NGO, *Asylum seekers on hold: Aspects of the asylum procedure in Greece*, Greece April 2017, available at: http://www.aitima.gr/images/pdf/onholdenglishreport.pdf

2.2. *Fast-Track Border Procedure: Examination of Asylum Claims based on the Safe Third Country Concept*

According to Article 60 (4) of Law 4375/2016, in case of third country nationals or stateless persons arriving in large numbers and applying for international protection at the border or at airport / port transit zones or while they remain in Reception and Identification Centres, a special border procedure is to apply by way of exception. Better known as the fast-track border procedure, it introduces significant changes to the border procedure. The registration of asylum applications, notification of decisions and other procedural documents, as well as receipt of appeals can now be done by staff of the Hellenic Police or the Armed Forces. Interviews with asylum seekers may also be conducted by personnel deployed by EASO. Furthermore, extremely short deadlines apply; the asylum procedure is to be concluded in no more than 2 weeks.

The fast-track border procedure is applied to applicants subject to the EU-Turkey Statement, i.e. applicants arriving on the islands of the Eastern Aegean after 20 March 2016, and takes place in the Reception and Identification Centres (RIC), where hotspots are established (Lesvos, Chios, Samos, Leros, Kos) and before the Regional Asylum Office of Rhodes. Applications by Syrian asylum seekers are examined on their admissibility on the basis of the Safe Third Country concept. Applications by non-Syrian asylum seekers from countries with a recognition rate below 25% are examined only on their merits. Applications by non-Syrian asylum seekers from countries with a recognition rate over 25% are examined on both their admissibility and merits ("merged procedure").[16] Individuals falling under Articles 8 to 11 of Regulation (EU) No 604/2013 of the Parliament and the Council as well as vulnerable persons under Article 14(8) of Law 4375/2016 are exempted from the procedures described above.

It is worth mentioning that the concept of the "safe third country" did not apply before the implementation of the EU-Turkey Statement. The introduction and the implementation of the fast-track procedure -a measure that was initially established as exceptional- objectively demonstrates the intrinsic disparities and the inconsistencies that prevail in the asylum procedure in Greece.

The impact of the EU-Turkey Statement has, inter alia, revealed a de facto dichotomy in the asylum procedures applied in Greece. To

[16] AIDA Country report Greece, available at: http://www.asylumineurope.org/reports/country/greece

this end, contrary to Articles 20 and 21 of the EUCFR, applications for international protection are examined differently based on a person's nationality, date and place of entry into the territory.[17]

On September 2017, the Supreme Administrative Court of Greece, the Council of State in its Plenary Session issued two rulings concerning applications for annulment brought by two Syrian nationals on the application of the safe third country concept in respect of Turkey.[18] The applicants requested the annulment of regulatory and individual administrative acts rejecting their applications for international protection without an examination on the merits, as the competent administrative authorities recognized that Turkey fulfils the requirements of a "safe third country" under Article 56 of Law 4375/2016 (Article 38 of Directive 2013/32/EU). "Due to the importance of the issue concerned" the cases were referred to the plenary session of the Council of State by Judgments No. 445/2017 and 447/2017 of Chamber IV. The Council of State rejected the applications and agreed with the Independent Appeals Committee that the applicants' claims were inadmissible based on the "safe third country" concept.[19] It also refused by a narrow majority (13 votes to 12) to refer a preliminary question to the Court of Justice of the European Union (CJEU) on the interpretation of Article 38 of the recast Asylum Procedures Directive, including the issue of the characterization as a "safe third country" of a country that has ratified the Geneva Convention with a geographical limitation, and, instead, proceeded with the interpretation of the provision concerned. As stated by the National Commission for Human Rights, "*despite the fact that the obligation to protect human rights must be fulfilled effectively in practice and not in theory, as well as the fact that domestic legislation is not in principle capable of ensuring adequate protection, as long as its effective application is not secured, the Court did not consider e.g. the fact that the exercise of the right to work of Syrian refugees who live in Turkey seems to be completely inadequate, because, according to credible statistical data, the percentage of Syrians who have acquired a work permit is extremely low*".[20]

[17] The Fast-Track Border Procedure is only applied on people arriving on the Eastern Aegean islands and Rhodes.

[18] Greece, Council of State, Decisions 2347/2017 and 2348/2017 (Plenary Session), 22 September 2017

[19] Council of State, Decision 2347/2017, 22 September 2017, para 63

[20] National Commission on Human Rights, Report on the condition of the reception and asylum system in Greece, 22 December 2017, available at: http://bit.ly/2nkf1P0

The case of another Syrian applicant for international protection, whose application was rejected on the basis of an inadmissibility decision, is pending before the ECtHR. The case has been prioritized under Rule 41 of the Rules of the Court, to assess whether the applicant would face degrading treatment in the event of return to Turkey, particularly in relation to his ethnic origin, religion and state of health.[21] The AIRE Centre (Advice on Individual Rights in Europe), DCR (Dutch Council for Refugees), ECRE (European Council on Refugees and Exiles) and ICJ (International Commission of Jurists), Gisti and the FIDH (International Federation for Human Rights) submitted Third Party Interventions on the case before the ECtHR.[22]

2.3. *The Issue of EASO Personnel Conducting Interviews at First Instance*

Following the establishment of hotspots on the Eastern Aegean islands and the implementation of the EU-Turkey Statement, EASO's participation, providing operational support to the Greek Asylum Service, significantly expanded. According to the EASO Special Operating Plan for Greece for 2017, which set out the conditions and terms for EASO's participation in asylum procedures in Greece, EASO could be involved in conducting interviews in different asylum procedures, drafting opinions and recommending decisions to the Asylum Service throughout 2017.[23]

Since April 2016, EASO has been conducting admissibility interviews under the fast-track border procedure, initially only for Syrian nationals and subsequently for nationalities with recognition rates over 25%, based on the Eurostat quarterly statistics. According to Article 60(4)(b) of Law 4375/2016, as amended by Law 4399/2016, the asylum interview at first instance may be conducted by personnel made available by EASO.[24] EASO personnel are also conducting the vulnerability

[21] ECtHR, J.B. v. Greece, Appl. No 54796/16, Communicated on 18 May 2017, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-174322%22]}

[22] AIRE Centre, ECRE, ICJ and Dutch Council for Refugees, Third party intervention in J.B. v. Greece, 4 October 2017, available at: http://bit.ly/2qSRxoU; Gisti and FIDH, Third part intervention in J.B. v. Greece, 20 September 2017, available at: http://bit.ly/2DFZ0h8

[23] EASO Special Operating Plan to Greece, December 2016, available at: https://www.easo.europa.eu/sites/default/files/EASO%20Special%20Operating%20Plan%20to%20Greece%202017_%2014122016.pdf

[24] Law 4399/2016, Gazette 117/A/22-6-2016, available at: http://www.asylumineurope.org/sites/default/files/resources/n_4399.2016.pdf

assessment, a procedure which covers the gap in unidentified vulnerabilities faced by asylum seekers, when they arise or when stated during the interview.

The role of EASO in the first instance asylum procedure has been highly criticized by legal aid organizations and academics, in particular as regards the lawfulness of its involvement and the quality of the support it has being providing. According to HIAS' latest report on EASO's operations in Greece "*EASO's Operations in the Greek hotpots is going beyond the mandate envisaged in the founding regulation of the Agency and fails to meet core quality standards. (…) Furthermore, the significant shortcomings in the quality of the interviews and of the subsequent Opinions, product of training, direct supervision and constant monitoring, raise serious concerns in relation to the Agency's capacity to process applications for international protection, in respect of fairness and neutrality*".[25] The experts deployed by EASO conduct the interview and provide their recommendations to the Greek Asylum Service personnel. The Greek Asylum Service then issues its decision based on the recommendation provided. EASO deployed personnel conduct the interview and draft the recommendation in English. Holding the interview in English makes it challenging for Greek lawyers to provide legal aid and represent the best interests of an asylum seeker in a language they are not native speakers of.

In Dr. Evangelia Tsourdi's assessment of the agency's level of interaction with the Greek administration: "*The administrative reality is that this moves beyond assisted processing, into the realm of joint processing. That is to say, although the asylum decision-maker at first instance according to both EU and national law is the Greek Asylum Service, de facto this decision is based on a recommendation from, and facts ascertained during, an interview conducted by experts deployed by an EU agency. Hence, this is morphing de facto into a composite process*".[26]

In this regard, EASO's participation in the first instance asylum procedure is under examination by the European Ombudsman, following

[25] HIAS Greece, *EASO's Operation on the Greek Hotspots An overlooked consequence of the EU-Turkey Deal*, Greece March 2018, available at: https://www.hias.org/sites/default/files/hias_greece_report_easo.pdf

[26] Tsourdi, *Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office*, 2016, available at: http://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2016_3_15_Agenda_Evangelia_Lilian_Tsourdi.pdf

a complaint submitted by the European Centre for Constitutional and Human Rights (ECCHR) with the support of Brot für die Welt in April 2017. On 1 June the Ombudsman declared the complaint admissible.[27] The complaint argues that EASO's role in the decision-making process amounts to maladministration and asks the European Ombudsman to open an inquiry. ECCHR requests the suspension of EASO's involvement in admissibility interviews and the limitation of its activities to conduct that is not in breach of EU law.

According to ECCHR's analysis "*EASO not only violates its own guidelines for conducting interviews, but its involvement in the procedure goes beyond the scope of its powers under EU law. Consequently, applicants for international protection are deprived of a fair hearing and denied the chance to present and substantiate their asylum case".* The fact that the vulnerability assessment as well as the issuing of a recommendation towards the Greek Asylum Service is done by EASO personnel is not founded in any provision of Greek law and, therefore, lacks a legal basis.

2.4. *The Right to Legal Assistance, Legal Aid and Legal Representation in the First Instance Procedure*

By law, legal assistance is only mandatory in the second instance asylum procedure and there is no state-funded free legal aid programme. Only UNHCR and non-governmental organizations provide free legal assistance and counselling to asylum seekers at first instance. However, taking into consideration that some 50,000 third-country nationals remained in Greece at the end of January 2018, while 36,340 first instance asylum applications and 7,481 appeals were pending at the end of 2017, the number of people of concern and their needs far exceed the capacities of NGOs, especially on the islands of the Eastern Aegean, where a great number of people remain subject to geographical restrictions.[28]

According to FRA's recent publication "Migration to the EU: five persistent challenges", there was a lack of legal information available to

[27] European Ombudsperson, information on the complaint available at: https://www.ecchr.eu/en/international-crimes-and-accountability/migration/greek-hotspots.html?file=tl_files/Dokumente/Universelle%20Justiz/CaseReport_Greece_EASO_2017April.pdf

[28] AIDA Country report Greece, available at: http://www.asylumineurope.org/reports/country/greece

asylum seekers in Greece, and in particular on the islands. Legal assistance at first instance examinations of asylum requests was limited and provided exclusively by civil society organizations.[29]

The Greek Legal Aid Task Force consisting of 14 NGOs issued a policy paper on persisting challenges concerning legal assistance and legal aid in all aspects of the asylum procedure, and provided its recommendations. The Task Force states that the applicants are most often left to navigate the complicated asylum system themselves often without sufficient information, while the provision of legal aid is patchy due to numerous administrative, legislative and practical obstacles.[30]

By January 2018, the Greek Council for Refugees, Ecumenical Refugee Programme and METAdrasi had provided legal assistance in the form of counselling and representation to nearly 11,450 asylum-seekers and beneficiaries of international protection at hotspots, in urban areas as well as in detention. Legal aid covers asylum procedures, family reunification, child protection, protection of SGBV survivors, other relevant administrative procedures and access to rights.[31]

2.5. *Imposition of Geographical Restrictions on the People Arriving on the Eastern Aegean Islands*

Shortly after the EU-Turkey Statement of 18 March 2016 came into effect, the Police and the Asylum Service started imposing restrictions on the movement of people arriving in the Greek territory through the blue borders. People who enter the country through the blue borders and apply for international protection on the Eastern Aegean islands (Samos, Lesvos, Chios, Kos) and Rhodes are subjected to restrictions on freedom of movement. The vast majority cannot leave the island of arrival. In that respect, they remain for anything from several months up to more than a year in precarious conditions in poorly-equipped, overcrowded spaces. In practice, geographical restrictions are imposed

[29] EU Agency for Fundamental Rights (FRA), Migration to the EU: five persistent challenges, February 2018, available at:http://fra.europa.eu/en/publication/2018/five-persistent-migration-challenges

[30] Legal Aid Actors Task Force, *Legal Aid (Individual Legal Representation in Asylum/Refugee Context) for Migrants, Asylum Seekers and Refugees in Greece: Challenges and Barriers*, Greece January 2018, available at: https://data2.unhcr.org/en/documents/download/61989

[31] UNHCR, Greece Fact Sheet, 1-31 January 2018, available at: http://bit.ly/2oAeQzB

in the majority of cases, irrespective of the applicant's vulnerability status, even in cases where the conditions under Dublin III are fulfilled, i.e. even if the applicant has the right to family reunification.[32]

The decision[33] which imposes geographical restrictions on a specific island is applied indiscriminately, without any prior individual assessment or proportionality test. It is also imposed indefinitely, with no maximum time limit provided by law and with no effective remedy in place.[34] Furthermore, when implemented en masse, this measure violates the principle of proportionality. The principle of proportionality is expressly enshrined in Article 25 (2) of the Greek Constitution, according to which "*Restrictions of any kind which, according to the Constitution, may be imposed upon these rights, should be provided either directly by the Constitution or by statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality".*

According to Article 7 of Directive 2013/33/EU laying down the standards for the reception of applicants for international protection (recast) and concerning their residence and freedom of movement: "*2. Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection".* According to Article 41 of Law 4375/2016 which transposes Article 12 of Directive 2013/33/EU, the applicant's freedom of movement may be restricted to a part of the Greek territory following a Decision of the Director of the Asylum Service. On the basis of the above provision, the Director of the Asylum Service may impose a restriction on the movement of applicants for international protection in a particular part of the Greek territory. However, the Asylum Service is not the competent authority for maintaining the public order and implementing these kind measures. In principle, the Asylum Service lacks specific authorization to issue such decisions.

[32] MSF, *A dramatic deterioration for asylum seekers on Lesvos*, Greece July 2017, available at: http://bit.ly/2vCJzAF

[33] 10464/31-5-2017 (GG b 1977/7-6-2017) decision "Restriction of movement of applicants for international protection", available in Greek at: http://www.et.gr/idocs-nph/pdfimageSummaryviewer.html?args=sppFfdN7IQP5_cc--m0e19e4TovOcNyIUbZs5U7JyVO8rzSZFxgk-efEyKjbO6gAkAYi3ORfmarHlTZ0OcIYKwsOmdskFMTx75h8iB-tM3_vKMSuwFT8g8jMbcMCublFfxlNP8qam0ZP7cC4-3oYABPIpmfJ-Xl5NfSe2q0fYpxcftnL3d5jug..

[34] AIDA Country report Greece, available at: http://www.asylumineurope.org/reports/country/greece

Given that the fundamental rights of liberty and security of persons and freedom of movement are enshrined in Articles 1 and 6 of the EU-CFR, any restriction of these rights must be imposed after a necessity and proportionality evaluation of this restriction as to its purpose. In addition, Article 26 of the Geneva Convention provides for the freedom of movement and the right to choose the place of residence. Article 31(2) of the Geneva Convention further provides that only specific restrictive measures can be imposed on asylum seekers.

National and international organizations have repeatedly urged the Greek authorities to end this policy and refrain from indiscriminately imposing this measure.[35]

However, as a result of the abysmal living conditions on the islands, many asylum seekers ignore this policy and find irregular ways to reach the mainland, before receiving the decision on their asylum application. After reaching the mainland any further access to the asylum procedure is denied. More specifically, if an applicant does not appear before the island's Regional Asylum Office during the specified period with regards to the asylum procedure (i.e. registration, holding of the interview, card renewal), the asylum request case file is closed. In order for the asylum application to be further considered, the applicant must return to the island of arrival at his/her own expense and contact the competent Regional Asylum Office. Remaining on the mainland means that the applicant has no access to the asylum procedure or to all the services and facilities provided for asylum seekers (housing, cash assistance, health aid). Moreover, people tend not to return to the island due to financial reasons or out of fear of arrest and prosecution under Article 182 of the Criminal Code, concerning non-compliance with restrictive measures.[36]

The Greek Council for Refugees and the Bar Associations of Lesvos, Rhodes, Chios, Leros, Kos and Samos have filed an application be-

[35] Joint letter of 19 organizations to Greek Prime Minister concerning the conditions for asylum seekers on the Aegean islands, October 2017, available at: http://www.hlhr.gr/en/joint-letter-19-organizations-greek-prime-minister-conditions-asylum-seekers-aegean-islands/

[36] This practice is reflected in the judgment No. 2627/2017 of the Thessaloniki Court of First Instance, which acquitted asylum seekers who violated the geographical restriction, claiming that their actions were not illegal, on the ground that the damage caused through this violation of the geographical restrictions was significantly inferior to what was at stake, i.e. their health and safety. More information available at: https://www.solidaritynow.org/en/geographical_restrictions/

fore the Council of State to annul the Asylum Service's decision, which imposed restrictions on the movement of applicants for international protection on the islands of the Eastern Aegean.[37] The application was examined on 27 February 2018 before the Council of State. The decision, which was issued on 17 April 2018, annulled the Asylum Service Director Decision which imposed the geographical restriction.[38] The Court said that the Decision of the Asylum Service Director does not set out legal grounds for the imposition of restrictions on asylum seekers' freedom of movement, and deduced no serious reasons of public interest to justify the necessity of the restriction in accordance with Article 31(2) of the Geneva Convention. However, the ruling was issued without retroactive effect and does not apply to people who arrived on the islands prior to the decision. On 20 April 2018 the "newly appointed" Director of the Asylum Service issued a new decision reinstating geographical restrictions to newly arrived asylum seekers.[39]

3. *The Right to an Effective Remedy*

3.1. *Appeals Committee Composition: The Initial Composition and the Change through a Rapid Legal Amendment Following Implementation of the EU-Turkey Statement*

The Appeals Authority was re-established by Law 4375/2016, after being inactive since September 2015. The Appeals Committees were competent to examine, decide upon and issue quasi-judicial decisions on appeals against decisions issued by the Asylum Service. The Committees fall under the Appeals Authority, an autonomous Service within the Ministry of Interior and Administrative Reconstruction, report-

[37] Greek Council for Refugees, Press release on the application for annulment regarding the geographical restriction on the Aegean islands (in Greek), October 2017, available at: http://gcr.gr/index.php/el/news/press-releases-announcements/item/741-to-esp-katathetei-aitisi-akyrosis-tou-periorismoy-kykloforias-sta-nisia-tou-an-aigaiou.

[38] Greece, Council of State Decision 805/2018, 18 April 2018.

[39] Decision οικ. 8269/2018 of the Director of the Asylum Service on restriction of movement of applicants for international protection Gazette B/1366/20.04.2018, available at: http://www.et.gr/idocs-nph/pdfimageSummaryviewer.html?args=sppFfdN7IQP5_cc--m0e183Yj8syUyOHzioKt5-s0HW8rzSZFxgk-aQ8stXR4YPpkAYi3ORfmarM6Ym_fEOTFj5-dYQCMjJv75h8iB-tM3_vKMSuwFT8g8jMbcMCublFfxlNP8qam0a2Rw1H4nQiBgNAQ_djWvLJ5w35AjY_fYV7qESEgxS4rg.

ing directly to the Minister. The Committees were to be composed of holders of a university degree in Law, Political or Social Sciences or the Humanities with experience in the fields of international protection, human rights or international or administrative law.

In the meantime, transitional arrangements were introduced in Article 80(1) and (2) of Law 4375/2016, providing that until the new Appeals Committees were set up, appeals submitted after the enactment of Law 4375/2016 would be examined by the previous Appeals Committees established under Presidential Decree 114/2010. The Appeals Committees established under Presidential Decree 114/2010 were, until then, competent to examine appeals at second instance that were submitted to the police authorities, before the Asylum Service was established in 2013. The three-person Committees were comprised of one government representative acting as president, one representative appointed by the UNHCR and one human rights expert drawn from a list compiled by the National Commission for Human Rights.

Two months after the enactment of Law 4375/2016, which designated the Appeals Committees as competent to examine asylum applications at second instance, a fast-track amendment proposed modifications to the composition of these Committees. The new Committees were composed of two administrative judges and an appointed UNHCR representative. The amendment passed. However, it was severely criticized on the one hand due to its hasty introduction without prior consultation and on the other hand because it raised issues of compatibility with the Constitution, since it entailed the involvement of active judges in an administrative decision-making body. The Greek government supported the reform on the basis that it reinforced independence and the right to an effective remedy, arguing that this brings the asylum procedure at second instance closer to European safeguards. The Independent Appeals Committees are today the body competent to examine appeals against first instance decisions issued by the Greek Asylum Service. The Independent Appeals Committees are composed of two judges serving in the administrative courts, appointed by the General Commissioner of the Administrative Courts, and one UNHCR representative. A representative from a list compiled by the National Commission for Human Rights may take part in the Committees if UNHCR is not in a position to appoint a member.[40]

[40] Article 5(3) of Law 4375/2016, as amended by Article 86(3) of Law 4399/2016.

The speed with which the change in the composition of these Committees was proposed and executed provoked reactions from legal organizations and civil society. The National Commission for Human Rights, the independent advisory body of the Greek State on matters of protecting rights issued a public statement questioning the constitutionality of the new composition of the Independent Appeals Committees.[41] The Commission also expressed its grave concerns about the fact that the amendments to Law 4375/2016 on the composition of the Committees coincided with the issuance of positive decisions of the Appeal Committees under Presidential Decree 114/2010, where, after individual examination, it was ruled that Turkey was not a safe country for the respective applicants.[42] It is worth noting that 18 members of the Appeals Committees under Presidential Decree 114/2010 complained in a written statement that attempts have been made to interfere with the independence of the Appeals Committees.[43]

The amendments to the composition of the Appeals Committees were contested before the Council of State regarding their constitutionality. The Group of Lawyers for the Rights of Migrants and Refugees and the Greek Council for Refugees submitted two applications for annulment, on the basis of the constitutional ban on the participation of judges in administrative bodies. The specific provision of the Constitution contained in Article 89(3) ensures the functional and personal independence of judges. In addition, the organizations argued that the same administrative judges who decide on the appeal committees are also sitting in the Administrative Appeals Courts that review those rulings, which raise issues of independence and impartiality in the administrative courts themselves.[44]

[41] National Commission for Human Rights, Public Statement on the amendment modifying the composition of the Independent Appeals Committees, 17 June 2016 (in Greek), available at:http://nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/Dimosia%20dilwsi%20EEDA.pdf

[42] EDAL, Greece: The Appeals Committee issues decisions on Turkey as a Safe Third Country, Information available at: http://www.asylumlawdatabase.eu/en/content/greece-appeals-committee-issues-decisions-turkey-safe-third-country

[43] Press Project, Letter of members of the Appeals Committees, 18 June 2016, available in Greek: https://www.thepressproject.gr/article/96546/Epistoli-melon-Epitropis-Prosfugon

[44] Group of Lawyers for the Rights of Migrants, Press Release on the application for annulment before the Council of State concerning the composition of the Independent Appeals Authorities, available at: http://omadadikigorwn.blogspot.gr/2016/09/blog-post.html#more

Judgments No. 1237 and 1238/2017 of the Plenary of the Council of the State ruled that the establishment and composition of the Independent Appeals Committees is constitutional. The court also found that the fact that judges participating in these committees may later sit in administrative courts of appeal does not violate the principle of impartiality. It also ruled that the provision allowing judges participating in these committees to be selected by the General Commissioner of the Administrative Courts instead of by the judicial council does not violate Article 90 of the Constitution.[45]

The Plenary of the Council of State, in judgments No. 2347/2017 and 2348/2017, concluded on the issue of the compatibility to the Constitution, that the Independent Appeals Committees constitute a judicial body within the meaning of Article 86(2) of the Constitution; choosing not to apply its previous well-established relevant case law, according to which these Committees do not constitute a judicial body, given the fact that they decide administrative recourses against administrative acts without elements similar to the performance of a judicial task or exercise of competence of a judicial body, such as the publicity of the hearings and the obligation to guarantee adversarial proceedings.[46]

3.2. *The Right to a Personal Interview*

An applicant's right to be heard is a basic procedural safeguard, as it secures the effective protection of the right to asylum and the prohibition of refoulement. It allows the applicant the possibility of a detailed presentation of the case and his motivation for seeking international protection before the adoption of any decision liable to adversely affect his interests.

Since the establishment of the Appeals Committees under Presidential Decree 114/2010, the examination procedure for asylum applications at second instance has been gradually transformed from an oral into a written one, allowing for the possibility of an oral examination only under exceptional circumstances. The reform of Law 4375/2016 by the provisions introduced by Law 4399/2016, with regards to the

[45] https://www.lawspot.gr/nomika-nea/symfoni-me-syntagma-i-symmetohi-dikaston-stis-anexartites-epitropes-prosfygon-ste-olom

[46] National Commission for Human Rights, Report on the condition of reception and asylum system in Greece, December 2017, available at: http://www.nchr.gr/images/English_Site/PROSFYGES/GNCHR_Report_Asylum_system_final.pdf

composition of the Independent Appeals Authorities further narrowed the right of the appellant to an oral hearing before the Appeals Committees. The amendment has removed the option for the appellant to request a personal hearing before the Appeals Committees at least two days before the appeal. The appellant may appear personally before the Committees only if the latter deem it appropriate. The National Commission for Human Rights questioned the constitutionality of the new composition of the Appeals Committees and whether the new law complied with the right to an effective remedy, arguing that removing the possibility for the appellant to request a personal hearing before the Appeals Committees is a disproportionate restriction of the right to be heard, which is not justified by any specific overriding reason.[47]

According to Article 62(1) Law 4375/2016 the procedure before the Independent Appeals Committees is written and the appeal is discussed by the Committees based on the information in the case file. The Independent Appeals Committee calls for an oral hearing with the applicant when: a. the appeal concerns the revocation of international protection status, b. questions or doubts have been raised about the comprehensiveness of the interview held during the first instance examination, c. the applicant submitted significant new facts, d. the case is very complicated.

Taking into account the fact that the legal assistance provided during the first instance examination of the asylum application is extremely limited, combined with a complicated procedure such as the fast-track border procedure for the people applying on the islands, and the non-existent right to request an oral hearing, their right to an effective remedy is minimized.

The Plenary of the Council of State in judgment No. 2347/2017 examined and dismissed the possible violation of the right to be heard and the right to an effective remedy, on the ground that the obligation to hear the appellant under Article 14(1) of the recast Asylum Procedures Directive binds the competent asylum authority at first instance but does not apply to appeal procedures. The Court added that Article 46 of the recast Asylum Procedures Directive, read in the light of Article 47 of the EUCFR, does not preclude a court or tribunal from reject-

[47] National Commission for Human Rights, Public Statement on the amendment modifying the composition of the Independent Appeals Committees, 17 June 2016 (in Greek) available at: http://nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/Dimosia%20dilwsi%20EEDA.pdf

ing an application as inadmissible at second instance without hearing the appellant, when the facts leave no doubt as to the fair nature of the first instance decision, on condition: (a) that the appellant has had the opportunity of a personal interview at first instance and that the transcript of that interview is included in the case file on the one hand; and (b) that the authority may request a hearing if deemed necessary to exercise its functions.

In any case, even if the appellant had the right to a personal interview at second instance, its implementation would be extremely difficult for asylum applicants residing on the Eastern Aegean islands, since the Appeals Committees are located solely in Athens and the appellants are restricted from leaving the island of arrival due to the imposition of geographical restrictions. In this case, the oral interview could only take place through teleconference. In conclusion, the transformation of the second instance procedure into a written one does not provide the necessary guarantees for an in-depth assessment, in light of the abovementioned quality issues arising with regards to the first instance procedure.

3.3. *The Right to Legal Assistance, Legal Aid and Legal Representation in the Second Instance Procedure*

There is a lack of legal information provided to asylum seekers in Greece, particularly on the islands.[48] According to a Joint Agency Briefing Note by IRC, OXFAM and NRC, access to reliable information is extremely limited and the few lawyers who are available to support them have an excessive case load, while legal advice in the second instance procedure, at the appeal stage, is often provided too late.[49]

With regards to the provision of legal aid, since the procedure is, in principle, in writing, legal aid provision is required in order to prepare the appeal document per se and submit the necessary documents that will include the reasons for appealing the negative decision and the shortcomings of the procedure, in order to utilize the right to an effective remedy successfully, there must be effective access to a lawyer.

[48] AITIMA NGO, *Asylum seekers on hold: Aspects of the asylum procedure in Greece*, Greece April 2017, available at: http://www.aitima.gr/images/pdf/onholdenglishreport.pdf

[49] Joint Agency Briefing Note, March 2017, available at: https://www.rescue-uk.org/sites/default/files/document/1359/jointagencybriefingnote-eu-turkeystatement-final16march-newtitle.pdf

Article 44(2) of Law 4375/2016, which transposes Articles 19 and 24 of the Asylum Procedures Directive (Recast), provides that "*in procedures before the Appeals Authority, applicants shall be provided with free legal assistance*". The Ministerial Decision establishing free legal assistance in the second instance asylum procedure and outlining its modalities was issued on September 2016.[50]

Free legal assistance is available to applicants who appeal before the Appeals Committees against a negative decision on their asylum claim. According to the Ministerial Decision, the fee for providing legal aid to applicants for international protection is set at €80 per appeal. Time limits for requesting free legal assistance differ based on which procedure appellants fall under. In particular, asylum seekers whose asylum application is examined based on the regular procedure may request free legal assistance at least 10 days before the examination of their appeal; asylum seekers who fall under the accelerated procedure may request free legal assistance at least 5 days before the examination of the appeal and asylum seekers/appellants in the Reception and Identification Centres may request free legal assistance at the time they lodge the appeal. A registry of legal practitioners has been established by the Asylum Service.

Prior to the entry into force of the free legal aid scheme, a UNHCR project was implemented and is being continued by the Greek legal aid organizations Metadrasi and Greek Council for Refugees. Legal assistance at the appeal stage of the asylum procedure in the context of UNHCR's Memorandum of Cooperation with the Ministry of Migration Policy was provided to 3,600 appellants in 2017.[51] Additional programmes from other NGOs were also providing free legal assistance. According to the Greek Legal Aid Task Force policy brief on challenges and barriers related to legal aid for migrants, refugees and asylum seekers in Greece, the state-run legal aid scheme does not cover the population in need of legal assistance in the second instance asylum procedure.[52] The state-run legal aid scheme only started operating on

[50] Ministerial Decision 12205/2016 on provision of legal assistance to applicants for international protection, Government Gazette 2864/B/9-9-2016, available at: http://asylo.gov.gr/wp-content/uploads/2016/10/apofasi-12205-9.9.16-FEK-2864.pdf

[51] UNHCR, Fact Sheet, 1-31January 2018, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/62216.pdf

[52] Legal Aid Task Force policy brief on challenges and barriers related to legal aid for migrants, refugees and asylum seekers in Greece, available at: http://www.hlhr.gr/en/joint-announcement-legal-aid-migrants-asylum-seekers-refugees-greece/

21 September 2017 and consists of a total of 21 lawyers. By the end of 2017 legal assistance had been provided to 941 appellants, while the total number of appeals lodged in 2017 was 11,632.[53]

The situation is even more challenging for the asylum seekers on the islands who are faced with complex administrative procedures. The number of lawyers and legal aid organizations operating on the islands remains insufficient to address the needs of asylum seekers. Lawyers on the islands mostly take on the cases of vulnerable people and unaccompanied minors based on their capacity. People in detention have even more difficulty accessing information about their rights and legal assistance.

3.4. *Restrictions on the Right to Lodge an Appeal*

In April 2017, in an attempt to limit the number of people who appeal and scale up the Assisted Voluntary Return and Reintegration (AVRR) programme on the islands, the Ministry of Migration Policy announced a significant change in practice concerning the right of asylum seekers to take part in IOM's programme after lodging an appeal. The decision followed the direction set by the recommendations in the European Commission's and Greek Government's Joint Action Plan on the EU – Turkey Statement of 18 March 2016 with regards to scaling up the Assisted Voluntary Return and Reintegration (AVRR) programme on the islands.[54]

This practice foresees that after receiving a negative first instance decision, asylum seekers are given two options: either make use of their right to appeal within 5 days or waive their right to appeal and participate in IOM's AVRR programme. If they choose to appeal the negative first instance decision, they lose the opportunity to take part in the AVRR programme if their appeal is rejected, while if they choose to participate in the AVRR programme they are forced to forego their right to appeal. This procedure is implemented only on the five Eastern Aegean islands.

[53] Greek Asylum Service data, available at: https://www.facebook.com/481351218685655/photos/a.578873295600113.1073741828.481351218685655/951615948325844/?type=3&theater.

[54] Joint action plan on the implementation of the EU-Turkey Statement, available at: https://ec.europa.eu/commission/sites/beta-political/files/december2016-action-plan-migration-crisis-management_en.pdf

IOM's AVRR programme provides migrants who cannot or no longer wish to remain in a host country with the support to return and reintegrate into their country of origin. According to IOM, "*The decision about returning back home is 100% voluntary and based on the migrant's request. A voluntary decision encompasses two elements, freedom of choice and an informed decision which requires the availability of enough accurate and objective information upon which to base the decision*".[55] However, given the practice of losing the possibility to participate in the programme, should the applicant choose to exercise their right to an appeal, 15 NGOs criticized this policy for having a coercive effect on an asylum seeker's decision to appeal a negative decision, thereby jeopardizing the right to a fair asylum process as provided by EU law, and also on their decision to return to their country of origin.[56]

The right to an effective remedy and fair trial implies that access to the appeal should not be made impossible or very difficult as a result of national procedural rules or practices as is the case with the ban on participating in the AVRR programme. The right to an appeal should be exercised without preconditions of exclusion. Besides undermining the voluntary character of IOM's programme, implementation of this policy undermines the right to an effective remedy provided by Article 47 of the Charter.

4. *Procedural Guarantees*

4.1. *Duration and Time-Limits in the Asylum Procedure*

Lengthy asylum procedures could violate the EU principle of good administration guaranteed by Article 41 of the Charter, as they may result in a long period of uncertainty for applicants in relation to their legal position. Without underestimating the disproportionately large number of asylum applications that the Greek Asylum Service is responsible for processing, submitted both on the islands and on the

[55] IOM, Assisted Voluntary Return and Reintegration Programs (AVRR), information available at: https://greece.iom.int/en/assisted-voluntary-return-and-reintegration-programs-avrr

[56] 15 NGOs Decry New Policy Limiting Asylum Seekers in Exercising their Right to Appeal, May 2017, statement available at: https://www.hrw.org/news/2017/05/09/greece-ngos-decry-policy-limiting-asylum-appeal-rights

mainland, the duration of the asylum procedure can be characterized lengthy especially for the applicants that lodge their claim on the mainland. The average processing time at first instance is reported to be at about 6 months as of December 2017. According to the AIDA Country Report for Greece the average actual duration of the first instance procedure is longer if the time period of 81 days between pre-registration and registration of the application is taken into consideration. 4,052 applications were pending for a period exceeding one year at the end of December 2017.[57] Taking into account that the highest number[58] of registered first-time applicants in 2017 relative to the population of each Member State was recorded in Greece (5,295 first-time applicants per million of population) and the fact that personal interview appointments on the mainland are scheduled approximately one year or more after full registration of the application, the number of pending applications is likely to create a significant backlog.[59] However, the duration of the asylum procedure on the islands is more timely. According to the Asylum Service's data, the average time for the processing of asylum applications at first instance on the five islands, for the month of November 2017, stood at 72 days.[60]

Short time limits for lodging an appeal against a negative asylum decision may undermine an applicant's ability to substantiate his asylum claim and, therefore, enjoy effective protection of the EU right to asylum and the EU prohibition of refoulement. Moreover, short time-limits may render access to an effective remedy very difficult or impossible. This may lead to a violation of the EU right to an effective remedy guaranteed by Article 47 of the Charter.[61] Time limits for lodging an appeal against a negative decision must be sufficient in practical terms to enable the applicant to prepare and bring an effective action. The

[57] AIDA Country Report Greece, available at: http://www.asylumineurope.org/reports/country/greece

[58] Eurostat, 'Asylum in the EU Member States', 47/2018, 20 March 2018, available at: https://bit.ly/2u9hZMU

[59] AITIMA, Press Release, Greece: Persisting problems in the asylum procedure, April 2018, available at: http://www.aitima.gr/images/pdf/pressrelease16.04.2018.pdf

[60] Greek Asylum Service, Press Release, December 2017, available at: http://asylo.gov.gr/en/wp-content/uploads/2017/12/Press-Release-13122017.pdf

[61] ECRE, The application of the EUCFR to asylum procedural law, October 2014, available at: https://www.ecre.org/wp-content/uploads/2014/10/EN-The-application-of-the-EU-Charter-of-Fundamental-Rights-to-asylum-procedures-ECRE-and-Dutch-Council-for-Refugees-October-2014.pdf

deadline for submitting an appeal against a negative first instance decision of the Asylum Service differs depending on the procedure under which the asylum application is examined. An appeal must be lodged within 30 days in the regular procedure, 15 days in the accelerated procedure, in case of an inadmissibility decision or where the applicant is detained, and 5 days in the border procedure and fast-track border procedure. Law 4375/2016 has introduced extremely short deadlines in particular in the border and the fast-track procedure.[62] It is critical to note that asylum seekers have access to free legal aid only in the second instance asylum procedure. To this end, people whose asylum applications are being examined under the border and, especially, under the fast-track border procedure, which is implemented on the Eastern Aegean islands and Rhodes, face challenges in exercising the right to an effective remedy.

4.2. *Detention of Asylum Seekers*

According to Article 46 of Law 4375/2016, an alien or stateless person who applies for international protection shall not be held in detention for the sole reason that he/she has submitted an application for international protection, and that he/she entered irregularly and/or stays in the country without a legal residence permit. An alien or a stateless person who submits an application for international protection while in detention for the purpose of removal shall remain in detention, exceptionally and if this is considered necessary after an individual assessment on condition that no alternative measures exist. A new detention order shall be issued following an individualized assessment to establish whether detention can be ordered on grounds provided for within the asylum legal framework.

The law prohibits the detention of asylum seekers who apply while at liberty. However, asylum seekers are also detained on grounds of public order or national security, even if they were not in pre-removal

[62] Law 4375/2016 on the Organization and functioning of the Asylum Service, Appeals Authority, Reception and Identification Service, establishment of General Secretariat for Reception, transposition of Directive 2013/32/EU of the European Parliament and of the Council 'on common procedures for granting and withdrawing international protection (recast)' (OJ L 180/29.6.2013), provisions on employment of beneficiaries of international protection" and other provisions. Government Gazette 51/A/3-4-2016, available at: http://www.refworld.org/docid/573ad4cb4.html

detention at the time when they first lodged their application, in contravention of the law. In practice, applicants arrested within the context of the criminal procedure, even if accused of minor offences for which the Criminal Court does not impose pre-trial detention or after custodial sentences have been suspended, are detained under Article 46 of Law 4375/2016 on public order or national security grounds.[63]

According to Article 6 of the EUCFR, everyone has the right to liberty and security of person. While EU Member States can detain asylum seekers and returnees under certain circumstances, they need to respect their fundamental rights and the safeguards provided for in the EU asylum *acquis*.[64] The implementation of the EU-Turkey Statement increased the use of detention on the Eastern Aegean islands and the mainland. 9,534 asylum seekers were detained in 2017 in pre-removal centres compared to 4,072 in 2016. According to the AIDA Country Report for Greece, asylum seekers who are apprehended outside the island to which they have been geographically restricted are immediately detained in order to be returned to that island. This detention is applied without any individual assessment and without the person's legal status and any potential vulnerabilities being taken into consideration. In 2017, a total of 1,197 persons were returned to the Eastern Aegean islands after being apprehended outside their assigned island.[65]

Based on the Joint Action Plan on the implementation of the EU-Turkey Statement, in order to increase detention capacity, two pre-removal detention centres started operating on Lesvos and on Kos. Another one was established on Samos in June 2017 but has not yet become operational.[66] Substandard living conditions continue to prevail in several detention centres. Conditions in the pre-removal detention facilities located in Western Greece are inadequate. Monitoring reports by the Greek Council for Refugees reveal particularly serious overcrowding, a lack of natural light, substandard hygiene conditions, and

[63] AIDA Country Report Greece, available at: http://www.asylumineurope.org/reports/country/greece

[64] EU Agency for Fundamental Rights (FRA), *Migration to the EU: five persistent challenges*, February 2018, available at: http://fra.europa.eu/en/publication/2018/five-persistent-migration-challenges

[65] AIDA Country Report Greece, available at: http://www.asylumineurope.org/reports/country/greece

[66] Joint action plan on the implementation of the EU-Turkey Statement, available at: https://ec.europa.eu/commission/sites/beta-political/files/december2016-action-plan-migration-crisis-management_en.pdf

limitations on the time detainees can spend outdoors.[67] The state of detention facilities on the islands is equally concerning and poses serious concerns in relation to the respect of human dignity as enshrined in Article 1 of the Charter. In a report on its April and July 2016 visits to Greece, published in September 2017, the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) raised concerns over the situation in the "hotspots" on the Aegean islands and the detention facilities on the mainland and the islands. The CPT considers that conditions are unacceptable and, in the CPT's view, could be considered as inhuman and degrading.[68]

4.3. *The Delays in the Dublin Procedures and the Right to Family Unity*

Serious delays appeared to have been noted in Dublin procedures, while the waiting time is significant. In the majority of cases the Greek Dublin Unit reaches the maximum time limit to send the take-charge requests to the other EU countries. The average duration of the transfer procedure, after a Member State had accepted responsibility, was approximately 5-6 months in 2017.[69] In March 2017, an agreement between the German and the Greek Government reportedly led to the introduction of a monthly limit on the number of people transferred to Germany under the Dublin Regulation. The cap has been set at 70 people per month. The limitation to 70 people per month set by German authorities has resulted in the systematic expiration of the 6-month deadline for the transfer of many applicants.[70] The agreement reached

[67] NGO Greek Council for Refugees, The Greek Council for Refugees identifies adverse detention conditions in Western Greece press release, 31 October 2017, available in Greek at: http://gcr.gr/index.php/el/news/press-releases-announcements/item/743-to-esp-diapistonei-dysmeneis-synthikes-kratisis-sti-dytiki-ellada

[68] Greece, Council of Europe, Report to the Greek Government on the visits to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), September 2017, available at: https://rm.coe.int/pdf/168074f85d

[69] AIDA Country Report Greece, available at: http://www.asylumineurope.org/reports/country/greece

[70] PRO ASYL, Family reunification Dublin note, July 2017, available at: https://www.proasyl.de/wp-content/uploads/2015/12/Background-Note-Family-Reunification-Dublin_RSA_PRO-ASYL-August-2017.pdf

the media in May 2017.[71] Following publication, 27 civil society organizations sent an open letter to the European Commission on 27 July 2017 to express their concerns that "*the arrangement agreed between Germany and Greece on the implementation of family reunification of asylum seekers introducing quantitative criteria (maximum number per month) is in flagrant violation of international, EU and national legislation establishing the principle of family unity and the best interests of the child and in particular Article 8 of the European Convention on Human Rights which protects the right to family life, Article 10 of the Convention on the Rights of the Child as well as Article 7 of the EU Charter of Fundamental Rights*".[72]

Dublin transfers to Greece from other Member States have been suspended since 2011 following two judgments: the M.S.S. v. Belgium & Greece ruling of the European Court of Human Rights (ECtHR) and Joined Cases C-411/10 and C-493/10 N.S. v. Secretary of State for the Home Department ruling of the CJEU, which identified systemic deficiencies in the Greek asylum system.[73] In December 2016, in its Fourth Recommendation the European Commission noted that significant progress has been achieved by Greece in putting in place the essential institutional and legal structures for a properly functioning asylum system and recommended the gradual resumption of Dublin returns to Greece. The Commission noted that with Dublin transfers suspended, there is an incentive for asylum seekers who arrive irregularly in Greece to seek to move irregularly on to other Member States (known as 'secondary movements'), in the knowledge they will not be sent back to Greece.[74] The resumption of transfers will not have a retroactive effect and will only concern asylum applicants who have entered Greece irregularly from 15 March 2017 onwards or for whom Greece is responsible from 15 March onwards under other Dublin cri-

[71] ECRE, Greece/ Germany: Cap on transfers under Dublin family provisions, Information available at: https://www.ecre.org/greece-germany-cap-on-transfers-under-dublin-family-provisions/

[72] 27 civil society organizations' open Letter, July 2017, available at: https://www.proasyl.de/wp-content/uploads/2015/12/2_Open-letter-NGO_260717.pdf

[73] ECtHR, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, Judgment of 21 January 2011; CJEU 21 December 2011, Joined Cases 411/10 and 493/10, *N.S. v. Secretary of State for the Home Department*.

[74] European Commission-Fact Sheet: Questions and Answers: Recommendation on the conditions for resuming Dublin transfers of asylum seekers to Greece, available at: http://europa.eu/rapid/press-release_MEMO-16-4253_en.htm

teria.[75] Persons belonging to vulnerable groups such as unaccompanied children are to be excluded from Dublin transfers for the moment. The Recommendation on the resumption of Dublin transfers has been criticized by numerous civil society organizations.[76]

During 2017, the Greek Dublin Unit received 1,998 incoming requests under the Dublin Regulation, mainly from Germany. A total of 1,489 incoming requests were refused. Only 1 person has been transferred back to Greece from Switzerland; that took place on 18 December 2017, while another was transferred from Germany on 1 February 2018. Greece received 8.5% of the total number of asylum seekers in the EU, while it had the largest number of asylum seekers per capita. To this end, the gradual resumption of Dublin transfers will undoubtedly add more pressure on the Greek asylum system. It is worth mentioning that on 26 October 2017, the Administrative Court of Düsseldorf ruled against the transfer of an asylum seeker holding a visa to Greece, even though Greece had accepted the Dublin request on 8 August 2017. The Court based its decision mainly on information and recommendations from the European Commission on 8 December 2016. The Court reasoned that there are substantial grounds for believing that systemic flaws in the asylum procedure and reception conditions in Greece could put the applicant at risk of being subjected to inhuman or degrading treatment, in violation of Article 4 of the Charter of Fundamental Rights of the European Union.[77]

4.4. *Concluding Observations*

The Statement was meant to be a temporary and extraordinary measure, necessary to end human suffering and restore public order.

[75] European Commission, Fourth Recommendation on urgent measures to be taken by Greece in view of the resumption of transfers under the Dublin Regulation, available at: https://reliefweb.int/report/greece/commission-recommendation-1022016-addressed-hellenic-republic-urgent-measures-be-taken

[76] Letter addressed by ECRE, GCR, Aitima and Solidarity Now on the Joint Action Plan on EU-Turkey Statement and resumption of Dublin transfers to Greece, 15 December 2016, available at: http://test.solidaritynow.org/wp-content/uploads/2016/12/Letter_CommissionMinistryMigration_final-1.pdf

[77] EDAL, Germany: Administrative Court of Düsseldorf rules against a Dublin transfer to Greece based on serious shortcomings in the Greek asylum system, information available at: http://www.asylumlawdatabase.eu/en/content/germany-administrative-court-d%C3%BCsseldorf-rules-against-dublin-transfer-greece-based-serious

However, two years have passed and, despite the fact that the number of arrivals has significantly dropped compared to previous years, its implementation in the Greek asylum procedure through practices and reforms has been regularized. Despite the fact that the Asylum Service has grown rapidly in size since starting its operations, substantial shortcomings in the asylum system still exist. Accessing the asylum procedure is a persisting challenge, since the number of asylum applications remains disproportionately high for Greece. This threatens the realisation of the right to asylum as enshrined in Article 18 of the EUCFR.

In addition, the highly problematic fast-track asylum procedure with the use of the "safe third country" concept exposes applicants to the risk of refoulement and may lead to a violation of Articles 18 and 19 of the EUCFR. Furthermore, the involvement of EASO in the fast-track border procedure, which provides EASO personnel with the right to conduct asylum interviews, issue recommendations on admissibility, conduct the vulnerability assessment and provide assistance to the Appeals Committees in the examination of appeals, has raised serious concerns with regards to the right to good administration as enshrined in Article 41 of the EUCFR.

Asylum seekers are facing risks of arbitrary deprivation of liberty given the systematic imposition of geographical restrictions and immediate detention of specific nationalities contrary to Articles 1, 6, 20, 21, and 41 of the EUCFR. Moreover, due to the limited access to legal aid, the almost non-existent right to an oral hearing and very brief time-frames in second instance proceedings, applicants for international protection do not enjoy access to an effective remedy in accordance with Article 47 of the EUCFR.

In conclusion it is disputed whether the amendments introduced in order to swiftly implement the EU Turkey Statement are in line with Greece's obligations under the EUCFR.

"Judging" the Grounds for Detention of Asylum Seekers: Discrepancies between EU Law and the ECHR. An Analysis of the CJEU Decisions of *K. v. Staatssecretaris van Veiligheid en Justitie* & *J.N. v. Staatssecretaris van Veiligheid en Justitie*

Giuliana Monina*

1. *Introduction*

The right to liberty and security of person is a fundamental human right and an essential component of legal systems enjoying the rule of law. As such, it is enshrined in all major human rights instruments, such as the Universal Declaration of Human Rights (UDHR, Art. 3), the International Covenant on Civil and Political Rights (CCPR, Art. 9 and General Comment No. 35 of 2014), the European Convention on Human Rights and Fundamental Freedoms (ECHR, Art. 5) and the Charter of Fundamental Rights of the European Union (EUCFR or Charter, Art. 6).

Among the various forms of deprivation of liberty, the detention of asylum seekers raises particular concerns not only from a moral but also human rights point of view. The restrictions applied to this key fundamental right do not rest on criminal justice reasons but merely

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on States sovereign right to control aliens' entry into and residence in their territory.

Though the real figures of the detention of asylum seekers remain largely unknown, the legality of the detention of asylum seekers is being increasingly challenged before courts, which has led the two European Courts to develop a rich jurisprudence on this topic.

While safeguarding a rigorous application of the different grounds for detention exhaustively listed under Article 5(1) ECHR; the ECtHR has set up inexplicable low standards when it comes to the necessity and proportionality test legitimising an exceptionalism in the field of immigration detention.[1]

EU law, on the other hand, explicitly provides for the application of a necessity and proportionality test also in the context of immigration detention; but in comparison with ECHR seems to include broader possibilities to justify the detention of asylum seekers, such as for example in the case of detention for national security and public order grounds.

Between 2016 and 2017 the CJEU has released two important judgments interpreting Article 6 CFR and 5 ECHR: *K. v. Staatssecretaris van Veiligheid en Justitie (SVJ)* and *J. N. v. Staatssecretaris voor Veiligheid en Justitie (SVJ)*.[2] These were the first judgments of the CJEU on the issue of detention of asylum seekers, which as stated by Peers 'may become seminal'.[3]

Both cases concern the grounds for detention provided for in Article 8 of the Reception Conditions Directive (RCD), particularly whether they are are valid considering Articles 6 and 52 EUCFR in light of Article 5 ECHR as interpreted by the ECtHR.[4] The judgments also raise important questions on the relationship between the EUCFR and the ECHR, particularly with regard to the relevance of the ECtHR jurisprudence.

This paper wants to analyse the said case-law, reflect on the discrepancies between EU law and the ECHR law and case-law, and explore

[1] See C. Costello, *Immigration Detention: The Grounds Beneath Our Feet*, in *Current Legal Problems*, 2015, p. 176.

[2] CJEU 14.09.2017, Case 18/16, *K v. Staatssecretaris van Veiligheid en Justitie*.

[3] S. Peers, *EU Law Analysis: Detention of Asylum-Seekers: The First CJEU Judgment*, eulawanalysis.blogspot.com/2016/03/detention-of-asylum-seekers-first-cjeu.html, 20 March 2016.

[4] Directive 2013/33/EU, OJ L 180, 29.6.2013, pp. 96-116 (hereinafter RCD).

the potential role of the Charter in resolving such discrepancies. In doing so, the paper will focus on the grounds for detentions for asylum seekers assessed by the CJEU in its latest judgments: detention in order to determine or verify his or her identity or nationality (Art. 8(3)(a)) and detention for national security and public order reasons (Art. 8(3)(e)).

2. *Article 52 of the EUCFR*

2.1. *The Notion of Corresponding Rights and the Rules on Limitations*

Before starting with the analysis of the *K v. SVJ* and *J.N. v. SVJ* cases, it is worth exploring the relationship between the EUCFR and the ECHR.

With the entry into force of the Lisbon Treaty in 2009, EU Member States became bound to a new legal instrument: the Charter of Fundamental Rights of the European Union (EUCFR or Charter).[5]

With a view to prevent EU human rights standards to become lower than that of the ECHR as well as EU Member States from being subject to two different standards of human rights protection, the drafters of the Charter have included a specific provision governing the relationship with the ECHR. To this extent, Article 52(3) EUCFR establishes as follows:

> 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.[6]

[5] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391-407 (hereinafter: EUCFR).

[6] On Article 52 EUCFR and the role of the ECtHR see, *ex multis*: S. Peers, S. Prechal, *Article 52: Scope of Guaranteed Rights*, in S. Peers *et al.* (eds), *The EU Charter of Fundamental Rights: A Commentary*, 2014, p. 1455; T. Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts*, in *The Law and Practice of International Courts and Tribunals*, 2009, p. 375; S. Brittain, *The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: An Originalist Analysis*, in European Constitutional Law Review, 2015, p. 482; S. Anneli, *Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? Ibrahim and the Others v. the UK*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2017, p. 327.

The Explanations to Article 52 set up two list of rights: the first includes the Charter and Convention rights that have the exact same meaning and scope;[7] the second lists the Charter rights that correspond only in the meaning but have a "wider" scope than their Convention equivalent.[8] This also means that when a Charter right falls within the first category, the limitations that can be imposed on that right should be the same as those laid down by the ECHR.[9]

The right to liberty and security enshrined by Article 6 EUCFR, here in analysis, belongs to the first category. Hence, in this case, the ECHR shall constitute a term of reference not only for the interpretation of the meaning and scope of the terms liberty and security but also for the permissible limitations applicable under Article 5(1)(a)-(f) ECHR. This is also explicitly clarified by the Explanations to Article 6 EUCFR that stipulates '…the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR' and, then, proceed to recall the text of Article 5 ECHR in full.[10]

In addition to the rule on limitations established by Article 52(3), Article 52(1) EUCFR states that '[a]ny limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by the law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may only be made if they are necessary and genuinely meet objectives of general interest recognised by the Union or need to protect the rights and freedoms of others'.[11]

The co-existence of these two rules on limitations raises the question as to which of them is applicable if there is an overlap.[12] In this regard, it should be noted that that the Explanations explicitly affirm that the legislator, in laying down limitations to those rights, must comply with the same standards of the ECHR but 'without thereby adversely affecting the autonomy of Union law and of the Court of Justice of the European Union'. Similarly, the CJEU has often held that the ECHR does not constitute, as long as the EU has not acceded to it, a legal instrument which

[7] The list includes the following EUCFR Arts: 2, 4, 5 (1) and (2), 6, 7, 10 (1), 11, 17, 19 (1), 19(2), Article 48, Article 49(1).

[8] The list includes the following EUCFR Arts: 9, 12(1), 14(1), 14(3), 47(2) and (3), 50.

[9] Art. 52, Explanations.

[10] Art. 6, Explanations.

[11] For a more detailed analysis see Peers/Prechal, p. 1461.

[12] Ibid, p. 1515.

has been formally incorporated into EU law,[13] and on the basis of these considerations, seems to give preference to Article 52(1) EUCFR when assessing the limitations to Charter corresponding Articles.[14]

Yet, the Explanations also clarify that 'the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR'.[15] Hence, as maintained by *Peers/Prechal* when assessing the relationship between Article 52(1) and 52(3) 'there is a strong argument that the latter paragraph takes priority in the event of an overlap … Certainly there is no convincing argument for a "lower standards interpretation", since that would lead also in some cases to setting standards lower than those in the ECHR'.[16] This approach seems to be also confirmed by *Wilsher* in its analysis of Article 6 EUCFR, who states 'this means that only the specific justifications for detention that are listed permitted under Article 6, not the broader public policy justifications implicit in Article 52'.[17]

2.2. *The Role of the ECTHR Case Law*

The text of Article 52(3) EUCFR, however, refers explicitly only to the ECHR but not to its case-law. In other words, it does not specify whether the "meaning and scope" of ECHR articles should be retrieved also in light of the ECtHR jurisprudence. Hence, the question as to what role has the ECtHR jurisprudence remains open.

This question had been already discussed during the drafting of the Charter.[18] Back then, the drafters had contemplated including a specific provision on the ECtHR case-law in the operative part of the Charter.[19]

[13] CJEU 7.5.2013, Case 617/10, *Åklagaren v. Hans Åkerberg Fransson* at 20.

[14] S. Peers, S. Prechal, *Article 52*, *cit.*, p. 1498.

[15] Art. 52, Explanations,

[16] S. Peers, S. Prechal, *Article 52*, *cit.*, p. 1518.

[17] D. Wilsher, *Article 6: Right to Liberty and Security*, in S. Peers *et al.* (eds), *cit.*, p. 126.

[18] For a more detailed analysis see *ex multis* T. Lock, *The ECJ and the ECtHR*, *cit.*, p. 385; S. Brittain, *The Relationship*, *cit.*, p. 500, that remembers how certain Convention members argued that the inclusion of a reference to the ECtHR jurisprudence would hamper the development of an autonomous doctrine of fundamental rights in EU law, which was one of the essential purposes of the EUCFR.

[19] See Art. H.4 stating that 'no provision of this Charter may be interpreted as restricting the scope of the rights guaranteed by… the European Convention on Human Rights as interpreted by the case-law of the European Court of Human Rights', as cited in S. Brittain, *The Relationship*, *cit.*, p. 500.

However, after ample discussion, they could not agree to the adoption of this provision. Instead, they included a reference to the ECtHR in the Preamble of the Charter. Another reference to the ECtHR case-law can be found in the Explanations to Article 52(3), which state 'the reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union'.[20]

In the literature, many authors have maintained that neither the wording of Article 52(3) EUCFR nor the drafting history of the Charter support the conclusion that the case-law of the ECtHR is binding in all circumstances, but rather that it should be "accorded significant weight",[21] or that it postulates a "duty to duly regard",[22] or "persuasive suggestions".[23]

On the other side, it cannot be overlooked that the key object and purpose of Article 52(3) EUCFR was to prevent divergences between the ECHR and the EUCFR, and that both the Preamble and the Explanations contain a specific reference to the case law of the Strasbourg Court, the authoritative interpreter of the ECHR.[24]

3. *Discrepancies Between the EU and ECHR Law in the Field of Immigration Detention*

3.1. *The Rules Governing the Detention of Asylum Seekers and Limitations to the Right of Liberty and Security in the EU and ECHR Systems*

As opposed to its equivalent in the ECHR, Article 6 EUCFR does not explicitly provide for an exhaustive list of permissible grounds for

[20] Art. 52, Explanations.

[21] S. Brittain, *The Relationship*, *cit.*, p. 503; T. Lock, *The ECJ and the ECtHR*, *cit.*, p. 385.

[22] T. Lock, *The ECJ and the ECtHR*, *cit.*, p. 384.

[23] D. Chalmers, G. Davies, G. Monti, *European Union Law: Cases and Materials*, 2012, p. 246.

[24] P. Craig, *The Charter, the ECJ and National Courts*, in D. Ashiagbor *et al* (eds), *The European Union After the Treaty of Lisbon*, 2012, p. 103.

detention. Yet, because it corresponds to Article 5 ECHR, a legitimate limitation of this Charter right can only be justified in the exact same cases provided by ECHR law (Article 5 (1)(a)-(f)).

Under EU law, the detention of asylum seekers is regulated under various legal instruments namely, the Asylum Procedure Directive (Art. 26);[25] the Dublin Regulation (in particular Art. 28);[26] and the RCD (Arts 2 and 8), EURODAC Regulation (Arts 9 (1), 14 (1) and 29 (1) (d)).[27]

The RCD, the instrument containing the most detailed rules on asylum seekers detention, provides an exhaustive list of six permissible grounds for detention.[28] Moreover, EU law expressly establishes that detention can be applied only when it proves necessary and on the basis of an individual assessment of each case, and if other less coercive alternative measures cannot be applied effectively,[29] thereby requiring a full necessity and proportionality test. In sum, to be lawful under EU law deprivation of liberty must comply with at least five conditions, i.e. have a clear legal basis in national law, fall within one of the permissible grounds set up by EU law, be necessary and proportional, respect procedural guarantees, and be human and dignified.[30] This means that detention can never be for the sole reason that an individual has applied for international protection but must fall in one of these grounds.

Under ECHR law the right to liberty and security is regulated by Article 5 ECHR. Though there is no clear definition of deprivation of liberty, the ECtHR has consistently pointed out that the difference between deprivation of liberty and mere restrictions on liberty of movement remains one of 'degree and intensity, not one of nature or substance', hence, in order to determine whether a person has been deprived of liberty, the starting-point for the ECtHR's assessment is the person's concrete situation.[31] The ECtHR has further identified a number criteria to identify whether a certain restriction amounts to deprivation of liberty: the type, duration, effects and manner of imple-

[25] Directive 2013/32/EU, OJ L 180, 29.6.2013, pp. 60-95.

[26] Regulation (EU) No 604/2013, OJ L 180, 29.6.2013, pp. 31-59.

[27] Regulation (EU) No 603/2013, OJ L 180, 29.6.2013, pp. 1-30.

[28] Art. 8(3) RCD.

[29] Art. 8(2) RCD.

[30] FRA, *European Legal and Policy Framework on Immigration Detention of Children*, 2017, p. 33.

[31] ECtHR, *Guzzardi v. Italy* [GC], App No. 7367/76, Judgment of 6 November 1980, at 92.

mentation of the measure in question.[32] This in practice means, on the one side, that the detention may assume different forms and happen in different places, and, other side, that national definitions are not binding for the Court to find Article 5 ECHR applicable.

Moreover, according to the ECtHR to be lawful detention must have a clear legal basis under national law that is also of sufficient quality, i.e. compatible with the rule of law, accessible, precise and foreseeable.[33] Detention must also be in line with the ECHR law and case law, namely fall within one of the specific and exhaustive list of six permissible grounds under Article 5(1) ECHR.

Among these, there are two grounds that may in fact be used in the context of immigration detention: Article 5(1)(f) and Article 5(1)(b) ECHR. Only Article 5(1)(f) ECHR specifically addresses the detention of foreigners and permits it when it is conducted with a view to prevent their unauthorised entry or with a view to deportation or extradition. Because States enjoy an 'undeniable sovereign right to control aliens' entry into and residence in their territory',[34] the ECtHR applies different and less strict rules when it comes to Article 5(1)(f). This is particularly evident for the notion of arbitrariness, which includes an assessment of whether detention was necessary to achieve the stated aim and proportional only in the contexts of sub-paragraphs (b), (d) and (e) but not for Article 5§1(f).[35] In this last case, the ECtHR has developed a different and less demanding test that mainly looks at whether: detention is carried out in good faith; there is in genuine conformity with the purpose of the ground listed in Article 5(1) ECHR; the place and conditions of detention are appropriate, considering that 'the measure is applicable not to those who have committed criminal offences but to

[32] Eg ECtHR, *Amuur v. France,* App. No. 19776/92, Judgment of 25 June 1996, at 42; ECtHR, *Stanev. v. Bulgaria* [GC], App. No. 36760/06, Judgment of 17 January 2012, at 115; ECtHR, *Khlaifia and others v. Italy* [GC], App. No. 16483/12, Judgments of 15 December 2016, at 64.

[33] Eg ECtHR, *Medvedyev. and Others v. France* [GC], App. No. 3394/03, Judgment of 29 March 2010, at 79; *ECtHR, Khlaifia and others v. Italy* [GC], App. No. 16483/12, Judgments of 15 December 2016, at 66.

[34] ECtHR, *Amuur v. France,* App. No. 19776/92, Judgment of 25 June 1996 at 41; ECtHR, *Chahal v. the United Kingdom*, App no. 22414/93, Judgment of 15 November 1996, at 73; and ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, App. Nos. 9214/80; 9473/81 and 9474/81, Judgment of 28 May 1985 28 May 1985, at 67-68.

[35] Eg ECtHR, *Saadi v. the United Kingdom* [GC], App. No. 13229/03, Judgment of 29 January 2008, at 70 ss.

aliens who, often fearing for their lives, have fled from their own country'.[36] Depending on whether the Court applies the first of the second limb of the Article 5(1)(f) ECHR, the ECtHR may also look at additional specific criteria, such as: whether place and conditions of detention are appropriate; the authorities act due diligence; there is realistic prospect of removal; and the length of the detention. The development by the ECtHR of the so called 'immigration detention exceptionalism' has been highly criticized in the literature.[37] The other ground that is often used to justify detention with a view to determine or verify the identity or nationality of the asylum seeker is Article 5(1)(b) ECHR. Yet when detention is imposed under 5(1)(b) ECHR, it must also meet a number of additional guarantees, being Article 5(1)(b) ECHR one of those provisions requiring a fully fledge necessary and proportionality test.

The first difference that comes to mind when comparing EU and ECHR standards on the detention of asylum seekers concerns the necessity and proportionality test. In fact, while EU law requires a necessary and proportional test, the ECtHR still considers 'immigration detention' as an exception and does not apply a classical necessity test when the detention falls within the scope of Article 5(1)(f) ECHR. A proper necessity test is required by the ECtHR only if the detention falls under the scope of Article 5(1)(b) ECHR. In this sense, it is evident that EU law provides higher standards than the ECHR, because it obliges States to apply a necessity test in any case of immigration detention.[38]

The second difference that is worth noting concerns the list of permissible grounds for detention. As also noted by the Fundamental Rights Agency of the European Union (FRA), given the different wording, it is not always easy to establish whether each of the grounds specified under EU secondary law falls within the permissible limitations established by Article 5 ECHR.[39] In practice, doubts have arisen especially in two situations: in the case of detention "in order to determine or verify his or her identity or nationality" Article 8(a) RCD);

[36] ECtHR, *Amuur v. France,* App. No. 19776/92, Judgment of 25 June 1996, at 43.

[37] C. Costello, *Immigration Detention, cit.*, p. 147.

[38] See also V. Moreno-Lax, *Beyond Saadi v. UK: Why the Unnecessary Detention of Asylum Seekers Is Inadmissible under EU Law*, in *Human Rights and International Legal Discourse*, 2011, pp. 195 ss.

[39] FRA, *European Legal and Policy Framework*, *cit.*, p. 43.

or "when protection of national security or public order so requires" (Article 8(e) RCD).[40]

This paper will focus on the discrepancies relating to the grounds for detention, offering a first analysis of the *K. v. Staatssecretaris van Veiligheid en Justitie* and *J.N. v. Staatssecretaris van Veiligheid en Justitie.*[41]

3.2. *Detention in Order to Determine or Verify Identity or Nationality*

3.2.1. *Relevant ECHR Standards*

Under ECHR law, the detention in order to determine or verify identity or nationality may in principle fall under two categories.

One of the most common justification for detaining asylum seekers is the one provided by the first limb of Article 5(1)(f) which allows detention with a view to prevent an 'unauthorised entry'.

The leading ECtHR case on this issue is still *Saadi v. UK*, where the ECtHR addressed the question of whether this provision could be applied to asylum seekers.[42] In the *Saadi* case, the Court did 'not accept that as soon as an asylum-seeker has surrendered himself to the immigration authorities, he is seeking to effect an "authorised" entry, with the result that detention cannot be justified under the first limb of Article 5(1)(f). To interpret the first limb of Article 5(1)(f) as permitting detention only of a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the State to exercise its undeniable right of control referred to above'.[43]

More recently, however, the ECtHR seemed to have nuanced the *Saadi* principles in the *Suso Musa* case.[44] There, the ECtHR clarified that 'the applicant's argument to the effect that *Saadi* should not be interpreted as meaning that all Member States may lawfully detain immigrants pending their asylum claim, irrespective of national law, is not devoid of merit. Indeed, where a State which has gone beyond its

[40] Ibid.

[41] CJEU 14.09.2017, Case 18/16, *K v. Staatssecretaris van Veiligheid en Justitie*.

[42] ECtHR, *Saadi v. the United Kingdom* [GC], App. No. 13229/03, Judgment of 29 January 2008, at 45.

[43] Ibid, at 65.

[44] ECtHR, *Suso Musa v. Malta,* App No. 42337/12, Judgment of 23 July 2013; see also C. Costello, *Immigration Detention, cit.*, pp. 150, 173-176.

obligations in creating further rights or a more favourable position – a possibility open to it under Article 53 of the Convention – enacts legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application … an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention under Article 5§1(f). Indeed, in such circumstances it would be hard to consider the measure as being closely connected to the purpose of the detention and to regard the situation as being in accordance with domestic law'.[45]

Notwithstanding those considerations, the ECtHR did not reach a clear conclusion, affirming that 'given that it has not been established that the applicant had actually been granted formal authorisation to stay' the detention fell under Article 5(1)(f) ECHR first limb.[46] Though a similar question arose in the later cases *Jama v. Malta*,[47] and in the *OM v. Hungary* case,[48] the ECtHR has not yet provided further clarifications on the issue and continued to leave open the question on whether Article 5 ceases to apply because the individual has been granted formal authorisation to enter or stay by national authorities. Yet, as argued by *De Bruycker*,[49] this seemed to be because the national Courts and the government had a different interpretation as to the effect of their national law. It remains that in that judgment the ECtHR has very clearly mentioned that where the national law (of its own motion or pursuant to EU law) "explicitly authorises" the entry and stay of immigrants pending an asylum application 'it would be hard to consider the measure as being closely connected to the purpose of the detention and to regard the situation as being in accordance with domestic law'.

Finally, another ground of detention that could justify detention with a view to determine or verify the identity or nationality of the

[45] *Suso Musa v. Malta*, App No. 42337/12, Judgment of 23 July 2013, at 97.

[46] Ibid, at 99.

[47] ECtHR, *Mahamed Jama v. Malta,* App No. 10290/13, Judgment of 02/05/2016, at 144.

[48] ECtHR, *OM v. Hungary,* App no. 9912/15, Judgment of 5 July 2016, at 47-48, though here in the end the limited its scrutiny to the issue of Article 5 § 1 (b) of the Convention.

[49] P. De Bruycker *et al.* (Eds.), Alternatives to Detention in the EU: Time for Implementation, 2015, http://odysseus-network.eu/wp-content/uploads/2015/02/FINAL-REPORT-Alternatives-to-detention-in-the-EU.pdf, 27 March 2018, p. 273, in particular footnote 50.

asylum seeker is Article 5(1)(b) ECHR. The ECtHR has pronounced itself on this provision in the context of immigration detention for the first time in the case *OM v. Hungary*.[50] There, though accepting that Article 5(1)(b) ECHR could apply also to immigration detention, it specified that the detention imposed under 5(1)(b) ECHR must meet a number of additional guarantees. Among them the ECtHR identified the following safeguards:

- There must be an unfulfilled obligation incumbent on the person concerned;
- The obligation must arise either from a court order or by a legal provision;
- The obligation must be specific and concrete;
- The arrest and detention must be for the purpose of securing its fulfilment and not be punitive in character;
- The arrest and detention must be truly necessary for the purpose of ensuring its fulfilment.

In the present case, the applicant was arrested and placed in detention, on grounds that his identity and nationality had not yet been clarified. The Government justified the detention referring to Art. 5(1)(b) arguing that the applicant was under a legal obligation to cooperate with the asylum authority for the purposes of the asylum procedure. In these circumstances, the ECtHR found that there was no specific and concrete legal obligation incumbent upon the applicant, hence, the applicant's detention was unlawful. In particular, it considered that Hungarian national law did not contain an obligation for asylum-seeker to provide documentary evidence of their identity and nationality. Finally, the ECtHR made reference to the fact that Hungarian national law contained a provision concerning situations when the asylum-seeker is not in possession official documents proving his identity and that the applicant made reasonable efforts to clarify his identity and nationality.[51]

From a broader perspective, the classification of immigration detention under Article 5(1)(b) ECHR is an interesting development in the jurisprudence of the ECtHR on asylum seekers. If this opens up an additional ground that States can spend to justify the detention of asylum seekers under Article 5 ECHR, on the other side it can also be seen as a chance to 'take immigration detention out of the silo of Article 5(1)

[50] ECtHR, *OM v. Hungary,* App no. 9912/15, Judgment of 5 July 2016.

[51] Ibid, at 54.

(f), in which migrants are treated as inherently detainable, and instead treat immigration detention like other forms of preventive or coercive detention'.[52]

3.2.2. *Relevant International Law Standards*

Beside ECHR law, detention in order to determine or verify his or her identity or nationality is also explicitly envisaged by the Recommendation of the CoE Committee of Minister of 2003[53] and the UNHCR Guidelines of 2012.[54] The CoE recommendation allows detention 'when their identity, including nationality, has in case of doubt to be verified' but adds that this ground should be applied 'in particular when asylum seekers have destroyed their travel or identity documents or used fraudulent documents in order to mislead the authorities of the host state'.[55]

The UNHCR Guidelines envisage the need for 'initial identity and/or security verification' as a permissible ground of detention, but they do so categorizing such ground under the broader issue of the protection of public order. The UNHCR Guidelines further add that '[m]indful that asylum-seekers often have justifiable reasons for illegal entry or irregular movement, including travelling without identity documentation, it is important to ensure that their immigration provisions do not impose unrealistic demands regarding the quantity and quality of identification documents asylum-seekers can reasonably be expected to produce'.[56] In other words, the Guidelines invite to interpret this provision with caution, as the lack of identity documentation of asylum seekers is often linked to their status.[57]

More recently, this ground was also explicitly recognised by the Human Rights Committee in its General Comment 35.[58]

[52] C. Costello, *Immigration Detention, cit.*, p. 175.

[53] CoE, 'Recommendation Rec (2003) 5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers' para. 3 (hereinafter: CoE Recommendations).

[54] UNHCR, 'UNHCR Detention Guidelines' (2012) (hereinafter: UNHCR Detention Guidelines).

[55] CoE Recommendations, para. 3.

[56] UNHCR Detention Guidelines, para. 25.

[57] See C. Costello, *Immigration Detention, cit.*, p. 167; see also P. De Bruycker *et al.* (Eds.), Alternatives to Detention, *cit.*, p. 51.

[58] CCPR, 'General Comment No 35 - Article 9: Liberty and Security of Person' (hereinafter: CCPR, GC No 35).

3.2.3. *The Position of the CJEU in K*

Under EU law, detention in order to determine or verify identity or nationality is regulated under Article 8(3)(a) RCD. However, contrary to other international instruments, ECHR law does not envisage any situation that is exactly corresponding to Article 8(3)(a) RCD. Hence, the interpreter has to assess whether this provision can be justified under any of the permissible grounds provided by Article 5 ECHR, in particular Article 5(1)(f) and Article 5(1)(b) ECHR. This assessment was at least to some extent conducted by the CJEU in the case *K*.[59]

The case concerned a third-country national arrived in the Netherlands from Austria. During a control of documents, he was suspected of using a false passport and was arrested first on the basis of criminal charges. Once the criminal charges had been dismissed and he released, the applicant applied for asylum. On the same day, the authorities decided to detain him again on the basis of Articles 8(3)(a) and (b) RCD in order to establish the identity or nationality of that applicant, and to obtain data necessary for the assessment of his application. Given the circumstances, the referring court (*District Court, The Hague, sitting in Haarlem*) asked the CJEU to clarify whether the detention of an asylum seeker not imposed with a view to deportation can be considered with Article 6 EUCFR and Article 5 ECHR.

In doing so, the referring court only made a specific reference to the ECtHR judgment of *Nabil and others v. Hungary*, relating to an individual applying for asylum while already detained with a view to deportation or extradition in the context of the return Directive.[60] Also for these reasons, the CJEU could dismissed the arguments of the applicants and the referring court by stating that the request did not contain sufficient elements to put the validity of the Article 8(3)(a) RCD into question. The CJEU in fact stated that 'that request does not, however, contain elements allowing it to be concluded that the facts at issue in the main proceedings are covered by that provision of the ECHR or to

[59] CJEU 14.09.2017, Case 18/16, *K v. Staatssecretaris van Veiligheid en Justitie.*

[60] The preliminary reference stated: '(2) given the Explanation relating to the Charter of Fundamental Rights that the limitations which may legitimately be imposed on the rights in Article 6 of the Charter may not exceed those permitted by the ECHR in the wording of Article 5(1)(f), and the interpretation by the European Court of Human Rights of the latter provision in, inter alia, the judgment of 22 September 2015, *Nabil and Others v. Hungary* (CE:ECHR:2015:0922JUD006211612), that the detention of an asylum-seeker is contrary to the aforementioned Article 5(1)(f) if such detention was not imposed with a view to deportation?'.

establish to what degree the case-law deriving from the judgment of the European Court of Human Rights of 22 November 2015, Nabil and Others v. Hungary…, could affect the examination of the first subparagraph of Article 8(3)(a) and (b) of that directive in the present case'.[61]

But the CJEU went on with the analysis and specified that the situation of the applicant, if not under the second limb of Article 5(1)(f) ECHR, could fall under the detention ground of preventing an unauthorised entry provided under Article 5(1)(f) ECHR first limb. In doing so, it found that the ECHR does not exclude the application of Article 5(1)(f) ECHR first limb to asylum seekers, 'provided that such measure is lawful and implemented in accordance with the objective of protecting the individual from arbitrariness'.[62] In reaching this conclusion, the CJEU made a reference to two additional decisions of the ECtHR: *Saadi v. United Kingdom*[63] and the *Mahamed Jama v. Malta*.[64]

Yet neither the CJEU judgment nor the AG opinion make any reference to the issues raised in the *Suso Musa* judgment[65] and address the interesting question as to whether a State which has gone beyond its ECHR obligations in creating further rights or a more favourable position enacting legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application is still allowed to justify the detention of asylum seekers under Article 5(1)(f) first limb ECHR, given that that provision rests on the notion of 'unauthorised entry'.

It is true that ECtHR did not reach a definitive conclusion in that specific case,[66] but the ECtHR did mentioned very clearly that where the national law (of its own motion or pursuant to EU law) "explic-

[61] CJEU 14.09.2017, Case 18/16, *K v. Staatssecretaris van Veiligheid en Justitie*, at 51.

[62] CJEU 14.09.2017, Case 18/16, *K v. Staatssecretaris van Veiligheid en Justitie*, at 52.

[63] ECtHR, *Saadi v. the United Kingdom* [GC], App. No. 13229/03, Judgment of 29 January 2008.

[64] ECtHR, *Mahamed Jama v. Malta,* App No. 10290/13, Judgment of 02 May 2016.

[65] ECtHR, *Suso Musa v. Malta,* App No. 42337/12, Judgment of 23 July 2013. In the *Jama v. Malta* recalled by the CJEU in this decision, the ECtHR though included a reference to *Suso Musa* principles, it does not spell out the whole argumentation included in para. 97 of the *Suso Musa* case, but limits itself to recall the conclusion that the question is dependent on national law and that in the present case it was possible to conclude that the detention fell under Article 5(1)(f) ECHR as in *Suso Musa*. See ECtHR, *Mahamed Jama v. Malta*, App No. 10290/13, Judgment of 02 May 2016, at 138, 144.

[66] See also above para. 3.2.1.

itly authorises" the entry and stay of immigrants pending an asylum application 'it would be hard to consider the measure as being closely connected to the purpose of the detention and to regard the situation as being in accordance with domestic law'. In this sense, the Strasbourg Court was open to the applicant's argument that if an asylum seeker is authorized to entry or stay pending an asylum application either under national or EU law, then a detention for the purpose of preventing an unauthorized entry is hardly compatible with Article 5 (1)(f) ECHR.

Moreover, this conclusion was supported by several commentators and by the FRA which in a recent report stated '[w]ith regard to detention to prevent unauthorised entry, according to the ECtHR, asylum applicants who have been granted formal authorisation to stay in a country (e.g. under EU law) cannot be held in detention under the second limb of Article 5 (1) (f) of the ECHR'[67] and concluded that Article 8(3)(a) RCD falls best under Article 5(1)(b) ECHR.

Article 9(1) RCD and Article 9 APD clearly stipulate that asylum seekers have a 'right to remain pending the examination of the application'. EU law provides for a few exceptions to this right, namely: where a person makes a subsequent application referred to in Article 41; or where the Member State has to surrender or extradite a person either to another Member State pursuant to obligations in accordance with a European arrest warrant or otherwise, or to a third country or to international criminal courts or tribunals (Article 9(2) APD). An additional case in which EU law seems not to explicitly authorise the entry and stay can be identified in the rules on border procedures. In this regard, Art. 43 APD allows Member States to decide at the border or transit zones on the admissibility of an application made at such locations; and/or the substance of an application in an accelerated procedure pursuant to Article 31(8). This exception to the normal procedures, however, can be prolonged only for a short period of time. Hence, 'when a decision has not been taken within four weeks, the applicant shall be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with the other provisions of this Directive'.[68] Besides these

[67] C. Costello, *Immigration Detention, cit.*, pp. 173-176; P. De Bruycker *et al.* (Eds.), Alternatives to Detention, *cit.*, p. 50; ECRE, *Comments on the Commission Proposal to Recast the Reception Conditions Directive COM(2016)*, 2016, https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-RCD.pdf, p. 43.

[68] P. De Bruycker *et al.* (Eds.), *Alternatives to Detention*, *cit.*, p. 50. On this point, ECRE has rightly noted that Article 43(2) APD cannot be interpreted as meaning that

exceptions, and considering the rights to remain enshrined by EU law, it will be hard to justify the detention of asylum seekers under Article 5(1)(f) ECHR first limb – for the purpose of preventing unauthorised entry.[69]

If these arguments are correct, then, when none of the above mentioned exceptions can be applied, the only possibility left to justify the detention in order to determine or verify identity or nationality is Article 5(1)(b) ECHR. Yet in this case, ECHR sets up a different and stricter test. This includes not only a full necessity and proportionality test but also the requirement that the legal obligation incumbent on the applicant is "specific" and "concrete" and "unfulfilled". As noted above in *O.M. v. Hungary*, the ECtHR did not accept that the general obligation to cooperate with the asylum authorities could be a clear legal basis for the detention of the asylum seeker in that case.[70] Moreover, as pointed out by Matevzic, '[i]t is rare that a national legislation would actually impose an obligation on the asylum-seeker to provide documentary evidence of his identity and therefore it is highly questionable if the detention ground contained in Article 8(a) of the Recast Reception Directive actually falls under the scope of Article 5(1) of ECHR'.[71]

These considerations were, however, not part of the analysis of the CJEU in the *K v. SVJ* case. There, the CJEU based its assessment mainly on Article 52(1) EUCFR, conclud that 'the legislator struck a fair balance between, on the one hand, the applicant's rights to liberty and, on the other hand, the requirements relating to the identification of that applicant or his nationality or to the determination of the elements on which his application is based, which are necessary for the proper functioning of the Common European Asylum System'.[72] In doing so, the CJEU referred to international soft law standards such as the Recommendation of the CoE Committee of Minister of 2003[73] and the

until such decision has been taken, the asylum seeker has no right to remain on the territory: see ECRE, *Comments on the Commission Proposal*, *cit.*, p. 13.

[69] C. Costello, *Immigration Detention, cit.*, p. 175; ECRE, *Comments on the Commission Proposal*, *cit.*, p. 11; P. De Bruycker *et al.* (Eds.), *Alternatives to Detention*, *cit.*, p. 50; G. Matevžič, *Detention of Asylum-Seekers Under the Scope of Article 5(1)(f) of ECHR. Some Thoughts Based on Recent ECHR and CJEU Jurisprudence*, http://www.asylumlawdatabase.eu/en/journal/detention-asylum-seekers-under-scope-article-51f-echr-some-thoughts-based-recent-echr-and, 2016.

[70] ECtHR, *OM v. Hungary,* App no. 9912/15, Judgment of 5 July 2016, at 54.

[71] G. Matevžič, *ibid.*

[72] CJEU 14.09.2017, Case 18/16, *K v. Staatssecretaris van Veiligheid en Justitie,* at 50.

[73] CoE Recommendations, para. 3.

UNHCR Guidelines of 2012,[74] which as it was noted above, explicitly provide for such a ground of detention.

Only at the very end of the judgment, the CJEU assessed if the level of protection of Article 5(1)(f) ECHR was respected. As noted above, however, in its analysis under Article 52(3) EUCFR the CJEU accepted that Article 5(1)(f) ECHR can be applied recalling the case *Saadi v. United Kingdom*, but made no reference to the *Suso Musa* nor did it elaborate on the argument that given that EU law explicitly authorise the entry and stay of immigrants pending an asylum application it is not possible to justify the detention to determine or verify his or her identity or nationality under Article 5(1)(f) ECHR.

It is hoped, however, that these questions will be clarified in the future. In fact, if Article 5(1)(b) ECHR is to apply, the ECtHR requires a different test encompassing, not only a full necessary and proportionality test (anyway applicable under EU law), but also the need to verify if the legal obligation incumbent on the applicant fulfil certain criteria, including the need for the obligation to be "specific" and "concrete".

3.3. *Detention for National Security and Public Order*

3.3.1. *Relevant ECHR Standards*

ECHR law does not provide for any specific ground justifying detention for reasons of national security and public order. Hence, given that the grounds for detention are exhaustive and should be interpreted in a narrow manner, this justification cannot be invoked unless it falls already within one of the permissible ground of Article 5 ECHR.

The only situation in which this seems to be possible is when there is also the necessity to detain someone to prevent the commitment of an offence as indicated by Article 5(1)(c) ECHR.

The arguments of whether Article 5(1) ECHR permits a balance to be struck between the individual's right to liberty and the State's interest in protecting national security (e.g. in case of terrorist threat) were already at least to some extent addressed by the ECtHR in *A and others v. UK* case.[75] There, the argument of the UK Government were found 'inconsistent not only with the Court's jurisprudence under sub-para-

[74] UNHCR Detention Guidelines, pt. 4.1, particularly 4.1.3, para. 30.

[75] ECtHR, *A and Others v. the United Kingdom* [GC], App. No. 3455/05, Judgment of 19 February 2009.

graph (f) but also with the principle that paragraphs (a) to (f) amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5. If detention does not fit within the confines of the paragraphs as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee'.[76] In the same judgment, the Court also clarified that 'internment and preventive detention without charge' are 'incompatible with the fundamental right to liberty under Article 5§1, in the absence of a valid derogation under Article 15'.[77]

3.3.2. *Relevant International Law Standards*

On the contrary, detention for national security and public order is explicitly envisaged by the Recommendation of the CoE Committee of Minister of 2003[78] and the UNHCR Guidelines of 2012.[79]

This ground is also provided for by the CCPR General Comment 35, where national security is listed among the reasons that could justify detaining the asylum seekers after an initial brief period to determine the identity. Specifically, the General Comment states: '[t]o detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security'.[80]

3.3.3. *The Position of the CJEU in N.J.*

Under EU law, the possibility to detain asylum seekers for reasons of national security and public order is regulated under Article 8(3)(e) RCD. This raises the issue as to whether this provision is in line with the limitations set up in Articles 6 EUCFR and 5 ECHR. The question was addressed for the first time by the CJEU in *N.J. v. SVJ*.

The case concerned an asylum seeker with past criminal convictions. In the period 1999-2015, Mr N.J. had been convicted of 21 charges, mostly for theft-related offences. Mr N.J. had been subjected in the past to a return decision, which become final in April 2014. On 27

[76] Ibid, at 171.
[77] Ibid, at 172.
[78] CoE Recommendations, para. 3.
[79] UNHCR Detention Guidelines, 4.1.1.
[80] CCPR, GC No 35, para. 18.

February 2015, while serving a sentence of imprisonment for failure to comply with an entry ban, Mr N.J. submitted his fourth asylum application, this time based on new grounds based on health reasons. Once he had served his sentence on criminal grounds, the authorities decided that Mr N.J. should be maintained in detention in his capacity of asylum seeker on grounds that he posed a threat to national security or public order, given that he was convicted of a number of offences in the past and was suspected of having committed others.[81]

The applicant challenged that decision arguing it to be contrary to Articles 6 EUCRF and 5 ECHR, in that detention could be justified only when action is being taken with a view to deportation and extradition, but not against a foreigner who is lawfully residing in the Member State pending his asylum procedure. Consequently, the Dutch Council of State referred the question to the CJEU. In doing so, it referred to Article 5(1)(f) and the case ECtHR *Nabil and Others v. Hungary*. However, while in *Nabil and Others v. Hungary* the link with the deportation's aim of the government was clear, and national law provided that the expulsion order against him was only suspended in view of the asylum applications but could have been again enforced once the asylum application had been decided; in the case of *N.J.* the national authorities explicitly invoked national security and public order and not the deportation procedures to justify detention. Moreover, the referring Court also stated that according to Dutch law, an earlier return decision lapsed when the foreign national submits an application for asylum.[82]

Despite all this, the CJEU found that the case could fall under Article 5(1)(f) second limb. It specified that '*Nabil and Others v. Hungary* … does not exclude the possibility of a Member State ordering – in such a way that guarantees provided for by that provisions are observed – the detention of a third country national in respect of whom a return decision accompanied by an entry ban was adopted prior to the lodging of an application for international protection'.[83] Moreover it held that

[81] CJEU 15.02.2016, Case C-601/15 PPU, *J.N. v. Staatssecretaris van Veiligheid en Justitie,* at 30.

[82] See the CJEU/AG Opinion 26.01.2016, Case C-601/15 PPU, *J.N. v. Staatssecretaris van Veiligheid en Justitie* at 35, 63, and footnote 36, where the AG concluded that ' because the return decision had lapsed, the detention did not constitute action taken with a view to deportation or extradition'.

[83] CJEU 15.02.2016, Case C-601/15 PPU, *J.N. v. Staatssecretaris van Veiligheid en Justitie,* at 78.

'a procedure opened under Directive 2008/115, in the context of which a return decision, accompanied, as the case may be, by an entry ban, has been adopted, must be resumed at the stage at which it was interrupted, as soon as the application for international protection which interrupted it has been rejected at first instance and, accordingly, action under that procedure is still 'being taken' for the purposes of the second limb of Article 5(1)(f) ECHR'.[84]

The interpretation of the CJEU seems problematic for two main reasons. First, it is in doubt that the present case can be compared to the *Nabil v. Hungary* case. It is true that in the case *Nabil and others v. Hungary* the ECtHR has found that 'the pending asylum case does not as such imply that the detention was no longer "with a view to deportation" – since an eventual dismissal of the asylum applications could have opened the way to the execution of the deportation orders. The detention nevertheless had to be in compliance with the national law and free of arbitrariness'.[85] Yet, in that case, the ECtHR also notes that the under Hungarian national law the execution of the deportation order was only *suspended*, and the applicants' detention was ordered with a view to their eventual deportation. As also mentioned by the AG, in the present case, the fact that the applicant was not subject to an ongoing return procedure because the return decision was elapsed (not suspended) and that in the case of a rejection of the asylum application the Secretary of State would have been required to make a new return decision raise doubts as to whether this detention could fall under Article 5(1)(f) second limb. For this reason, the present case seemed to be more similar to *Ahmade v. Grèce* and *R.U. v. Grece* as the facts of the case hardly show that the deportation was or could have been 'in progress' and with 'true prospect of executing'.[86]

[84] Ibid, at 80.

[85] ECtHR, *Nabil and others v. Hungary,* App. No. 62116/12, Judgment of 22 September 2015, at 38.

[86] ECtHR, *Ahmade v. Greece*, App. No. 50520/09, Judgment of 25 September 2012, at 142-144; ECtHR, *RU v. Greec,* App. No. 2237/08, Judgment of 7 September 2011, at 88-96, in particular 94. In *R.U. v. Grece* and *Ahmade v. Grèce*, the ECtHR had found violations of Article 5 § 1 (f) under its second limb on the basis that the applicants' detention pending asylum proceedings could not have been undertaken for the purposes of deportation, given that national law did not allow for deportation pending a decision on asylum. In this case, national law seemed to allow for such type of detention only if the return order could be executed. This is in contrast with the case *Nabil and others v. Hungary*, where under Hungarian national law the execution of the

Secondly, the referring court mentioned Article 8(3)(e) RCD, despite under EU law there is a specific provision regulating detention of asylum seekers pending deportation (Article 8(3)(d) RCD). Under Article 8(3)(d) RCD, detention of an applicant who has submitted his/her application for international protection after being subject to detention under the return procedure can, yes, be justified but only on the basis of additional objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision.

The above considerations cast doubts on whether the detention of the present case was justifiable under Article 5(1)(f) ECHR. Especially considering the existence of Article 8(3)(d) RCD – when the purpose of the detention is linked with the deportation – it remains unclear why one should use national security and public order provision under Article 8(3)(e) RCD, if not to circumvent the additional burden of proof set up by the Article 8(3)(d) RCD. Moreover, justifying situations like the present one under Article 8(1)(e) RCD and simultaneously under Article 5(1)(f) ECHR *de facto* risks to create a new additional ground for detention – not provided in the list under Article 8 RCD – that would permit detaining asylum seekers pending a return procedure outside the specific situations identified under item d).

As for the *K* case, also in *N.J.* the CJEU seemed to have prioritised an assessment of the limitations to the right of liberty and security based on Article 52(1) EUCFR. Only at the very end of the judgment, after having replied affirmatively on the questions pertaining Article 52(1), the CJEU analyses whether Article 8(3)(e) RCD is in line with the limitations provided by the ECHR in Article 5 ECHR. In doing so, the CJEU made arguments that seem more appropriate for an assessment of the validity of Article 8(3)(d) RCD rather than Article 8(3)(e) RCD on the detention for national security and public order. But especially because the grounds indicated in Article 5 ECHR are exhaustive, should be given a narrow interpretation, and because detention should be carried out in good faith and be in genuine conformity with the purpose of the ground listed in Article 5(1) ECHR, the arguments of the CJEU do not seem convincing when applied to the detention for national security and public order grounds.

deportation order was only suspended, and the applicants' detention was ordered with a view to their eventual deportation.

In other words, in the opinion of the author, if the national authorities want to justify the detention of an asylum seeker under Article 5(1)(f) ECHR second limb, they will have to use Article 8(3)(d) RCD. Since the ECtHR requires that the detention is conducted in genuine conformity with the purpose of the ground listed in Article 5(1) ECHR, the fact that Article 8(3)(d) RCD is not applied or cannot be applied is a strong indicator that the detention cannot be justified under Article 5(1)(f) ECHR second limb.

Further, it is believed that the detention of an asylum seeker for reasons of national security and public can be justified only in two cases: if Article 5(1)(c) ECHR can be applied; and when the State has validly derogated from its obligations under Article 5§1 of the Convention under Article 15 ECHR. In this regard it is worth make a comparison with the ECtHR case *A and others v. UK*.[87]

Similar conclusions were reached by the FRA in a 2017 report, which argued that the detention to protect national security and public order did not find any corresponding ground under EU law, and therefore recommended that '[d]omestic legislation regulating immigration or asylum should not be used to detain individuals on grounds of public order, thereby circumventing the safeguards established under human rights law for criminal detention. EU Member States should ensure that grounds for immigration detention established at national level do not extend beyond the exhaustive list of legitimate grounds listed in Article 5(1) of the ECHR, as well as those permissible under the EU asylum and return acquis'.[88]

4. *Conclusions*

As seen above, the right of liberty and security provided by the Charter must be given the same meaning and scope of Article 5 ECHR. This also means that the right of liberty and security can be limited only on the basis of one of the grounds provided for by Article 5 ECHR.

Despite a reference to the ECtHR is included in the Preamble and in the Explanations to the Charter, in the literature many authors have maintained that neither the wording of Article 52(3) nor the drafting

[87] ECtHR, *A and Others v. the United Kingdom* [GC], App. No. 3455/05, Judgment of 19 February 2009. See also above para. 3.3.1.

[88] FRA, *European Legal and Policy Framework*, *cit*., p. 46.

history of the Charter support the conclusion that the case-law of the ECtHR is binding in all circumstances, but rather that it should be "accorded significant weight".[89]

In *K. v. Staatssecretaris van Veiligheid en Justitie* and *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, confirming its previous jurisprudence, the CJEU seems to have given preference to Article 52(1) EUCFR when assessing the limitations to Charter corresponding Articles.[90] This notwithstanding, in both cases the CJEU has conducted – at least to some extent – an analysis of the Strasbourg Court jurisprudence in light of Article 52(3) EUCFR. These assessments were anchored to the ECtHR cases mentioned by the referring national court, and left several important questions opened.

As it was seen above, the *K.* did not offer the chance to clarify the repercussions of the *Suso Musa* judgment in the EU system, and specifically the question whether a State which has gone beyond its ECHR obligations in creating further rights or a more favourable position enacting legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application is still allowed to justify the detention of asylum seekers under Article 5(1)(f) first limb ECHR, given that that provision rests on the notion of 'unauthorised entry'.

Similarly, even after the *J.N.* judgment, there remains serious doubts on the compatibility of Article 8(1)(e) RCD with Article 5 ECHR, and a risk that this Article will be used to detain individuals with a view to circumvent the existing criminal procedural safeguards or erode the guarantees established by EU law for international protection applicants in a return procedure.

It is hoped that these questions will be clarified in the future. In fact, even if the EU is not strictly bound to follow the ECtHR case law, the ECtHR case-law should certainly be accorded significant weight, especially in case such those highlighted above, where the standards set up by the ECtHR are in fact higher than those laid down by the EU. As clearly stated in the Explanations, 'the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR'.[91]

[89] S. Brittain, *The Relationship Between*, *cit*., p. 503; T. Lock, *The ECJ and the ECtHR*, *cit.*, p. 385.

[90] S. Peers, S. Prechal, *Article 5*, *cit*., p. 1498.

[91] Art. 52, Explanations.

Preliminary Questions in Asylum Cases Lodged by the Courts from Central and Eastern Europe: a Pragmatic Study

Jacek Białas*, Małgorzata Jaźwińska**

1. *Introduction*

Authors of the paper aim to elaborate how the "new" EU countries use the possibility to lodge preliminary questions to the CJEU of the European Union (CJEU) in asylum and migration cases, where the Charter of Fundamental Rights of the European Union (hereinafter the EUCFR) is applicable. The situation in Central and Eastern European countries (CEE) being also members of the EU, except Germany, will be discussed. Those countries are: Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia and the Baltic states: Estonia, Latvia and Lithuania. In the paper below a referral to CEE will include all countries listed above.

The paper also aims to compare the activity of particular CEE in terms of the number of preliminary references made. The possible reasons behind the activity or the lack of activity of CEE will be analysed.

While analysing the role of courts and tribunals of the CEE countries in the dialogue with the Court of Justice, the most important rulings in the field of asylum and migration originating from the preliminary questions from those countries will be discussed.

The paper also analyses in detail the activities of Polish courts in

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terms of preliminary references in the field of asylum and migration policy. Unsuccessful motions to Polish courts to request to the CJEU to give preliminary rulings will be analysed. The paper will also try to identify possible preliminary questions that could be lodged in the CJEU taking into account Polish asylum law and practice.

2. *Definition of the Preliminary Rulings and its Importance in the Field of Asylum*

One of the main proceedings within the jurisdiction of the CJEU is the preliminary ruling procedure. This procedure can only be initiated by the court or tribunal of one of the Member States, it has the limited scope of jurisdiction and has several distinct characteristics.

According to article 267 of the Treaty on the Functioning of the European Union the subject matter of a preliminary ruling is restricted to:

(a) the interpretation of "the Treaties", that is EU primary law, including TEU, TFEU, the Charter of Fundamental Rights and the general principles of EU law,

(b) the validity and interpretation of "acts of the institutions, bodies, offices or agencies of the Union", what covers EU secondary legislation.

The CJEU is the only authority within the EU that can declare void a EU secondary legislation, if it is contrary to the EU primary law. The procedure can be initiated by the preliminary reference.

A second type of the preliminary ruling that can be given by the CJEU is the ruling on the interpretation of the EU law. Both primary and secondary EU law is subject to the CJEU interpretation given in the form of a preliminary ruling.

What has to be born in mind is that the CJEU can decide only on the interpretation of the EU law. It has no jurisdiction over national legislation. The preliminary reference procedure also does not substitute for national courts. After obtaining a preliminary ruling on the interpretation or the validity of the EU law, it is for the national court or tribunal to apply it in the individual case. The CJEU does not verify nor establish the facts of the case. Those are being established by the national court or tribunal.[1]

[1] CJEU (First Chamber) 16 March 1978, Case 104/77, *Wolfgang Oehlschläger v. Hauptzollamt Emmerich*, para. 4.

Preliminary reference procedure is sometimes referred to in terms of the judicial dialogue between national and the European court. It is because only courts or tribunals from the Member States are entitled to initiate it. In the procedure they can express their view on the matter.

Preliminary ruling has a binding effect, the national court or tribunal is bound by the ruling, be it an interpretative one or questioning the validity of the EU law. While adjudicating later a domestic case, they have to apply the EU law in a manner that is consistent with the preliminary ruling.

The term 'court' or 'tribunal' is given an autonomous meaning in the Union law and is not reserved to bodies having judicial power within the meaning of national laws. In the case C-175/11 H.I.D., B.A., the CJEU held that the Irish Refugee Appeals Tribunal could be regarded as a tribunal within the meaning of the EU law. It was highlighted that the Irish Refugee Appeals Tribunal was established by law, permanent, applied the rules of law, its decisions in favour of asylum seekers were binding on national authorities and its decisions could be appealed. All those factors taken together led the CJEU to rule that for the purpose of the Union law the Irish Refugee Appeals Tribunal should be regarded as a tribunal.[2] While deciding whether a specific national entity can refer a preliminary question to the CJEU one has to analyse its composition, function and procedure in terms of the factors mentioned above.

Another important issue is, whether national courts or tribunals are required to initiate the preliminary ruling procedure or it is their discretionary power? Article 267 (2) and (3) of the Treaty on the Functioning of the European Union partly provides an answer. The crucial distinction has to be made between the courts and tribunals of final and non-final instance and between the interpretative ruling and a ruling on the validity of the EU law.

Courts and tribunals of lower instance have a right to request a preliminary ruling should they need guidance in interpreting EU law while adjudicating individual cases. However they are under no obligation to make such a reference and seek an interpretative preliminary ruling. The situation changes if national court or tribunal of lower instance questions the validity of EU acts. Since national judges are primarily the Union

[2] ECRE, *The application of the EU Charter of Fundamental Rights to Asylum Procedural Law*, October 2014. Available at: https://www.ecre.org/wp-content/uploads/2014/10/EN-The-application-of-the-EU-Charter-of-Fundamental-Rights-to-asylum-procedures-ECRE-and-Dutch-Council-for-Refugees-October-2014.pdf.

judges they cannot disregard the EU law they believe to be unlawful, neither can they declare the EU act invalid (case C-314/85, Foto-Frost).

The CJEU is the only body that is authorized to decide on the validity of the EU secondary legislation. Therefore the only possibility for a national judge to disregard EU legislation is by lodging a preliminary reference to the CJEU concerning the validity of EU law. All in all, if the court or tribunal believes that EU law is unlawful and does not want to apply it, this court or tribunal is obliged to make a preliminary reference concerning the validity of the EU legal instrument.

Courts and tribunals of final instance, against whose decisions there is no judicial remedy under the national law, are obliged to make a preliminary reference if the individual case raises the question as to the interpretation or validity of the EU law. The question concerning the EU law has to be relevant in the case, that is the answer to the question must affect the outcome of the case. There are only three situations when a court or tribunal can be relieved from the duty to lodge a preliminary question. Firstly, when the issue at question is identical with the one that has already been the subject of preliminary ruling in a similar case (joined cases 28 to 30/62, Da Costa, p. 31). Secondly, when the CJEU has already dealt with the point of law questioned even if the issue at question is not strictly identical (so called *acte éclairé*). Finally, when the proper interpretation of the EU law is so obvious that it does not leave room for any reasonable doubt for the judge of any other court or tribunal of the other Member States (so called *acte clair*). If one of those three situations occur, the court or tribunal of final instance is not obliged to make a preliminary reference, however is at liberty to bring the question to the CJEU if they consider it appropriate.[3]

Another distinct characteristic of the preliminary ruling procedure is the fact that the ruling of the CJEU is final and cannot be appealed. Even if a party to a proceedings does not agree with the ruling they have no possibility to further question it. Bearing in mind the doctrine of *acte éclairé* and the principle of sincere cooperation it can have a significant effect not only on the parties of the proceedings but also on the legal standard throughout the Union.

The preliminary rulings both on the interpretation and on the validity of EU law are declaratory in nature and in principle have retro-

[3] CJEU 6 October 1982, Case 283/81, *C.I.L.F.I.T. v. Ministero della Sanità.*

active effect (*ex tunc*). This characteristic can be important from the perspective of potential compensatory claims.

In cases pending before national courts or tribunals, with regard to persons in custody, the CJEU can use the urgent preliminary ruling procedure (PPU). The aim is to ensure that a preliminary ruling is given faster. This procedure is frequently used in preliminary references concerning the interpretation of EU secondary law provisions on the detention of third-country nationals in asylum or deportation procedures.

Preliminary ruling procedure is an important instrument for the development of the Common European Asylum System (CEAS) and the EU immigration policy. The jurisdiction of the CJEU in the area of asylum and immigration dates back to the entry into force of the Treaty of Amsterdam, in May 1999. From this date, courts and tribunals of last instance from the Member States can ask preliminary questions on the validity of the secondary EU law and the interpretation of both primary and secondary EU law in the field of asylum and migration. With the entry into force of the Treaty of Lisbon also courts and tribunals of lower instances may ask preliminary questions. Since then, the CJEU can also declare EU secondary legislation concerning asylum or immigration void, should it be contrary to the fundamental rights as enshrined in the EUCFR. The importance of the Charter in the area of asylum is additionally highlighted by the fact, that all of the legal acts creating the Common European Asylum System contain direct reference to fundamental rights and the Charter itself.

Through the preliminary ruling procedure national courts and tribunals can ask the CJEU for guidance in the interpretation of the Union law, thou leading to a more uniform application and interpretation of the EU law. This function seems especially important for the proper development of the Common European Asylum System. The ultimate goal of the CEAS is to ensure equal treatment of asylum seekers, refugees and persons with a subsidiary protection status when it comes to the procedures and qualification and reception conditions. Preliminary references, which ensure that provisions of the EU law concerning asylum are uniformly applied and interpreted throughout all Member States, lead to a greater legal unity in everyday legal practice.

By engaging in the dialogue with the Court of Justice, through preliminary reference procedure, national courts and tribunals can also advance the development of the Union law in the field of asylum and migration. Even, when it is evident that Member States apply and inter-

pret EU law incorrectly, or that the EU provision is contrary to the primary law, the CJEU cannot act *ex officio*, on its own motion to correct the wrong. It has to wait for the case to be brought before the Court by the competent authority.

The development of the EU law on asylum and migration was influenced by the participatory process between supranational and national judges. The preliminary rulings of the Court of Justice, regarding fundamental rights in asylum and return proceedings, had a significant impact on national jurisprudence and development of the CEAS.[4] Thanks to preliminary references the CJEU could advance the protection of third-country nationals subject to detention in asylum or deportation procedures, as well as guaranteed a right to a an effective remedy and to a fair trial in migration and asylum related cases. The impact of preliminary references in the field of asylum and migration where a reference to the Charter was made will be discussed in detail below.

3. *Statistics*

Each year the CJEU receives numerous references for a preliminary ruling. From 2010 until 2016 the number of preliminary references oscillated around 400 per year. In 2017 there were 533 preliminary questions asked.

In 2017 the average number of preliminary references made by each Member State was around 19. Yet some Member States asked significantly more often than the others. In 2017 alone, from Germany came 149 preliminary references, around 28% of all questions asked that year. Italy with 57, Netherlands with 38, Austria with 31 and France with 25 also exceeded the average number of preliminary questions asked by a Member State in 2017.[5] As can be seen from those numbers no CEE country was a frontrunner when it comes to the number of preliminary references made.

According to the list prepared by ECRE and ELENA, as of January 2018, there were before the CJEU about 120 important judgements

[4] M. Moraru, S. Coutts, G. Renaudiere, *ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter. MODULE 5 – ASYLUM AND MIGRATION*. Available at: https://www.eui.eu/Projects/CentreForJudicialCooperation/Documents/D1.1.e-Module-5.pdf

[5] Statistics from the CJEU annual reports, available at: https://curia.europa.eu/jcms/jcms/Jo2_7000/en/.

and pending cases referred by national courts and tribunals concerning asylum and migration policy.[6] In about 40 cases national courts or tribunals made a reference to the Charter.

Out of those 120 cases, 23 (around 18%) were initiated by a preliminary question lodged by courts or tribunals from CEE countries. In 11 of them a reference to the Charter was made.

The greatest number of preliminary references from the CEE country in the field of asylum and migration policy came from Bulgaria – 7 preliminary questions, 4 of them included reference to the Charter. Three questions were asked before 2015 and four in the years 2015-2017 (in the context of the so-called migration crisis).

Hungarian courts lodged 6 preliminary questions in the field of asylum and migration and one of them made reference to the Charter. Two references were made before 2015 and four in the years 2015-2017 (in the context of the so-called migration crisis).

Courts and tribunals from Czech Republic made four preliminary references with three of them referencing the Charter. One question was lodged before 2015, and three were made in the years 2015-2017 (in the context of the so-called migration crisis).

Slovenian courts asked 3 preliminary questions in the field of asylum and migration policy, one involved reference to the Charter, all were lodged in the years 2016-2017.

In the period 2016-2017 Slovakia and Poland asked each one preliminary question in the field of asylum and migration. The question asked by the Polish court included reference to the Charter. The question asked by the Slovak court has been later withdrawn (case C-113/17, QJ v. Ministerstvo vnútra SR - Migračný úrad),

One preliminary question concerning border control was asked by Latvian court in 2012. In the question Latvian court made reference to the Charter.

The majority of preliminary questions stemming from the CEE countries, in the field of asylum and migration policy, were made in the years 2016-2017. Courts and tribunals from Bulgaria and Hungary, CEE countries most affected by the migration crisis, were the most active. Before the crisis, only Bulgaria, Hungary and Czech Republic

[6] ECRE/ELENA, List of Relevant Asylum Judgments and Pending Preliminary References from the Court of Justice of the European Union, January 2018, available at: http://www.asylumlawdatabase.eu/en/content/ecreelena-list-relevant-asylum-judgments-and-pending-preliminary-references-court-justice.

were actively participating in the dialogue with the CJEU in the field of asylum and migration policy. What is worth mentioning, is the fact, that in the years 2016-2017 the number of asylum application in Hungary and Bulgaria rapidly decreased due to the closure of the Western Balkan route. However it did not lead to the significant decrease of preliminary references in those years.

The increased activity of courts and tribunals when it comes to making referrals to the CJEU in years 2016-2017 in the field of asylum and migration could be triggered if not by the greater number of asylum applications then by the greater visibility of asylum seekers and thou legal problems arising from migration be it a forced or a voluntary one.

It is worth mentioning that before the migration crisis Poland was the CEE country with the greatest number of asylum applications. Yet, up until today, no Polish court made a preliminary reference in the field of asylum policy (preliminary reference made by the Supreme Administrative Court concerned visa policy). It shows that engaging in a dialogue with the CJEU is not always directly connected with the number of cases being adjudicated.

4. *Asylum Situation in the Central and Eastern European Countries*

When it comes to asylum, Central and Eastern European States share one characteristic – most of them are treated by asylum seekers as a transit and not destination countries. Many asylum seekers are passing those countries trying to apply for asylum in the Western Europe, that is France, Germany and Sweden, etc.[7] Yet, the asylum situation in CEE countries is not uniform. CEE countries can be divided into two groups based on the primary nationalities of asylum seekers present there. In this chapter a situation of Baltic states (Estonia, Latvia and Lithuania) will not be discussed as the yearly number of asylum applications lodged there remains relatively low.

First group is formed by those countries where a majority of applicants are coming from Middle East, mainly from Afghanistan, Iraq

[7] For example, in 2017 in Poland, 53% of the asylum proceedings were discontinued as the applicants left the territory of Poland and travelled to Western Europe countries. Source: Urząd do spraw Cudzoziemców, Raport roczny – ochrona międzynarodowa, 2017 (Office for Foreigners. Annual report – international protection 2017) available at: https://udsc.gov.pl/statystyki/raporty-okresowe/raport-roczny-ochrona-miedzynarodowa/2017-2/.

and Syria. Those countries, mostly situated on the Balkan route, were affected by the refugee crisis of 2015. It is Bulgaria, Croatia, Hungary, Romania, and Slovenia that belong to this category. Out of this group, mostly Bulgaria and Hungary noted a rapid increase of asylum applications during the refugee crisis.

In Bulgaria, before a refugee crisis in the years 2008-2012, there were about 1,000 asylum applications per year. From 2013, the number started to grow. In 2013 there were already 7,000 applications whereas in 2016 almost 20,000. Those numbers decreased to 3,700 in 2017, after the closure of the Western Balkan route.

Hungary is the CEE country perceived to be mostly affected by the refugee crisis. Before the crisis Hungary received about 2,000 – 4,000 applications per year (in the years 2008-2012). Those numbers started to grow significantly in 2013, reaching around 19,000 applications. At the climax of the refugee crisis (2015), in Hungary around 178,000 applications were lodged (around 13% of all asylum applications lodged in all EU countries). After the influx of asylum applications Hungary advocated for the closure of the Western Balkan route and started the construction of the fence along its border with Serbia. It resulted in the decrease of asylum applications – about 30,000 were lodged in 2016, and only 3,300 in 2017.

Slovenia and Croatia are the countries where the number of asylum seekers remains relatively low. Until 2015, in Slovenia around 200-300 applications were lodged each year, whereas in Croatia the number oscillated between 200 and 2,000 applications. There was a slight increase of the applications in 2016, with Slovenia receiving 1,265 applications and Croatia 2,225 applications. Although, apart from Greece, Croatia and Slovenia were the first EU countries on the Western Balkan route, those countries did not register a massive increase of asylum applications during the crisis. Asylum seekers did not want to lodge their asylum application in those countries.

Romania is yet another CEE country from this group where a number of asylum applications remained relatively stable. From 2008 till 2016 Romania registered between 1,000 and 2,500 asylum applications yearly. After the closure of the Western Balkan route, Romania observed an increase of asylum applications with about 4,800 applications lodged in 2017. The data shows that the Black Sea route connecting Turkey and Romania became more commonly used what could impact the number of asylum applications in this CEE country.[8]

[8] Refugees and Migrants at the Western Balkans route: Regional Overview (September-December 2017) – Balkans Migration and Displacement Hub Data and Trends

The second group of CEE states is formed by those countries where a majority of asylum applicants are citizens of the former Soviet Union, mostly Ukrainians, Russians, Georgians, Armenians and Tajiks. This group includes Czech Republic, Poland and Slovakia. Belarusian-Polish border crossing in Terespol is the main point of entrance into Europe of the former Soviet Union citizens applying for asylum in the EU.

In Poland, the number of asylum applications was relatively stable until 2017. There was around 7,000 – 10,000 asylum applications per year (with exceptional 2013 – about 15,000 applications). Out of CEE countries discussed, Poland held the highest number of applicants of the North Caucasus origin, most commonly Chechens, Dagestanis, Ingushetians. The vast majority of Tajiks made their asylum applications in Poland. Relatively higher number of asylum applications made in Poland could be attributed to its geographical location. Poland, as the border country, was the first point of entry to the EU for many asylum seekers from the former Soviet Union. The number of asylum applications in Poland decreased significantly in 2017, with only 5,000 applications made. It could be attributed to intensified problems with submitting asylum application at the Polish border crossings and practice of pushbacks.

In the Czech Republic the number of asylum applications is stable, yet significantly lower. It ranges from about 700 to 1,600 applications per year. It must be noted however, that this country has no external EU border and is surrounded by EU countries, therefore under Dublin III Regulation it is less likely to become Member State responsible for examining an application for international protection.

In Slovakia, in 2008-2015, the number of applications was also stable, ranging between 330 and 900. There was a decrease in asylum applications made in 2016 and 2017, with respectively 145 and 160 applications registered.[9] Contrary to other CEE countries from this group, Slovakia holds a relatively large proportion of Syrian and Afghan asylum seekers.

To sum up, CEE countries with the highest number of asylum applications are Bulgaria, Hungary and Poland, all border countries. Bulgaria and Hungary were most affected by the refugee crisis in terms of

Analysis, December 2017, available at: https://reliefweb.int/report/world/refugees-and-migrants-western-balkans-route-regional-overview-september-december-2017.

[9] Asylum and first time asylum applicants – annual aggregated data (rounded) persons. Statistics available at http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00191&plugin=1.

the number of asylum applications. During the refugee crisis we could observe a mass influx of asylum seekers through the Western Balkan route. The situation changed significantly in 2016 with the closure of the Balkan route, the EU-Turkey refugee deal, the construction of the fence at the Hungarian border and a routine practice of pushbacks. Poland, a country bordering with the former Soviet Union, did not register any significant influx of asylum seekers during the refugee crisis. Yet, in 2017 the number of applicants reduced almost by half. It is being attributed to the policy of pushbacks. The wide spreading policy of pushbacks at the external borders of the EU range from the denial of entry to proposed legislative changes restricting access to protection.[10]

The influence of the closure of the Western Balkan route, and of the pushback policy, can be seen by comparing the percentage of asylum applications lodged in the CEE countries in 2015, at the climax of the refugee crisis, and in 2017 after the introduction of measures aiming at reducing the number of asylum seekers in the CEE countries. In 2015 asylum application made in the CEE countries amounted to 16% of all asylum applications lodged in the EU, whereas in 2017 this percentage shrunk to only 3%. Although, the methods used in order to limit the number of applications seem to have reached the goal, its accordance with international law and the Charter is questionable.

5. *Important CJEU Cases from the Central and Eastern European Countries*

Courts and tribunals from CEE countries referred to the CJEU several important preliminary questions relating to asylum and migration policy. Some of them, such as the case of Arslan (C-534/11), Kadzoev (C-357/09), Bolbol (C-31/09) or El Kott (C-364/11), influenced the functioning of the Common European Asylum System although did not refer to the EUCFR. Others, while furthering the development of asylum and migration policy of the EU, also advanced the interpretation and application of the EUCFR. Those preliminary questions concerned mostly detention, Dublin III Regulation, border control and visa procedure and will be discussed in detail below.

[10] Hungarian Helsinki Committee, *Pushed Back at the Door: Denial of Access to Asylum in Eastern EU Member States*, 2017, available at: https://www.helsinki.hu/wp-content/uploads/pushed_back.pdf.

Most important rulings concerning detention practices in the CEE countries in the context of the EUCFR were Mahdi (C-146/14) and Al Chodor (C-528/15).

In the case of Mahdi, the Bulgarian court pondered about the procedural issues of extending period of the detention of third-country nationals and the grounds for extending such detention in the deportation procedure. The referring court acknowledged the importance of the EUCFR, namely the right to liberty and security and the right to an effective remedy and a fair trial.

The CJEU reaffirmed the central role of the EUCFR in interpreting the secondary EU law. Apart from the requirement to prolong the detention period by the decision providing in writing reasons in fact and in law for that decision, the CJEU also stressed the necessary scope of the judicial review. While deciding on extension of the detention of a third-country national in the deportation procedure, national courts have to take into account all relevant circumstances. It means that they cannot rely almost entirely on information provided by the authority requesting the extended detention. Should it be necessary in an individual case, the national court needs to consider observations made by a third-country national or other evidence and facts important from the perspective of prolonging the detention. Furthermore, in each case the national court has to assess whether there is a possibility to apply less coercive means.

The CJEU also highlighted, that the mere lack of identity documents cannot automatically lead to the extension of the detention. Each case has to be individually analysed and decided.

Another important judgement, initiated from the Czech Republic, concerns the detention of asylum seekers transferred to another Member State under Dublin III Regulation. The CJEU was asked to clarify the concept of "serious risk of absconding". In its judgement (Al Chodor, C-528/15) the CJEU stressed the importance of judicial protection and protection against arbitrary detention guaranteed to asylum seekers. In consequence, the CJEU ruled that the national legislation must provide objective criteria indicating the presence of a risk of absconding. Otherwise, the detention of asylum seekers under Dublin III Regulation will not be permissible. Furthermore, the Court stressed, that the national legislation laying down those criteria must be sufficiently clear, predictable, accessible and it has to protect against arbitrariness.

The ruling was crucial to other Member States as at the time some still did not have the objective criteria for evaluation of the "risk of ab-

sconding" set in their national legislation, i.e. France,[11] Czech Republic or UK.[12] It meant that, before enacting such legislation, they could not detain asylum seekers waiting to be transferred to another Member State under Dublin III Regulation.

Another group of preliminary questions asked by the CEE countries relates to Dublin III Regulation and its appliance in conformity with the EUCFR. Questions from this group were asked by courts situated on the Western Balkan route, that is Slovenia.

In the case C.K., H.F., A.S. (C-578/16), the Supreme Court of Slovenia asked a preliminary question regarding the application of Dublin III Regulation. The question was referred to the CJEU during the heights of the refugee crisis, when the migration of asylum seekers within Member States became one of the major issues for the governments. The issue to be resolved by the CJEU was: whether the state of health of the asylum seeker could indicate a prohibition of a transfer to another Member State, where there are no systematic deficiencies in its asylum system.

The CJEU once again highlighted the requirement to interpret and apply secondary EU law in accordance with fundamental rights guaranteed by the EUCFR and the prohibition of inhuman or degrading treatment or punishment as having a fundamental importance. The CJEU held that in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment, within the meaning of Article 4 of the EUCFR.

Such a determination can be made irrespective of the level of medical and psychological care offered by another Member State. Authorities, where necessary, are always required to take precautions or postpone the transfer of an asylum seeker so to prevent the violation of the prohibition of inhuman or degrading treatment.

The issue of proper application of Dublin III Regulations was brought to the attention of the CJEU once again by the Slovenian pre-

[11] France. Grounds for detention. Asylum Information Database, available at: http://www.asylumineurope.org/reports/country/france/grounds-detention.

[12] UK High Administrative Court: unlawful detention based on Al Chodor and disputed age assessment. European Database of Asylum Law, July 2017, available at: http://www.asylumlawdatabase.eu/en/content/uk-high-administrative-court-unlawful-detention-based-al-chodor-and-disputed-age-assessment.

liminary question in the case A.S. (C-490/16). In its ruling the CJEU held that the right to an effective remedy requires that the national courts do examine, whether the criteria for determining responsibility of the Member State to examine the asylum application were correctly applied. The fact that another Member State accepted the applicant does not restrict the scope of the judicial review.

Another interesting area appeared to be the evidentiary rules for determining sexual orientation of an applicant in an asylum procedure. In the case F. (C-473/16), Hungarian court asked the CJEU about the appropriateness of using projective personality tests in order to establish sexual orientation of an asylum seeker. Although, generally allowing for expert opinions in asylum procedures, the CJEU held, that using projective personality tests to establish sexual orientation of an asylum seeker violates his/her right to respect for private life, as the interference is being disproportionate. Psychological tests should not be used to determine a sexual orientation of an applicant. National authorities can carry out a personal interview and assess the applicant statements according to the procedural standards laid down in the EU legislation.

This referral shows that the debate over the proper and dignified asylum procedure for asylum seekers from the LGBT community is relevant throughout the Member States, including the CEE countries. Member States, with the significant input from the Court of Justice, are trying to find the most appropriate procedure, that could reconcile the need to establish relevant facts in an asylum procedure with the requirement to protect the dignity and privacy of asylum seekers. By using preliminary questions mechanism CEE countries are actively participating and advancing this debate.

Courts and tribunals of CEE countries asked also for the rulings of the CJEU in cases of border control and visas.

The Latvian court referred a preliminary question concerning the right to appeal and a right to an effective judicial remedy against infringements committed in the procedure, leading to a decision authorizing entry into the Member State. In the case Zakaria (C-23/12), the CJEU held that border guards performing duties are required to fully respect human dignity. Should they fail this obligation, Member States need to provide appropriate legal remedy, in compliance with Article 47 of the EUCFR (right to an effective remedy and to a fair trial).

The Polish Supreme Administrative Court referred a preliminary question concerning the right to the judicial control of Schengen visa refusal decision. In the case El Hassani (C-403/16), the CJEU referred

to the Article 47 of the EUCFR and held that appeal proceedings in such cases must, at a certain stage, guarantee a right to judicial appeal.

The abovementioned cases do not exhaust the activities of courts and tribunals from CEE countries when it comes to their engagement in the dialogue with the European Court on the interpretation of the Charter in the field of asylum and migration. Before the CJEU there are (as of July 2018) several significant pending preliminary questions originating from the CEE countries. Some of them concern: the scope of judicial review in asylum cases (mainly whether the court or tribunal can amend administrative decision refusing international protection and grant such protection),[13] the possibility to revoke or refuse a renewal of the refugee status based on security concerns,[14] the concept of persecution for religious reasons[15] and the influence of the right to protect family life on asylum procedure.[16]

6. *(Possible) Preliminary Request from the Polish Courts*

Until now, Polish courts made no preliminary reference in asylum cases, although several motions for a preliminary reference were lodged by lawyers within asylum proceedings.

Polish courts dealt with number of cases concerning entry refusal decisions issued to the third-country nationals trying to cross the external EU border. Third-country nationals claimed that the Border Guards ignored their asylum declarations. After being removed back to Belarus or Ukraine, they lodged appeals against entry refusal decisions. Those appeals also contained asylum declarations.

In the motions for a preliminary reference, third-country nationals argued that there is a need for an interpretation of Article 6 of the 2013/32 Procedures Directive in the light of the Article 18 of the Char-

[13] CJUE 22 September 2017, Case 556/17, *Torubarov v. Bevàndorlàsi és Menekültügyi Hivatal*.

[14] CJUE, Request for a preliminary ruling from the Nejvyšší správní soud (Czech Republic) lodged on 14 July 2016 Case 391/16, *M. v. Ministerstvo vnitra*

[15] CJUE, Request for a preliminary ruling from the Administrativen sad Sofia-grad (Bulgaria) lodged on 3 February 2017, Case 56/17, *Fahti v. Predsedatel na Darzhavna agentsia za bezhantsite*.

[16] CJUE, Request for a preliminary ruling from the Administrativen sad Sofia-grad (Bulgaria) lodged on 19 December 2016, Case 652/16, *Akhmedbekov v. Zamestnik-predsedateł na Dyrżawna agencija za beżancite*.

ter in order to establish whether a third-country national can lodge an application for international protection in any form, including in the appeal against entry refusal decision. The Warsaw Regional Administrative Court dismissed those motions, stating that asylum declarations in appeals against entry refusal decisions are not made at the border of the Member State as it is done after the third-country national was refused an entry into Poland and already removed to Belarus or Ukraine. Therefore it is out of the scope of the Procedures Directive.[17]

In another case, asylum applicants argued, that there is a need for the interpretation of the provision mentioned above (Article 6 of the 2013/32 Procedures Directive) and asking the Court of Justice, whether presenting to the Border Guards at the border a written asylum declaration may be treated as "making" an asylum application?[18] In this case both the Regional Administrative Court in Warsaw and the Supreme Administrative Court decided to not request the CJEU for preliminary reference.

Another motion for a preliminary reference was made in the case of an applicant excluded from being a refugee. He was recognized as been guilty of acts contrary to the purposes and principles of the United Nations. According to the Polish law, in cases involving security matters, the applicant is not provided with any information about the basis of the exclusion. S/he has no access to the case files and the written reasons of the decision are limited. The motion for a preliminary reference contained an argument that such a regulation may be not consistent with the Article 11 and Article 23 of the 2013/32 Procedures Directive, interpreted in the light of the rights of defence enshrined in the Article 47 of the EUCFR. Those provisions do not foresee a possibility to limit reasons of the decision when an application is rejected. In terms of access to case files, in cases involving security issues this right might be limited, but the Member States shall establish procedures guaranteeing that the applicant's rights of defence is respected. In particular, they may grant access to classified information to a legal representative, who has undergone a security check; Poland legislation provides no such measures.

[17] The Regional Administrative Court in Warsaw, judgment of 27 October 2017, IV SA/Wa 1846/17.

[18] The Regional Administrative Court in Warsaw, judgments of 7 March 2018, IV SA/Wa 3095/17, the Supreme Administrative Court, judgment of 14 December 2018, II OSK 2511/18. Written reasons of the Supreme Administrative Court judgment are not prepared yet.

The Warsaw Regional Administrative Court dismissed the abovementioned motion, stating that the court has a full access to all case files and has a duty to conduct an independent in-depth case analysis, therefore a rights of defence is observed in those cases. The Court also stated that the Ombudsperson may be treated as a "special representative" as Ombudsperson has an access to classified documents and may join any case pending before administrative and judicial bodies.[19] Motion for the preliminary reference in this case was also dismissed by the Supreme Administratice Court (judgment of 23 November 2018, II OSK 1710/18).

It should be also noted that the Polish system of challenging asylum decisions differs significantly from the system provided by the 2013/32 Procedures Directive. It could also give a reason for lodging a preliminary reference to the Court of Justice.

Article 46 of the 2013/32 Procedures Directive ensures a right to an effective remedy before a court or tribunal, against the decision taken regarding application for international protection. It also states that Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs, at least in appeals procedures before a court or tribunal of the first instance. The directive also gives the applicants a right to remain in the territory pending the outcome of the remedy.

According to the Polish law an appeal against a negative asylum decision is reviewed by the Refugee Board (*Rada do Spraw Uchodźców*), which provides full and *ex nunc* examination of both facts and points of law. However, the Refugee Board is an administrative body. It does not provide for an adversary proceedings and it is a party to a court's proceedings questioning its decisions. Therefore the Board cannot be treated as a court or tribunal within the meaning of Article 46 of the 2013/32 Procedures Directive.[20] The decision of the Refugee Board may be appealed to the administrative court. The administrative court however, provides only *ex tunc* examination of points of law. More-

[19] The Regional Administrative Court in Warsaw, judgment of 24 November 2017, IV SA/Wa 1612/17.

[20] P. Dąbrowski, M. Kowalski, *Rada do Spraw Uchodźców jako „sąd lub trybunał" w rozumieniu prawa Unii Europejskiej*, in G. Baranowska, A. Gliszczyńska-Grabas, A. Hernandez-Połczyńska, K. Sękowska-Kozłowska, (Eds.), *O prawach człowieka,* Warsaw, 2017, 435-449.

over, pending proceedings before the administrative court the applicant has no right to remain at the territory of Poland. An appeal to the administrative court has no suspensive effect and a return procedure may be initiated and a return decision given. In practice, failed asylum seekers make subsequent applications and, by the virtue of law, the return decision cannot be executed when the second asylum application is being examined (deportation is possible only during the third and subsequent applications being reviewed).

Before 1 May 2014, when the current Act on Foreigners[21] entered into force, in the decisions refusing international protection the administrative authorities also ordered the expulsion of the applicant. There were number of cases when a failed asylum seekers were returned before the expiry of the prescribed time limit for lodging an appeal to the administrative court, or before the court decided about a stay of their expulsion, or before it considered the appeal.[22] The Supreme Administrative Court dismissed a motion for a preliminary reference in this respect. The court stated that, although the applicant was expelled before the court decided about the appeal, the applicant managed to lodge the appeal, appeal was considered and the applicant was represented by the lawyer before the court.[23] Such an argumentation is doubtful, as even if the administrative court revoked a decision, then the applicant could not effectively enjoy it, since he had already been expelled.

There are serious doubts whether in asylum cases Polish law provided and currently provides a right to an effective remedy before the court. This is the matter which might be solved by the judgment of the Court of Justice.

To conclude, Polish asylum legal system gives numerous opportunities for making a preliminary reference. The questions concerning the right to an effective remedy or the right to asylum are all relevant in the European and Polish context and require an interpretation of the EU law as well as the Charter. Unfortunately, despite having numerous opportunities, Polish courts did not yet decide to make a preliminary reference in this area.

[21] Act of 13 December 2013 on Foreigners, Journal of Laws of 2013 item 1650.

[22] Helsinki Foundation for Human Rights, *Expulsion of foreigner may violate their right to court*, 2012, available at: http://www.hfhr.pl/en/expulsion-of-foreigner-may-violate-their-right-to-court/.

[23] The Supreme Administrative Court, judgement of 17 February 2017, II OSK 1660/15.

7. *Conclusions*

The preliminary reference procedure gives to the courts and tribunals of the Member States a unique possibility to take an active part in the development and the unification of the EU asylum and migration law. Through preliminary references national courts and tribunals can ask for the interpretation of the EU law or question its validity.

Courts and tribunals from the CEE countries made several important references to the CJEU in asylum and migration cases where the Charter was applicable. Bulgarian and Hungarian courts and tribunals should be praised for being the most active in engaging in the dialogue with the CJEU in cases relating to asylum and migration. The activity of those courts and tribunals cannot be entirely attributed to the refugee crisis of 2015, as even before the massive influx of asylum seekers they were amongst the most active in terms of the number of preliminary references lodged. Yet, the refugee crisis certainly did influence the activity of national courts and tribunals of the CEE countries. When it comes to preliminary references in the field of asylum and migration, the majority of them was lodged by the analysed CEE countries in the years 2016-2017.

Courts and tribunals from the CEE countries are engaging in the European debate over asylum and migration issues through the preliminary reference procedure. Unfortunately the activity of some of those countries is incompatible with the number of third-country nationals and asylum seekers on their territory. Not a single preliminary question in the area of asylum was lodged from Poland, the CEE country that had the highest number of asylum applications before the refugee crisis. This situation cannot be explained by the lack of possibilities or the lack of cases before the national courts that could result in the preliminary reference. In Poland in asylum and migration cases there were several motions to make a preliminary reference, yet all of them were dismissed. Current legal situation and legislative plans (introduction of border proceedings, introduction of new appeal authority in asylum procedure) seem to open new possibilities to ask the CJEU for a preliminary ruling and thou participate in the European asylum debate. It is only up to the judges from the Polish courts and tribunals to either seize or once again miss the opportunity.

The Western Balkans Route as an Alternative to Breaching the EU Charter of Fundamental Rights

Iris Goldner Lang*

1. *Introduction*

This paper discussed the major legal and reality challenges in the context of the recent refugee influx into Europe and, in particular, in the context of the creation of the 2015/2016 Western Balkans migration route. It will be suggested that the Western Balkans Route can be viewed as an alternative to breaching the EU Charter of Fundamental Rights. Following the introduction, the second section explains the situation on the Western Balkan route in 2015 and 2016 by offering the timeline of events across the Route. The third section discusses the discrepancy between the functioning of the Western Balkans route and the Dublin Regulation and places the discussion into the context of Member States' Charter obligations. The fourth section focuses on the position of Greece and Croatia. The final section examines the consequences of the Western Balkans Route and the judgments of the CJEU in *A.S.* and *Jafari*[1] on Member States' future behaviour, in particular the challenges in their compliance with the Charter and Convention obligations.

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[1] CJEU 26.07.2017, Case C-490/16, *A.S. v Slovenia*; CJEU 26.07.2017, Case C-646/16, *Jafari*.

2. *The Western Balkan Route - Timeline*

The Western Balkans route was a corridor created in 2015 which enabled the passage of hundreds of thousands of refugees transiting mostly from Syria, Iraq and Afghanistan, through Greece, FYROM, Serbia and Hungary, with the intention of reaching Germany.[2] On 15 September 2015 the route changed from Hungary to Croatia, when Hungary closed its border with Serbia, alongside its construction of a border fence along its 175-kilometre border with Serbia. The Serbian government, consequently, decided to redirect the refugee flow to Croatia. Croatia, on the other hand, directed the refugee flow further to Slovenia, as Hungary closed its border with Croatia on 16 October 2015 and constructed a border fence along the 348-kilometre Hungarian-Croatian border.

Following the German government's decision to reduce the number of asylum seekers in the country, in January 2016 Germany started allowing the entry of only those migrants who intended to seek asylum in Germany. This move was followed by Austria and it soon produced a chain reaction on the Western Balkans route by Slovenia, Croatia, Serbia and FYROM, which closed its border with Greece.[3] Soon afterwards, in February 2016, Austria set a daily cap of 80 asylum applications and of no more than 3,200 migrant entries into its territory.[4] This move was followed by Croatia and Slovenia, which decided on 26 February 2016 to impose a daily cap of 580 migrants.[5]

[2] Since the start of the refugee influx on 16 September 2015 until the closure of the Western Balkans route on 8 March 2016, an estimated 658,068 refugees and migrants – mostly from Syria, Afghanistan and Iraq, but also from other countries – transited through Croatia. See here: Regional Refugee and Migrant Response Plan for Europe: Eastern Mediterranean and Western Balkans Route, UNHCR, 2016 (available at: http://www.unhcr.org/577220cf7.pdf - last accessed on 16 October 2017). See also the press release of the Croatian Ministry of Interior (available at: https://www.mup.hr/novosti/364/priopcenje-za-javnost - last accessed on 16 October 2017).

[3] Balkan states attempt to limit numbers of refugees claiming asylum, The Guardian, 20 January 2016 (available at: https://www.theguardian.com/world/2016/jan/20/balkan-states-attempt-to-limit-numbers-of-refugees-claiming-asylum - last accessed on 16 October 2017).

[4] J. Rankin, *Austria Dismisses Criticism of its Plan to Limit Daily Refugee Numbers*, 18 February 2016 (available at: https://www.theguardian.com/world/2016/feb/18/austria-dismisses-criticism-of-its-plan-to-limit-daily-refugee-numbers - last accessed on 16 October 2016).

[5] J. Rankin, *Croatia and Slovenia Impose Limits on Refugee Numbers*, 26 February

On 11 November 2015 Slovenia started constructing a wire fence along its border with Croatia and, just several days later, on 19 November 2015, it decided to allow the entry of only those migrants "from countries where there is armed conflict", thus triggering a chain reaction in Croatia, Serbia and the FYROM.[6] Consequently, the then Croatian minister of the interior stated that Croatia would allow in migrants from Syria, Iraq, Afghanistan and Palestinians.[7]

The restrictions along the Western Balkans route continued to escalate in January and February 2016. Finally, at the meeting of the heads of police services of the Western Balkans countries, held in Zagreb on 18 February 2016, it was agreed that entry would be allowed only for those individuals who had a valid travel document and a visa or a residence permit, or who were arriving from war-torn areas and were in need of international protection, provided they could prove their nationality and were in possession of a registration form issued by Greek authorities.[8]

On 7 March 2016 the EU heads of state or government held a meeting with Turkey to find modes of cooperation in the context of the refugee influx. The meeting led to an agreement on the outlines of the future deal with Turkey reached on 18 March 2016.[9] This resulted in the Statement of the EU Heads of State or Government proclaiming that "irregular flows of migrants along the Western Balkans route have now come to an end".[10] In effect, from 8 March 2016 the countries along the Western Balkans route closed their borders for migration flows and stated they would accept only those individuals travelling with valid

2016 (available at: https://www.theguardian.com/world/2016/feb/26/croatia-slovenia-limits-refugee-numbers-europe-greece - last accessed on 16 October 2016).

[6] P. Teffer, *Balkan Countries Close Borders to Economic Migrants*, in *EUobserver*, 20 November 2015 (https://euobserver.com/migration/131192 - last accessed on 16 October 2017).

[7] Ibid.

[8] Joint Statement of Heads of Police Services from the Meeting Held in Zagreb, Croatia on 18th February 2016, points 5 and 6 (available at: https://www.mup.hr/UserDocsImages/topvijesti/2016/veljaca/migranti_sastanak/joint_statement.pdf - last accessed on 16 October 2017).

[9] EU-Turkey Statement, 18 March 2016 (available at: http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/ - last accessed on 16 October 2017).

[10] See point 2 in the Statement, available at: http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/ (last accessed on 16 October 2017).

documents and visas or who planned to request asylum or sought entry for humanitarian reasons.[11]

3. *Dublin Transfers and the Western Balkans Route - Where Law and Reality Diverge*

The functioning of the Western Balkans route represents a clear departure from EU rules, in particular the Dublin Regulation. Art. 13(1) of the Dublin Regulation stipulates that the Member State responsible for examining an asylum application is the state whose border the asylum applicant first crossed irregularly when coming from a third country. If asylum rules do not apply to a third-country national (TCN), the entry conditions of a TCN to the territory of a Member State are regulated by Art. 6(1) of the Schengen Borders Code which stipulates that the TCN has to have a valid travel document and a valid visa. TCNs should also be able to justify the purpose and conditions of their intended stay and show that they have sufficient means of subsistence, both for the duration of the intended stay and for the return journey.[12] Exceptionally, a TCN who does not fulfil one or more of the above conditions may be granted entry on humanitarian grounds, on grounds of national interest or because of international obligations. However, as will be shown in the analysis of the CJEU's judgment in *A.S.* and *Jafari*, the exception based on humanitarian grounds was not applicable to the developments on the Western Balkans route.[13]

The migrants on the Western Balkans route were not applying for asylum either in the EU state of their first entry (Greece) or in the Western Balkans countries, among them Croatia as the second EU Member State on the Western Balkans route. Instead, they were transiting through several EU and non-EU states until they came to the EU Member State of their desired destination (mostly Germany)

[11] Euractive, Balkan Route 'closed' after cascade of border shutdowns, 9 March 2016 (available at: https://www.euractiv.com/section/global-europe/news/balkan-route-closed-after-cascade-of-border-shutdowns/ - last accessed on 16 October 2017).

[12] Art. 6(1)(a), (b) and (c) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

[13] Art. 6(5)(c) of the Schengen Borders Code. For another exception, which is not relevant for the developments on the Western Balkans route, see Art. 6(5)(a) of the Schengen Borders Code.

and applied for asylum there. On the other hand, Greece, Croatia and other countries on the Western Balkans route did not apply the Schengen Borders Code and, thus, they did not prevent the entry of irregular migrants into their respective territories, but facilitated their further movement to other states along the route. The transit of migrants on the Western Balkans route was organised by the states along the route, which sometimes (allegedly), contrary to the Eurodac Regulation, did not fingerprint and register the migrants before further transit.

Clearly, there was a tacit agreement between the Western Balkans states and the migrants transiting the route not to apply the Dublin rules. Further, there was an agreement among the states on the Western Balkans route to organise and run the route contrary to the Dublin rules. This was the direct consequence of two factors. First, it was prompted by the German willingness to take all the migrants and examine their asylum claims itself. The states on the route were allowing entry and transit of migrants as long as Germany was ready to accept them on its territory. Second, the Western Balkans route was the direct consequence of the states' realisation that the alternative to not allowing migrants' entry into their respective territories would have been to leave hundreds of thousands of migrants stranded at national borders in degrading conditions which would have led to a humanitarian catastrophe and to the respective states' breach of Art. 3 of the ECHR and Art. 4 of the Charter.[14]

Therefore, the extraordinary developments on the Western Balkans route can only be understood in light of the following five circumstances: first, the extremely high number of migrants who were transiting the route in groups and not individually; second, the willingness of the migrants to take the route and not to apply for asylum in the state of first entry; third, the German open-border migration policy; fourth, the fact that the route was facilitated and run by the states; and fifth, the fact that the states on the Western Balkans route did not want to create a humanitarian crisis and breach their Charter and Convention obligations. These five factors arguably justified and legitimised the route despite the fact that it ran counter to the Dublin rules.

[14] In that respect, see the statement of AG Sharpston in Case 490/16, *A.S. v Slovenia* and Case 646/16 *Jafari*, para. 174.

4. *The Western Balkans route and the Position of Greece and Croatia*

The migrants on the Western Balkans route entered the EU via Greece. Therefore, Greece was the state of first irregular entry under the Dublin rules. However, the Greek situation was unique in that respect, as Dublin transfers to Greece could not take place. Even though Greece was the state of first entry on the Western Balkans route, since the two groundbreaking judgments in *MSS*[15] and *NS*[16] in 2011, all Dublin transfers to Greece had been suspended due to systemic deficiencies in the Greek asylum procedures and its reception conditions.[17] The judgments in *MSS* and *NS* revealed the inaccuracy of the premise that all EU Member States provide an adequate level of quality and efficiency in the asylum procedure and ensure a satisfactory level of protection of asylum seekers' fundamental rights. In *MSS*, the ECtHR concluded that both Greece, as the state of the asylum seeker's first entry into the EU, and Belgium, as the transferring state, violated Article 3 ECHR (which prohibits torture, inhuman or degrading treatment or punishment) and also Article 13 ECHR (which proclaims the right to an effective remedy).

On the other hand, in *NS* the CJEU relied on the EU Charter of Fundamental Rights and held that the presumption that Member States are observing the fundamental rights enshrined in the Charter is rebutted when there are systemic deficiencies in asylum procedures and in the reception conditions of asylum seekers.[18] The Court of Justice, however, emphasised that not every violation of fundamental rights would suffice to rebut the presumption, but rather that the systemic deficiencies need to amount to a real risk of inhuman or degrading treatment of asylum seekers in the sense of Article 4 of the Charter.

[15] ECtHR, *MSS v Belgium and Greece*, Application number 30696/09, 21 January 2011.

[16] CJEU 21.12.2011, Joined cases C-411/10 and C-493/10, *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law*.

[17] The judgments in MSS and NS were followed by the subsequent ECtHR and CJEU judgments in *Abdullahi* (Case C-394/12 *Shamso Abdullahi v Bundesasylamt*, 10.12.2013), *Tarakhel* (*Tarakhel v. Switzerland*, Application no. 29217/12 (ECtHR, 4 November 2014)) and *C.K. v Slovenia* (Case C-578/16 PPU, *C.K. v Slovenia*, 16.02.2017).

[18] The CJEU's judgment in *NS* was embraced in Article 3(2) of the Dublin III Regulation.

During the existence of the Western Balkans route, the serious deficiencies of the Greek asylum system persisted.[19] As a consequence, based on Art. 3(2) of the Dublin Regulation – despite the fact that Greece was the state of first entry – its non-compliance with Art. 13(1) could not result in Dublin transfers to Greece.

The next EU Member State on the Western Balkans route was Croatia. Based on the CJEU's rulings in *A.S.* and *Jafari*, Croatia was deemed responsible under the Dublin rules. The cases concerned Syrian and Afghan nationals who applied to asylum in Slovenia (A.S.) and Austria (Jafari), but the Slovenian/Austrian authorities asked Croatia to take charge, considering Croatia as the state of first entry (as transfers to Greece could not take place). The Court decided that entries of TCNs to Croatia that were taking place during the existence of the Western Balkans route must be regarded as "irregular crossings" "irrespective of whether they were tolerated or authorised in breach of the applicable rules or whether they were authorised on humanitarian grounds by way of derogation from the entry conditions generally imposed on TCNs".[20] According to the Court, the fact that such a crossing took place in the context of the arrival of an unusually large number of TCNs could not affect the irregular character of the crossing.[21] The only instance where the responsibility of the state of irregular crossing could be precluded would be the case where Dublin transfers to that state could lead to a risk of inhuman and degrading treatment of the transferee, within the meaning of Article 4 of the Charter.[22] Consequently, EU Member States in which the asylum applicants, who transited the Western Balkans route, lodged their asylum application are entitled to carry out Dublin transfers to Croatia provided the three-month time limit, as interpreted by the Court in *Mengesteab*, has not

[19] See the Commission Recommendations of 10 February 2016 (Commission Recommendation of 10 February 2016 addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No 604/2013 – C(2016) 871 final), 15 June 2016 (Commission Recommendation of 15 June 2016 addressed to the Hellenic Republic on the specific urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No 604/2013 – C(2016) 3805 final)and 8 December 2016 (Commission Recommendation of 8.12. 2016. addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013, December 8, 2016, C(2016) 8525 final).

[20] Para. 92 in *Jafari*.

[21] Para. 93 in *Jafari*.

[22] Para. 101 in *Jafari*.

been exceeded. In reality, the three-month deadline was exceeded with the vast majority of TCNs transiting the Route, so only a minor fraction of TCNs could be transferred back to Croatia.[23]

5. *Concluding Remarks*

The Western Balkans Route and the judgements of the Court of Justice in *A.S. and Jafari* can have serious implications for future Member States' behaviour in case of a new crisis. It is highly unlikely that Member States would allow or facilitate the creation of a new transit route through their territories, as this would breach their EU law obligations and enable numerous Dublin transfers to their territories. Consequently, in the case of a new refugee influx, an EU Member State confronted with a high number of TCNs on its borders, will have to decide whether to allow or block entry, and bear the consequences of its actions either way. If a Member State decides to admit numerous asylum seekers to its territory – without a transit route or another mechanism to distribute more evenly the arriving asylum seekers across the EU – it might exceed its asylum capacities, thus leading to inhuman or degrading treatment of those admitted and a breach of Article 4 of the Charter and Article 3 of the ECHR. On the other hand, such a Member State might decide to prevent TCNs, who do not fulfil the conditions contained in the Schengen Borders Code, from entering its territory by erecting border fences or a wall, as was the case with Hungary during the operation of the Western Balkans route. The creation of such barriers could redirect the passage of TCNs to another state, but it could leave numerous migrants stranded in inhuman and degrading conditions, again creating a breach of Article 4 of the Charter and Article 3 of the ECHR. Whichever pattern of behaviour Member States choose to take, it could lead to their breach of both the Dublin Regulation and their obligations stemming from the Charter and the Convention.

[23] CJEU 26.07.2017, Case 670/16 *Mengesteab*.

Challenging the Externalised Obstruction of Asylum – the Application of the Right to Asylum to EU Cooperation with Libyan Coast Guards

Adel-Naim Reyhani, Carlos Gómez Del Tronco,
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1. *Containing Asylum-Seekers in Post-Revolutionary Libya*

The focus of the European Union (EU) on the external dimension of asylum and migration policy, including the concern "to strengthen the capacity of countries in North Africa to intervene," is not new.[1] It is an expression of the realisation that upholding human rights commitments and securing borders involves an inevitable tension.[2] The Libyan case represents a disturbing example of the consequences of the trend[3] of systematically prioritising border security.

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[1] Already in 1994, the European Commission had proposed a strong focus on cooperation with third countries.

[2] In the European Agenda on Migration (COM/2015/0240 final), this realisation is formulated as follows: "Upholding our international commitments and values while securing our borders and at the same time creating the right conditions for Europe's economic prosperity and societal cohesion is a difficult balancing act that requires coordinated action at the European level".

[3] For an encompassing analysis of this concern, see V. Moreno-Lax, *Accessing Asylum in Europe*, Oxford, 2017.

1.1. *A Transit Country*

In the second half of the twentieth century, Libya transformed into a transit country for migration.[4] The country's oil reserves had attracted large numbers of foreign workers since the 1960s, but despite this early influx, Libya never set a consistent and effective legal framework for the protection of migrants or asylum-seekers. Instead, guarantees were highly dependent on factors such as foreign policy shifts, oil recessions and the impact of international sanctions.[5] In the 1990s, a foreign policy orientation towards sub-Saharan Africa, combined with an open approach to migration from that region,[6] influenced the flows into Libya.[7] More stringent border security measures in Morocco and Tunisia resulting from cooperation with the EU,[8] as well as xenophobic riots that pushed African migrants out of Libya,[9] later turned the country into a hub for migration between Africa and mainly Italy in the early 2000s.[10]

Italy first responded within the framework of the "deterrence paradigm".[11] While the EU country sought to prevent the increasing de-

[4] M.O. Attir, *North African Regular and Irregular Migration: The Case of Libya*, in *New England Journal of Public Policy*, 2018, pp. 1-4.

[5] S. Hamood, *African Transit Migration through Libya to Europe: The Human Cost*, 2006, pp. 19-22.

[6] A significant contribution was the creation of the Community of Sahel-Saharan States (CENSAD) in 1998, whose establishing treaty enshrined the principle of free movement.

[7] G. Joffé, E. Paoletti, *Libya's Foreign Policy: Drivers and Objectives*, 2010, p. 8; M. Toaldo, *Migrations Through and From Libya: A Mediterranean Challenge*, in *IAI Working Papers 15|14*, 2015, p. 7.

[8] N. Abdel Aziz, P. Monzini, F. Pastore, *The Changing Dynamics of Cross-border Human Smuggling and Trafficking in the Mediterranean*, report for *New-Med Research Network*, 2015, pp. 32-33.

[9] S. Bredeloup, O. Pliez, *The Libyan Migration Corridor*, in P. Fargues, D. Papademetriou (ed.), *Improving EU and US Immigration Systems' Capacity for Responding to Global Challenges: Learning from experiences*, San Domenico di Fiesole, 2011, pp. 7-8.

[10] Ibid.; Amnesty International, *Libya's dark web of collusion: Abuses Against Europe-Bound Refugees and Migrants*, London, 2017, p. 12; IOM, *Four Decades of Cross-Mediterranean Undocumented Migration to Europe, A Review of the Evidence*, Geneva, 2017, pp. 10-11; Altai Consulting, *Leaving Libya: Rapid Assessment of Municipalities of Departure of Migrants in Libya,* 2017, p. 23; Guardia Costiera, *2017 SAR Operations in the Mediterranean Sea*, 2018, p. 5.

[11] According to this perspective, the dominant approach of developed states to the refugee protection crisis has been setting barriers towards accessing asylum. The

parture of migrants, Muammar Gaddafi wanted to reconcile his broken ties with Europe, which led to a significant intensification of the co-operation.[12] Eventually, in 2012 the European Court of Human Rights (ECtHR) found that an Italian push-back operation conducted within the framework of this partnership in May 2009 had violated the *non-refoulement* principle.[13] The ruling naturally challenged Italy's approach to migration control.

The Libyan revolution of 2011 and, more significantly, the ensuing civil war of 2014 contributed to a dramatic increment in the number of

assumption underlying this approach is that states could absolve themselves from responsibility by "maintaining a formal commitment to international refugee law, while at the same time largely being spared the associated burdens" (T. Gammeltoft-Hansen, N.F. Tan, *The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy*, in *JMHS* Volume 5 Number 1, New York, 2017, pp. 4, 28-56).

[12] S. Bredeloup, O. Pliez, *Ibidem*, pp. 8-9. From the mid-2000s until the fall of Gaddafi, several EU projects worked on boosting the migration management capacities of Libya. Human rights organisations criticised the cooperation because of the many human rights violations of migrants detained in Libya (M. Akkerman, *Expanding the Fortress - The Policies, the Profiteers and the People Shaped by EU's Border Externalisation Programme,* Amsterdam, 2018, pp. 44-45). In addition, strict visa laws were imposed on foreigners in Libya under threat of fines or imprisonment in the country's detention centres; amendments to Law 6 of 1987 introduced these restrictions through Law 2 of 1372 (2004) (S. Hamood, *African Transit Migration*, p. 20). Italy and Libya established bilateral police and readmission collaboration through formal and informal arrangements. In the early 2000s, tighter joint migration management arrangements between Libya and Italy, including police cooperation as well as more informal measures, favoured higher numbers of repatriations, apprehensions and even push-backs of migrants and asylum-seekers (see P. Cuttitta, *Readmission and Forcibly Return in the Relations between Italy and North African Mediterranean Countries*, paper for the *Ninth Mediterranean Research Meeting*, 2008, pp. 5-6; also E. Paoletti, F. Pastore, *Sharing the dirty job on the Southern front? Italian–Libyan relations on migration and their impact on the European Union,* Oxford, 2010, pp. 11-12). Similar practices were present in Italian bilateral cooperation with other North-African states (see E. Paoletti, *Migration Agreements between Italy and North Africa: Domestic Imperatives versus International Norms*, Middle East Institute, 19 December 2012). The most notable legal framework for Libyan-Italian cooperation in migration control was the 2008 "Treaty of Friendship, Partnership and Cooperation" In this document, amongst other goals, Italy committed to sharing satellite information, conducting patrols with mixed crews, donating boats and building up a satellite system to control Libya's territory; for an analysis of the treaty see N. Ronzitti, *The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?*, in *Bulletin of Italian Politics*, 2009, pp. 125-133.

[13] ECtHR, *Hirsi Jamaa and Others v Italy*, Application No. 27765/09, Judgement of 23 February 2012.

crossings to Italy and drownings in the Central Mediterranean Route.[14] Smugglers took advantage of the power vacuum in the North African country to strengthen their role and networks. Italy had to react to this new situation, but this time without Gaddafi as an interlocutor and the dimensions of the predicament of asylum-seekers becoming exceedingly worrisome.

At this point, the ensuing response of the Italian government was to prioritise Search and Rescue (SAR) missions.[15] As the 2012 ECtHR ruling had implied, Libya could not be considered a safe place, leading to the disembarkation of individuals and groups rescued in the high-seas in Italy.[16] After this one-year interlude, the EU decided to establish missions that would again prioritise deterrence.[17]

[14] UNHCR, *Desperate Journeys,* February 2017, pp. 6-7; IOM, 2017, p. 26; see also Frontex Annual Risk Analysis for the period 2012-2015.

[15] Two fatal shipwrecks in early October 2013 mobilised Italy to assume de-facto SAR responsibilities outside of Libyan territorial waters through Operation Mare Nostrum. Amnesty International claims that there were 560 casualties as a result of both incidents, but sources differ significantly on the numbers (see Amnesty International, 2017, p. 17). The mandate of Mare Nostrum was divided into two main pillars, namely conducting SAR missions and fighting smuggling. Its operational zone overlapped with the SAR areas of Malta and Libya, thus obtaining a strategic position for the interception of departing boats (see Amnesty International, *Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean*, 2014, pp. 24-26).

[16] Amnesty International, 2017, p. 17. Having saved more than 100,000 people during its first nine months of existence (A. BUSONERO, *Operazione "Mare Nostrum": Una Grande Operazione Umanitaria*, in *Informazioni della Difesa* 4/2014, Rome, 2014, p. 16.), Mare Nostrum was discontinued in October 2014, accused of constituting a pull factor for human smuggling and with Italy unwilling to further carry the financial burden on its own (S. Panebianco, *The Mare Nostrum Operation and the SAR approach: the Italian response to address the Mediterranean migration crisis*, in *EUMedEA JMWPS* 03-2016, 2016, p. 15).

[17] The European Border and Coast Guard Agency (Frontex) began the modest Joint Operation Triton in November 2014, limited to operating in areas much closer to Italy's coast. The primary focus of the operation was on border control (S. Panebianco, 2016, p. 16; S. Carrera, L. Den Hertog, *Whose Mare? Rule of Law Challenges in the Field of European Border Surveillance in the Mediterranean*, CEPS paper in Liberty and Security in Europe, 2015, p. 9). Contrary to initial expectations, however, departures and deaths at sea increased again after the winter months of 2014 to 2015. See the IOM website dedicated to documenting fatalities on migration routes, available at https://missingmigrants.iom.int/region/mediterranean (accessed 24 May 2018); also UNHCR, 2017, pp. 6-7. On 18 April 2015, a shipwreck left more than 600 casualties off Sicily's coast and on 22 June 2015, two further ones took the lives of approximately 1,200 people (European Political Strategy Centre, *Irregular Migration via the Central*

1.2. *The Road to Libya: The Case of Niger*

With the emergence of Libya as the most relevant country of departure towards Italy from Africa from 2012 onwards,[18] Niger has risen in importance as a country of transit to the shores of North Africa. From a geostrategic perspective, the vast country connects Western Africa with Libya and Algeria, and despite various security threats in the country,

Mediterranean - From Emergency Responses to Systemic Solutions, EPSC Strategic Notes, issue 22, 2017, p. 3). The EU responded to these incidents by reinforcing its efforts: on the one hand by setting up the military mission EU Naval Force Mediterranean (later rebranded Operation Sophia) in June 2015. Operation Sophia's initial core mandate, namely the disrupting of smuggling and human trafficking networks, was later expanded twice. By June 2016, two tasks were added, namely training the Libyan coast guards and navy, and contributing to implementing the UN arms embargo on the high seas off the coast of Libya. On July 2017, surveillance activities and information gathering on trafficking, including information on crude oil and other illegal exports that are contrary to UNSCR 2146 (2014) and UNSCR 2362 (2017) were incorporated to the mandate of the mission; so were the set up a monitoring mechanism of the long-term efficiency of the training of the coast guard, as well as the enhancement of the possibility for sharing information on human trafficking with member state law enforcement agencies, Frontex, and Europol (see Council Decision(CFSP) 2017/1385 of 25 July 2017 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean). While successful in the capture and disposal of vessels and arrests of suspected low-rank smugglers, the Operation's direct effect on the deterrence of migrant flows has been limited (C. Loschi, L. Rainieri, F. Strazzari, *The Implementation of EU Crisis Response in Libya: Bridging Theory and Practice*, D6.2 Working Paper for EUNPACK project, 2018, pp. 3-4). In parallel to the establishment of Operation Sophia, Operation Triton moved southwards to operate within the Maltese SAR area in July 2015 (European Political Strategy Centre, 2017, p. 3). Despite not being expressly tasked with SAR, both missions conducted a significant number of rescues (Guardia Costiera, 2018, p. 14). The recently launched Joint Operation Themis has replaced Triton in 2018, this time covering a much broader portion of the Mediterranean; the operation was launched on 1 February 2018 but operational details remain scarce to this day. For the initial press release, see Frontex, Frontex Launching New Operation in Central Med, 1 February 2018. In March 2018, a request was made to access the operational plan of the mission, but eventually Frontex refused. The full request is found at https://www.asktheeu.org/en/request/operational_plan_for_operation_t?unfold=1#incoming-16618 (accessed 29 May 2018). Concerning Italy, the mission is expected to be operating within 24 nautical miles off the Italian coast (far from the 138 nautical miles with which Triton was tasked in July 2015), see Reuters, *In New EU Sea Mission, Ships Not Obliged to Bring Migrants to Italy*, 1 February 2018.

[18] Altai Consulting, *Irregular Migration between West Africa, North Africa and the Mediterranean*, November 2015, p. 39.

Niger benefits from a situation of relative stability.[19] Additionally, Niger has long granted a liberal application of the free movement protocol of the Economic Community of West African Countries (ECOWAS).[20] Until a crackdown on migration in 2016, the most common and a comparably safe way of travelling to Agadez, a city at the outskirts of the Teneré desert, was by bus.[21] From there on, asylum-seekers and other migrants had to rely on private facilitators for the further journey through the perilous desert, where transnational networks of semi-nomadic tribes and age-old trading and smuggling paths have been used to move onwards to the Libyan border.[22] These services were intrinsically linked to informal taxes and bribes paid to state authorities[23] and led to the establishment of an economy based on migration[24] that was more or less intact until 2016.[25]

EU cooperation with Niger in migration control is distinct from the Libyan case due to Niger's relative political stability, which, although tenuous, allows the implementation of on-ground support for border enforcement as well as jurisdictional measures. Niger presents itself as a reliable and trustworthy partner to the EU, pledging to take migration control measures to "please the European partners".[26] This cooperation is feared to bear risks for the country's social cohesion, which is built upon

[19] The relativity of this often-stated stability must be stressed; it is in contrast to war ridden countries such as Libya and Mali, that Niger – on whose territory currently several terrorist groups are active, and which saw a two year-long armed rebellion merely a decade ago – can be considered relatively stable.

[20] J. Bergmann, J. Lehmann, T. Munsch, W. Powell, *Protection Fallout: How increasing Capacity for Border Management Affects Migrants' Vulnerabilities in Niger and Mali,* November 2017, p. 25. Altai Consulting, *Mixed Migration Trends in Libya,* February 2017, p. 87.

[21] A. Hoffmann, J. Meester, H.M. Nabara, *Migration and Markets in Agadez,* October 2017, p. 19.

[22] J. Bergmann, J. Lehmann, T. Munsch, W. Powell, 2017, p. 25.

[23] P. Tinti, T. Reitano, *Migrant, Refugee, Smuggler, Saviour,* London, 2016, p. 180. Not only have bribes been a widespread and accepted phenomenon, they were considered essential for the functioning of Niger's chronically underfunded security forces.

[24] A. Hoffmann, J. Meester, H.M. Nabara, 2017, p. 19. A wide variety of economic sectors such as the provision of shelter and nutrition, money transfer operators and other services have obviously been linked to transportation business thus providing livelihoods for considerable parts of the population in the Agadez region.

[25] G. Zandonini, *The Monday that Changed Migration in Niger,* Open Migration, 15 January 2018.

[26] D. Howden, G. Zandonini, *Niger: Europe's Migration Laboratory,* News Deeply, 5 May 2018.

a fragile basis intrinsically connected to economic opportunities that originate from the influx and transit of large numbers of migrants.[27] A major legislative turn in favour of EU policies[28] was the 2015 law against human smuggling (commonly known as Loi 36)[29] drafted with the assistance of the United Nations Office on Drugs and Crime (UNODC).[30] Shortly after its entry into force, the Nigerien government requested one billion Euros for the implementation of the law.[31] Considering that migration has long been a driver of economic development rather than a criminal activity,[32] it is not unreasonable to assume that Niger was encouraged by European actors to pass the law.[33] The European Commission pledged one billion euros to Niger for the timeframe of 2017-2020,[34] including direct budgetary aid and projects implemented under the EU Emergency Trust Fund for Africa (EUTF).[35] These projects amount to 229 million euro and are primarily geared towards migration control and security concerns.[36] Furthermore, EUCAP Sahel[37] supports Nigerien security forces in combating irregular migration.[38]

[27] D. Davitti, A.E. Ursu, *Why Securitising the Sahel Won't Stop Migration,* FMU Policy Brief No. 02/2018, University of Nottingham, p. 3.

[28] A. Massalaki, *Niger Passes Law to Tackle Migrant Smuggling, First in West Africa,* Reuters, 12 May 2018.

[29] The text of *Loi 36/2015 relative au trafic illicite de migrants* can be found at https://www.unodc.org/res/cld/document/loi-relative-au-trafic-illicite-de-migrants_html/Niger-_trafic_illicite_de_migrants.pdf (accessed 13 November 2018).

[30] UNODC, *Niger becomes the first Sahel country to legislate against human smuggling,* 2015.

[31] Y.S.S. Barima, B. Brice, *Niger Tells Europe it Needs 1bn Euros to Fight Illegal Immigration,* Reuters, 2016. T. Reitano, *Further Criminalizing People will not Work,* News Deeply, 30 September 2016.

[32] P. Tinti, *The EU's Hollow Success Over Migrant Smuggling in Niger,* News Deeply, 17 January 2017.

[33] J. Tubiana, C. Warin, G.M. Saeneen, *Multilateral Damage: Effects of EU Policies in Niger*, Clingendael, September 2018, p. 23. European Council On Foreign Relations, *Migration through the Mediterranean,* 2018.

[34] European Commission, *EU will support Niger with assistance of 1€ billon by 2020,* 13 December 2017.

[35] European Commission, *Cooperation de l'UE avec le Niger,* 13 December 2017.

[36] European Commission, *Trust Fund for Africa: Niger*; for a critical view of the EUTF see: Concord, *Partnership or Conditionality?,* Brussels, 2018.

[37] EUCAP Sahel Niger, *Support on Security issues in Agadez,* 15 December 2017.

[38] European Union External Action Service, *Factsheet EUCAP Sahel Niger,* April 2016. Upon its foundation in 2012 migration control was not included in its mandate, but after a 2014 repositioning the institution's focus is said to have shifted

To illustrate the Niger-related migration dynamics against the backdrop of connection with the consequences of EU cooperation with the country, we may look at possible scenario involving the hypothetical example of a potential asylum-seeker from the North-East of Nigeria.[39] There, challenges with Boko Haram are far from being resolved. In the second quarter of 2018, limited progress in the fight against the extremist group[40] led to an increase in attacks and civilian casualties, both in remote areas as well as in urban centres.[41] This situation of extreme violence has so far pushed more than 2.4 million people out of their homes and has led to more than 220,000 persons fleeing the country.[42] The crisis is most present in the Lake Chad Basin – in the border region of Nigeria, Cameroon, Chad and Niger – causing unrest and violence in all of these countries.[43]

It is especially in such circumstances that the flight process is marked by "fluid decision-making and fragmented journeys".[44] Europe is not always the originally intended destination, but accumulating factors of insecurity as well as economic precarity in the hosting communities may lead people to move onwards. Beyond this, factors such as personal connections, relatives in a host country or access to smuggling networks may inform the choice.[45]

In the case of a person from Nigeria's Borno state seeking a safe place to reside, logistical questions may arise when attempting to access protection in other regions of the country due to limited freedom of movement.[46]

widely towards migration control, see D. Howden, G. Zandonini: *Migration, Niger at a Crossroads*, The African Report, 24 July 2018.

[39] Up until the beginning of September 2018 about 20.000 persons have reached the shores of Italy, roughly 6% of which are Nigerian. This represents a sharp decline both in absolute and relative numbers in comparison to 2017, where in the same period of time 17.000 persons or about 16% were of Nigerian descent. See IOM, *Mixed Migration Flows in the Mediterranean August 2018,* 2 October 2018.

[40] O.S. Mahmood, *Despite its Division Boko Haram is no Weaker,* Institute for Security Studies, June 2018.

[41] UNHCR, *Regional Update Nigeria,* October 2018.

[42] UNHCR, *Regional Update Nigeria*, September 2018.

[43] Ibid.

[44] V. Squire, A. Dimitriadi, N. Perkowski et alii., *Crossing the Mediterranean Sea by Boat: Mapping and Documenting Migratory Journeys and Experiences,* Warwick, 2018, p. 31.

[45] V. Squire, A. Dimitriadi, N. Perkowski et alii., 2018, pp. 28-31.

[46] UNHCR, *Regional Protection Strategic Framework,* 2017, p. 4. Persons fleeing Boko Haram controlled territory are at times accused of being part of the terrorist group themselves and may face persecution. See Toogood, *Bad Blood,* International Alert, 2016, p. 19.

This obstacle may make one of the neighbouring countries a more viable option. Cameroon, for example, presently hosts about 90,000 displaced persons from Nigeria. But Cameroon is also the country with the second highest number of attacks by Boko Haram, and there have been reports about forced returns of hundreds of Nigerians to Borno state since the beginning of 2018.[47] Persons spontaneously returning to Nigeria from Cameroon may face extreme violence, even in refugee camps where numerous atrocious terrorist acts have occurred.[48]

Moving northwards to Niger can thus not be considered an entirely inexplicable option. The country is currently hosting more than 100,000 displaced Nigerians, mostly in informal refugee camps in the Diffa region in the South-East,[49] which faces terrorist attacks, armed disputes and a humanitarian crisis due to the influx of large quantities of displaced persons into one of the poorest countries on earth.[50] In three of Niger's regions, a state of emergency has been declared due to terrorist threats linked to different Islamist groups in the bordering areas with Nigeria, Mali and Burkina Faso.[51]

Hence, while Niger is presented as an anchor of relative stability in the Sahel region, the country is confronted with a highly complex security situation. For refugees, escaping the original threat is a priority, but new challenges upon arrival, such as the widespread violence and general insecurity in refugee camps in the south of Niger[52] can be seen as a driver to move further northwards to seek protection.[53] It is also relevant to note that the Nigerien government does not view the country as a haven of refuge, but rather as a place of transit.[54] This attitude is

[47] UNHCR, *Continuing forced returns of Nigerians by Cameroon,* 20 April 2018. An incident in July led directly to the killing of six Nigerian asylum-seekers who were being deported back to Nigeria, see UNHCR, *Shock over Nigerian Asylum-seeker deaths in Cameroon,* 2 August 2018.

[48] UNHCR, *Hoping for peace - Nigerians find violence,* 3 May 2018.

[49] OCHA, *Diffa: Access, Insecurity and Population Movements,* March 2018.

[50] Rank 189 out of 189 in the Human Development Index (HDI) in 2018 according to UNDP.

[51] Amnesty International, *Niger Report 2017-2018,* 2018.

[52] Reach, *Evaluation de la Situation en termes de protection des personnes deplacées à Diffa,* May 2017, p. 38.

[53] V. Squire, A. Dimitriadi, N. Perkowski et alii., 2018, p. 15.

[54] Mixed Migration Centre, *Monthly Trend Analysis,* July 2018. In the words of President Issoufou "[Niger] will welcome people who are in difficulty, who are in disarray. It is the tradition of our country…The main thing is that people do not stay long in Niger."

expressed in the deportation of hundreds of Sudanese asylum-seekers to Libyan territory in May 2018,[55] highlighting the implementation gap of refugee rights in Niger and other surrounding countries.[56]

The direct effects of EU cooperation on transits through Niger are hard to measure. What can be observed is a more hostile environment for foreigners perceived as 'illegal migrants', resulting in deteriorating conditions for asylum-seekers and other migrants.[57] According to the European Parliament, there has been a 95% decrease of border crossings from Niger to Libya from 2016-2018,[58] but this alleged significant drop does not take into account the decreased visibility of movements.[59] The 2016 crackdown on migration led to the arrest of numerous smugglers and the emergence of new routes which avoid Agadez and other known checkpoints such as Séguedine and Dirku.[60] Because of this and due to attacks by armed groups, new routes are longer, more expensive and more dangerous; also, the higher risk of getting caught has led more smugglers to leave behind their human cargo in the desert.[61] In 2017 alone, more than 1,000 people were rescued in the Teneré desert by International Organization for Migration (IOM), and more than 400 persons were found dead – the actual number of deaths is assumed to be much higher, considering the vastness of the territory.[62] Moreover, the crackdown has largely tackled low key actors, which has led to an increasing market concentration and professionalisation, driving out small-scale smugglers and benefitting international criminal networks with ties to Libyan militias.[63]

[55] E. Reidy, *Niger sends Sudanese Refugees back to Libya,* Irin News, 10 May 2018.

[56] European Parliament, *Refugee Policies in Africa, Open Borders but limited Integration,* 2017.

[57] E. Reidy, *Destination Europe: Desperation,* Irin News, 3 July 2018. Loi 36 is supposed to only target human smugglers, but reportedly migrants are threatened and imprisoned as well. See J. Tubiana, C. Warin, G.M. Saeneen, 2018, p. 17.

[58] European Parliament, *95% decrease in migration flows to Libya and Europe,* 13 July 2018.

[59] G. Zandonini, *cit.*, 15 January 2018.

[60] J. Tubiana, C. Warin, G.M. Saeneen, *cit.*, p. 24. Some of the new routes now seem to lead through conflict areas in Northern Chad, adding to the highly insecure situation of migration paths.

[61] IOM, *Search and Rescue Missions in Sahara Desert help 1000 migrants, August 2018*.

[62] For an account of the rising death toll in the aftermath of the enforcement of Loi 36 see J. Tubiana, C. Warin, G.M. Saeneen, *cit.*, p. 27.

[63] D. Davitti, A.E. Ursu, 2018, p. 3; T. Reitano, *Short-term Wins, Long-term Risks,*

The remote 350 km border between Niger and Libya, which lies mostly in Tebu controlled territory, represents a complex area of tension between migrant smuggling and efforts to curb migration.[64] Crossing the border has long been a matter of paying a bribe paid at semi-formal border posts.[65] Since 2017, however, increased migration control efforts by the Nigerien army seem to have contributed to lowering the number of border-crossings.[66] These efforts are in line with European demands and are assisted by the presence of Italian[67] and French troops at a military base in Madama, which are deployed for "training and border control" measures to decrease the permeability of the border towards Libya's south.[68]

1.3. *Libya's Disturbing Reality*

In Libya, European efforts to obstruct the movement of asylum-seekers face a different reality. The current political situation in the country is complicated and constantly mutating, adding to highly unstable security conditions. The initial cause of the Revolution had united a proliferating number of military groups against Gaddafi, but they were soon divided by re-emerging political, tribal and family tensions after his fall.[69] The security apparatus of successive governments after 2011 has integrated some of these heterogeneous groups.[70] The fact that

Human Trafficking and People Smuggling in the Mediterranean Area, Global Initiative Against Transnational Organized Crime, September 2018, p. 3.

[64] J. Tubiana, C. Warin, G.M. Saeneen, 2018, pp. 31-33.

[65] G. Zandonini, *The New European Border Between Niger and Libya,* Open Migration, 11 May 2018.

[66] A newly signed security protocol by Niger, Chad, Sudan and the GNA of Libya calls for cross-border controls and increased border security between the signing countries see Fetouri, *Will Libya's newly signed border security agreement change anything?*, Al-Monitor, 8 June 2018,. It is however questionable how the GNA is planning on implementing border control in an area which it defacto does not control, see: Tubiana, Warin, Saeneen, 2018, p. 72.

[67] The Italian Ministry of Defence accounts for a maximum of 470 military personal deployed in Niger to contribute to border surveillance activities, see: https://www.difesa.it/OperazioniMilitari/op_intern_corso/Niger_missione_bilaterale_supporto/Pagine/Contributo-nazionale.aspx.

[68] Infomigrants, *Italy weighing military collaboration with Chad and Niger,* Info Migrants, 9 April 2017.

[69] M. Micallef, *The Human Conveyor Belt: Trends in Human Trafficking and Smuggling in Post-Revolution Libya*, Geneva, 2017, p. 8.

[70] Y. Sayigh, *Crumbling States: Security Sector Reform in Libya and Yemen*,

many of them have preserved their former chains of command adds a component of fragility to the nature of the alliances.[71] Today, both the Government of National Accord (GNA) and the opposing Libyan National Army (LNA)[72] rely on an intricate web of militias to support their operations and exert sovereignty in their allegedly controlled territories.[73] The dense concentration of rent-seeking armed groups vying for power in the process of state-formation, particularly in Tripoli, has translated into state-capture and a fragile balance of power.[74]

Powerful militias, some of which affiliated with smuggling and trafficking activities and networks, also joined the efforts of the GNA migration control authorities,[75] rebranding themselves to profit from EU funds and gain legitimacy within Libya's future state configuration.[76] Collusion between smugglers and coast guards, as well as with detention centres[77] or brigades entrusted with combating human trafficking,[78] has repeatedly been reported.[79]

Beirut, 2015; European External Action Service, *EUBAM Libya Initial Mapping Report Executive Summary*, working document of the EEAS(2017) 0109, 2017, p. 9.

[71] L. Marinone, *Libya at Crossroads: Between Elections and Instability*, in L. v (ed.), *The Libyan Maze. The Path to Elections and the Future of the Reconciliation Process*, CESI, September 2018, pp. 3-11.

[72] Although, according to some consulted analysts, to a lesser extent in the LNA.

[73] F. El Kamouni-Janssen, K. De Bruijne, *Entering the Lion's Den: Local Militias and Governance in Libya*, The Hague, 2017.

[74] W. Lacher, A. Al-Idrissi, *Capital of Militias: Tripoli's Armed Groups Capture the Libyan State*, SANA Briefing Paper, June 2018.

[75] Such as the Libyan coast guards or the authorities in charge of detention centres.

[76] M. Micallef, T. Reitano, *The Anti-Human Smuggling Business and Libya's Political End Game*, 2017. These dynamics play militias against each other (see Ibid. pp. 13-15), and Italy is allegedly fuelling the assimilation of militias through informal engagement at the local level (see F. El Kamouni-Janssen, K. De Bruijne, 2017, p. 13; M. Michael, *Backed by Italy, Libya Enlists Militias to Stop Migrants*, AP News, 29 August 2017).

[77] UN Panel of Experts on Libya, *Final report of the Panel of Experts on Libya established*

pursuant to resolution 1973 (2011), June 2017, pp. 21, 61, 103.

[78] See the case of the Subul al-Salam Brigade (UN Panel of Experts on Libya, *Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011)*, 5 September 2018, pp. 15, 107-110).

[79] Co-option is exemplified by an individual (Abd Al Rahman Al-Milad, known as Al-Bija) singled out by the UN Libya Panel of Experts in June 2017 as a facilitator of human smuggling, who was by the end of that same year leading most boat interceptions in the Western coast of Libya (in Zawiya) by means, amongst other

Human smuggling had already been connected to Gaddafi's administration.[80] Post-revolutionary Libya, however, was characterised by the emergence of new actors and the growth in the scale of operations.[81] Larger armed groups seized the opportunity to operate more professionally and cost-effectively,[82] consolidating transnational networks with Sub-Saharan partners.[83] This "industrialisation of the smuggling and trafficking business"[84] is among the factors that have created a most violent environment for asylum-seekers and migrants, which has exposed more individuals to slavery and human trafficking.[85]

It is undisputed that asylum-seekers and migrants[86] face continuous and grave human rights violations in Libya – a situation that well amounts to systemic and fundamental rightlessness.[87] Detention is a systemic concern and widely applied. Those intercepted in Libya's territory or pulled back from the sea have no access to justice but are

assets, of a boat donated by Italy (see UN Panel of Experts on Libya, June 2017, pp. 11-13, 103). Eventually, on early June 2018, the Security Council imposed sanctions on Al-Bija and five other individuals connected to smuggling activities in Libya. Later that month, Al-Bija was reportedly suspended (United Nations Support Mission in Libya, *Report of the Secretary-General*, S/2018/780, 24 August 2018, p. 8). Al-Bija's brigade was cooperating with Mohammed Kashlaf (aka al-Hadi), a prominent smuggler who ironically controlled detention centres for the Libyan government. Al-Bija would intercept boats from rivaling smugglers and take them to Kashlaf's detention centres. (see Annex II to Regulation (EU) 2016/44 in *Council Implementing Regulation (EU) 2018/1285 of 24 September 2018 implementing Article 21(5) of Regulation (EU) 2016/44 concerning restrictive measures in view of the situation in Libya*, Official Journal of the European Union, L 240/7). Despite the sanctions and a reported suspension, at the time of writing two sources confirmed that Al-Bija is still running a coast guard unit in Zawiya. For this and other reported cases of collusion, see Frontex, *Africa-Frontex Intelligence Community Joint Report 2016,* Warsaw, 2017, p. 18; Amnesty International, 2017; European External Action Service, 2017, pp. 37-8, 44; M. Micallef, T. Reitano, 2017; Altai Consulting, 2017, pp. 26, 51, 90-2; M. Micallef, 2017, pp. 31, 38.

[80] Ibid., pp. 4-5.

[81] M. Toaldo, 2015, pp. 9-10; Altai Consulting, 2017, p. 23 ss.

[82] Ibidem.

[83] M. Micallef, 2017, p. 5.

[84] Ibid., p. 8.

[85] Ibid., p. 34 ss.

[86] As of February 2017, IOM has estimated that over 700,000 foreigners currently live in Libya (IOM, *Migrant Report Libya Jan-Feb 2018*, for DTM Libya - Flow Monitoring, 2018, p. 5).

[87] This term denotes a situation in which individuals are without a legal status that adequately protects them against human rights violations.

instead transferred to detention centres[88] by default.[89] These are either run by the DCIM, militias under the nominal control of the DCIM,[90] or non-affiliated militias.[91] Overcrowding, extortion, rape, kidnappings, torture, undernutrition, extrajudicial killings, slavery and human trafficking, as well as a lack of legal protection, are among the atrocities faced by migrants inside and outside detention centres that have been extensively documented by a broad range of sources.[92]

1.4. *Externalised Obstruction*

By mid-2016, most asylum-seekers reaching EU territory were using the Central Mediterranean Route.[93] Unable to push back individuals on its own or to conduct operations in Libyan territorial waters, the EU and Italy opted for cooperation. A "deputational twist"[94] was given to the previous deterrence strategy by engaging mostly with the internationally-recognised GNA[95] in the coercive management of migration, thus attempting "to sever any jurisdictional link" with asy-

[88] There are discrepancies among the different institutions tracking the number of these centres (for an exhaustive compilation see Global Detention Project, *Country report - Immigration Detention in Libya: "A Human Rights Crisis"*, August 2018, pp. 39-53).

[89] Altai Consulting, 2017, p. 47.

[90] Ibid., pp. 11, 94.

[91] Amnesty International, 2017, p. 27.

[92] UNSMIL, *Report of the Secretary-General*, 7 May 2018, pp. 7-8; European External Action Service, 2017; UNSMIL and OHCHR, *"Detained and Dehumanised" Report on Human Rights Abuses Against Migrants in Libya,* 2016; Amnesty International, 2017; UN Secretary General, *Report of the UN Secretary-General on the United Nations Support Mission in Libya (UNSMIL) from 1 December 2016*; Panel of Experts on Libya, June 2017, pp. 133-6; Amnesty International, *Refugees and migrants fleeing sexual violence, abuse and exploitation in Libya,* July 2016.

[93] For statistics on the number of irregular border crossing towards Europe, see the Frontex Risk Analysis Reports 2017 and 2018; also IOM, 2017, p. 26.

[94] V. Moreno-Lax, M. Giuffré, *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows*, in S. JUSS (ed.), *Research Handbook on International Refugee Law* (Edward Elgar, forthcoming), 2017, p. 3.

[95] UN Security Council Resolutions 2259 and 2278 endorse the GNA as the sole legitimate government. The EU has been supportive of the conciliatory Libyan Political Agreement (LPA) signed in Skhirat (Morocco) on December 2015. See the Commission's official position on this respect at https://eeas.europa.eu/headquarters/headquarters-homepage_en/19163/EU-Libya%20relations (accessed 24 May 2018).

lum-seekers.[96] This aim was delineated through a more coherent and comprehensive EU migration strategy towards Libya by early 2017.[97] One of its key priorities became to strengthen the capacities of Libyan coast guards.[98]

Italy took the lead in the implementation of this strategy through a bilateral *Memorandum of Understanding*[99] (MoU) signed with the GNA on 2 February 2017. A day later, EU heads of state agreed on an encompassing strategic document that supported Italy's aims, known as the *Malta Declaration*.[100] On this basis, the EU allocated funds for its pursuit, most notably through the EUTF,[101] and reshaped and reinvigorated Common Security and Defence Policy (CSDP) missions.[102]

[96] V. Moreno-Lax, M. Giuffré, 2017, pp. 3-4.

[97] See European Commission, *Joint Communication on the Central Mediterranean Route 'Managing Flows, Saving Lives',* 25 January 2017.

[98] This is complemented by policies that aim at broader cooperation and the sharing of information, assisting local communities in order to create economic alternatives to smuggling, improving the situation of migrants on the ground, intensifying assisted voluntary returns, as well as tackling smuggling in the countries of origin and transit (see ibid.; also European Council, *Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route*, 3 February 2017). For a detailed account of policy developments, see Forensic Oceanography, *MARE CLAUSUM Italy and the EU's Undeclared Operation to Stem Migration Across the Mediterranean*, for Forensic Architecture, 2018, pp. 29-55.

[99] *Memorandum d'Intesa sulla Cooperazione nel Campo dello Sviluppo, del Contrasto all'Immigrazione Illegale, al Traffico di Esseri Umani, al Contrabbando e sul Rafforzamento della Sicurezza delle Frontiere tra lo Stato della Libia e la Repubblica Italiana*, available at http://www.governo.it/sites/governoNEW.it/files/Libia.pdf (accessed 25 May 2018).

[100] European Council, *Malta Declaration,* 3 February 2017.

[101] As of May 2018, the EU had allocated over € 208 million to country-specific projects for Libya. Some of these address assistances to migrants and local communities, while others target the enforcement of the border and migration management systems. Besides this, Libya is participating in five regional projects worth € 45.5 million, two of them paying particular attention to migration in Libya. Criticisms on EUTF highlight its limited consultations with Libyan authorities, the neglect of local CSOs, the little influence of INGOs, the consequences of a remote management in areas where no EU staff can access due to security reasons, and, more generally, the abuse of ODA for EU interests (see C. Loschi, F. Rainieri, L. Strazzari, 2018, pp. 15-7).

[102] EUBAM Libya's capacities were expanded and its mandate extended, see European External Action Service, *EUBAM Libya, September 2017 Factsheet*. Furthermore, as described above, Operation Sophia's mandate was expanded in the summers of both 2016 and 2017, and Operation Themis has meanwhile replaced Triton, moving closer to the Italian coast. Additionally, it was proposed that Libya would

Two significant obstacles for preventing asylum-seekers from leaving Libya's Western coast towards Europe remained at this stage: the lack of a Libyan-coordinated SAR area, on the one hand, and the limited capacities and resources of the coast guards to prevent vessels from departing or intercepting them at sea, on the other.

Libya is obliged by international law[103] to provide a SAR service within a regionally established SAR area, supervised by a corresponding coordination centre that is responsible for designating a port of safety for disembarkation during SAR missions.[104] However, until recently Italy had been the only state providing a functioning and internationally-recognised SAR service in the Central Mediterranean,[105] and the Rome Maritime Rescue and Coordination Centre (MRCC) was coordinating almost all SAR events in the area over this period of increased migration.

In line with the aim of avoiding direct liability, Italy repeatedly supported Libya in its application for a SAR area to the International Maritime Organization (IMO).[106] Eventually, in June 2018, the IMO recognised a Libyan SAR area.[107] This achievement has placed Libyan authorities in a position to assert even more sovereignty over the area, while Italy has tried to refer vessels conducting SAR missions within this zone to contact Libya.[108] In parallel, Italy has been working with-

become the first third country to join the EU's Seahorse Mediterranean network, leading to shared intelligence and cooperation on migration and border control (see M. Monroy, *A Seahorse for the Mediterranean: Border Surveillance for Libyan Search and Rescue Zone*, Digit.site36, 3 January 2018).

[103] Libya is a party to the *International Convention on Maritime Search and Rescue* of 1979 as amended by *Resolution MSC.155(78)* (adopted on 20 May 2004).

[104] See amendments to chapter 4 in annex 5 of IMO's *Resolution MSC.155(78)* (adopted on 20 May 2004).

[105] CILD, *Guidance on Rescue Operations in the Mediterranean, Know your Rights*, Rome, 2017, p. 8.

[106] The initial GNA application for that purpose and the promise of taming NGOs operating within it came in August 2017 with the backing of Italy (A. RETTMAN, *Italy Backs Libya as NGOs Chased out of Mediterranean*, EU Observer, 14 August 2017). The application was withdrawn in December that year, and Rome reportedly assisted Libya with a new one, sent a few days later (M. MONROY, 3 January 2018; L. BAGNOLI, *Libia: una Stabilizzazione Solo Apparente,* Open Migration, 21 December 2017; Scherer, Lewis, *Exclusive: Italy Plans Big Handover of Sea Rescues to Libya Coastguard*, Reuters, 15 December 2017).

[107] UNHCR, UNHCR, *Position on Returns to Libya (Update II)*, September 2018b, p. 15.

[108] FRANCE 24, *Italian Coastguard Tells Rescue Ships to Call Libya for Help,* 23 June 2018. Even when ships have completed a rescue within the Libyan SAR area,

in the framework of an EU-funded project towards the establishment of both an MRCC and an Interagency National Coordination Centre within the same premises in Tripoli.[109] Activities have so far crystallised into the newly operative Libyan Joint Rescue Coordination Centre (JRCC),[110] at which the degree of direct Italian participation in its day-to-day operations is yet unclear.[111] The "regular presence" of Italian officials in these centres "for both technical assistance and monitoring purposes", however, had been already envisioned in the text of the programming document.[112]

While Libyan authorities take full control over SAR coordination, there have been attempts by Italy at progressively delegating competencies to the Libyan coast guards: the Rome MRCC conceded priority to Libyan boats in missions where NGO vessels were better-positioned for the rescue; they referred the coordination of missions to the Libyan coast guards' operations centre in Tripoli that acted as an unofficial MRCC prior to the Libyan SAR area recognition;[113] or, by providing direct operational instructions, the Italian navy assumed a by-standing role and facilitated the coordination of missions and apprehensions by

Italian authorities have refused to identify a port for disembarkation on the basis that they did not coordinate the rescue (see the events of 20 September 2018 in the Aquarius 'Maltese Patrol Boat 2018.09.20-30' case available at https://onboard-aquarius.org/sections/operations/sar-operations-maltese-patrol-boat-2018-09-20-30/ [accessed 14 October 2018])

[109] This activity is covered by the EUTF's program "Support to Integrated Border and Migration Management in Libya – First phase" (see, Activity 2 in action fiche).

[110] Aquarius Onboard, *Aquarius enters Libyan Search and Rescue Region*, 18 September 2018. To the knowledge of the German Federal Government, in the building there are also employees from the Libyan Foreign Ministry, both Libyan coast guard bodies, the Libyan Aviation Authority, as well as personnel from the Libyan Post, Telecommunication & IT Company (Deutscher Bundestag, *Auf die Kleine Anfrage der Abgeordneten Andrej Hunko, Heike Hänsel, Michel Brandt, Weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 19/4521 – Über 100 Ertrunkene nach Unterbliebener Seenotrettung vor Malta*, 30 October 2018, question 7).

[111] Whether the Libyan JRCC only depends on Italian technical capacities or whether there is direct interference or coordination from Italian actors remains obscure. A feasibility study of the Centre carried out by Italy should have been delivered to the European Commission by 30 October 2018 (Deutscher Bundestag, 30 October 2018, question 17).

[112] See p. 13 in EUTF's "Support to Integrated Border and Migration Management in Libya - First Phase" action fiche.

[113] See case of 31 March 2018 in SOS Méditerranée, *Three Days of Complex Operations in the Central Mediterranean*, Press Release, 1 April 2018.

the Libyan coast guards.[114] The interests and loyalties of NGOs' missions frequently clashed with those of Libyan coast guards during SAR operations, reflected in critical tensions during these interventions.[115]

An internationally-recognised Libyan SAR area has further placed rescuers in a thorny position when it comes to identifying which authority (Italian, Maltese or Libyan) is best-suited to coordinate a SAR event, as well as whose instructions they should follow in order not to breach international law.[116] A controversy has been sparked by the case of the Asso Ventotto, a commercial Italian-flagged ship which was working for an oil platform in Libya when it conducted a rescue operation in international waters and was subsequently instructed by Libyan authorities to disembark the migrants aboard in Tripoli.[117] Even before, survivors of another incident filed an application against Italy with the ECtHR in a case that involved their coordination with Libya of a pull-back operation.[118] Thereupon, the United Nations High Commissioner for Refugees (UNHCR) expressed that it "does not consider that Libya meets the criteria for being designated as a place of safety for disembarkation…".[119]

Cooperation is furthermore not only pursued at arm's length. Since August 2017, shifting Italian warships have docked at the Abu Sitta

[114] For a detailed account of such cases, see Forensic Oceanography, 2018, pp. 57-85.

[115] Sea Watch, *Breaking: Dramatic First Rescue Operation for Sea-Watch 3*, 6 November 2017; Belhumeur, *Libyan Coastguard Opened Fire at Refugee Boats: NGOs*, Al-Jazeera, 25 May 2017; Assad, *Libyan Navy, Proactiva Open Arms Exchange Blame for Stumbled Sea Rescue Operation*, Libya Observer, 17 March 2018; EURACTIV, AFP, *Libyan Coastguard Prevents NGO Boat From Rescuing Migrants*, 7 May 2018; Y. Behrakis, *Spanish Migrant Rescue Ship Threatened by Libyan Coastguard: Witness*, Reuters, 15 August 2017.

[116] See Amnesty International, 2018.

[117] In doing so, it might have violated the non-refoulement principle, see L. Bagnoli, F. Floris, *Asso Ventotto: lo Scenario si Complica per le Navi Commerciali*, Open Migration, 16 August 2018.

[118] The LCGPS's boat involved in the incident had been donated by Italy, eight out of the 13 crew members had been trained by Operation Sophia, their actions were partly coordinated by the Rome MRCC, and the 'pulled back' migrants were later exposed to flagrant human rights abuses (Glan, *Legal Action Against Italy Over Its Coordination of Libyan Coast Guard Pull-Backs Resulting in Migrant Deaths and Abuse*, 8 May 2018).

[119] UNHCR, September 2018, p. 22; the position of UNHCR, however, seems to only apply to operations in international waters, thus leaving space for interceptions by the coast guards in Libyan waters.

port in Tripoli.[120] These have provided technical and logistical support as part of Italy's MoD's support missions to Libya,[121] and also have been partly used by Libya as a surrogate centre for coordination and communication.[122] As an Italian judge stated, the Italian navy is "substantially entrusted with coordinating [the Libyan coast guard] by both their own naval means and the ones provided to the Libyans".[123] Formally, there are two coast guard bodies in Libya: the General Administration for Coastal Security (GACS), dependent on the Ministry of Interior (MoI), and the Libyan Coast Guard and Port Security (LCGPS, sometimes referred to as the Libyan navy), dependent on the Ministry of Defence (MoD).[124] As mentioned, revolutionary and post-revolutionary armed groups were incorporated into the structures of both bodies (directly or as external support units), and their chains of command seem to exist only on paper.[125]

Libyan coast guards have been supported through training, information sharing, advice, as well as equipment and infrastructure by different channels, funds and actors, amongst others the CSDP missions EUBAM Libya and Operation Sophia, Frontex, EUTF programs,[126]

[120] Ministero della Difesa, *Missioni Militari: Nave Caprera sostituisce la Capri nella missione bilaterale di assistenza e supporto in Libia*, 30 March 2018. While the ship Caprera returned to Italy in July 2018, the ship Gorgona reportedly remains in Tripoli, see F. Biloslavo, *Le forze tricolori in campo: 6 navi, 5 aerei e 400 soldati*, Il Giornale, 4 September 2018.

[121] Cooperation between the Italian Ministry of Defence's Mare Sicuro operation and the Bilateral Assistance and Support Mission (MIASIT).

[122] Forensic Oceanography, 2018, p. 49.

[123] A. Pagano Dritto, *Italy's Navy Directly Coordinates Tripoli's Coast Guard, Libya, Official Documents From The Inquiry On The "Open Arms" Reportedly Reveal, Between Libya and Italy*, 31 March 2018. See also, Italy's Undersecretary of Defence, Raffaele Volpi, 24 June 2018, on Twitter: https://twitter.com/volpi_raffaele/status/1010957505004998656 (accessed 6 October 2018).

[124] GACS is a law enforcement entity responsible for a 30-km band of land along the approx. 1,700 km of Libyan coast as well as the first 12 nautical miles off the Libyan coast. The LCGPS is part of the Libyan Navy and it operates at both territorial and international waters.

[125] Altai Consulting, *cit.*, 2017, p. 42. According to security analysts, only the coast guards in Misrata and at the Abu Sitta naval base had a functioning chain of command which was directly responsive to the Ministry of Defence.

[126] Implemented and co-financed by Italy, the program 'Support to Integrated border and migration management in Libya' (42.223.927 €) contemplates in its first phase the provision to both coast guard bodies of "repair [and maintenance] of existing vessels […], supply of communication and rescue equipment, rubber boats

EUROSUR,[127] as well as by individual EU member states,[128] particularly Italy. Until September 2018, Operation Sophia alone had trained 213 personnel of the Libyan Navy Coast Guard.[129] In consonance with the overall EU strategy, Italy has repaired four patrol boats[130] that it had donated to Libya in the times of Gaddafi, and it has recently provided (at least) twelve more.[131]

This strategy of enabling Libyan coast guards to obstruct movements towards Italy does not tolerate NGOs' rescue missions to operate in the Central Mediterranean freely. NGOs had increased their presence in international waters off the Libyan coast in 2014[132] as the SAR efforts of the EU and its Member States dwindled.[133] As NGOs progressively patrolled

and vehicles", see a detailed list of types of assets in the description of Activity 1 of the program (EUTF's "Support to Integrated Border and Migration Management in Libya - First Phase" action fiche, pp. 2, 9-10). Within this framework, in an answer to MEP Sabine Lösing, EU Commissioner Dimitris Avramopoulos acknowledged that by early 2018 vessels were repaired and given to the Libyan Coastguard (post on personal blog, Sabine Lösing, *Unterstützung der libyschen Küstenschutzverwaltung*, 11 July 2018).

[127] "Capacity delivery to the Libyan coastguard is provided through a number of activities channels, including Op Sophia, EUBAM Libya, Project Seahorse, Frontex, (including provision of tailored Eurosur Fusion Services), on-going MS initiatives and the information exchange network of the European Maritime Safety Agency (EMSA)." (European External Action Service, *Strategic Review on EUNAVFOR MED Operation Sophia, EUBAM Libya & EU Liaison and Planning Cell*, Brussels, 27 July 2018, p. 19). A connection to the Seahorse Mediterranean Network has been for a long time foreseen, and even future EU-Libya joint patrols' potential is contemplated (ibid, pp. 35-6).

[128] For example, through a donation of 35€ million from the four Visegrad countries in December 2017 aimed at supporting the second phase of the above-mentioned EUTF program.

[129] Ibid, p. 25; training materials were partly disclosed in response to an access to documents request by Access Info Europe; see the publication on the website of the organization at https://www.access-info.org/article/30058 (accessed 24 May 2018). It is however unclear whether this training actually serves the interests and needs of Libyan coast guards (see C. Loschi, L. Rainieri, F. Strazzari, 2018, pp. 6-7).

[130] A. Lewis, S. Scherer, *Italy Tries to Bolster Libyan Coast Guard, despite Humanitarian Concern,* Reuters, 15 May 2017.

[131] D. Ghighlione, *Italy Donates 12 More Vessels to Libya to Stem Migration,* Financial Times, 7 August 2018. Allegedly, three additional boats would have been delivered by early 2018, see G. Pelosi, *Libia e Niger: il Bilancio dell'Italia e l'Eredità per il Prossimo Governo*, Il Sole 24 Ore, 24 February 2018. The latter are likely to be part of an EUTF program.

[132] European Political Strategy Centre, 2017, p. 2.

[133] see P. Cuttitta, *Pushing Migrants Back to Libya, Persecuting Rescue NGOs: The End of the Humanitarian Turn (Part I)*, Border Criminologies, 18 April 2018; also

southwards[134] and conducted up to 40% of the rescues,[135] they became criticised for creating a pull-factor and were even accused of colluding with smugglers.[136] Italy imposed a Code of Conduct on NGOs in August 2017 to exert further control over their activities.[137] Many of the organisations refused to sign[138] or abandoned the area.[139] Since May 2018, a newly-formed Italian government has substantially aggravated the conditions under which SAR missions are conducted in the region. Rhetorical vilification of NGOs has been accompanied, most notably, by repeated refusals to allow vessels of different nature to disembark rescued asylum-seekers at Italian ports.[140] On top of this, in June 2018, the European Council reminded "[a]ll vessels operating in the Mediterranean" their obligation to comply with "applicable laws" and their duty of "not obstruct[ing] operations of the Libyan Coastguard".[141] Overall, the aggression on behalf of the Libyan coast guards,[142] the Italian (and Maltese)[143] prosecution

P. Cuttitta, *Repoliticization Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean*, 2017.

[134] See Guardia Costiera, *Search and Rescue Activity and Migratory Flows in Central Mediterranean Sea - Year 2016,* 2017, p. 16; also G. Baczynska, *Ferry Service or Humanitarian Rescue Boat: EU's Mediterranean Dilemma*, Reuters, 12 May 2017.

[135] See, for example, early 2017 in Guardia Costiera, 2018, p. 14.

[136] A. Pécoud, M. Esperti, *Are NGOs Responsible for the Migration Crisis in the Mediterranean?*, The Conversation, 20 June 2017; Momigliano, *In Italy, Conspiracy Theories About Collusion Between Smugglers and Charities Rescuing Migrants Are Spreading*, The Washington Post, 2 May 2017.

[137] In Italian, *Codice di Condotta per le ONG Impegnate nelle Operazioni di Salvataggio dei Migranti in Mare*"; the code of conduct partly also responds to worries expressed by Frontex reports on the lack of adequate communication of decisions of NGO boats with authorities (Frontex, *Risk Analysis for 2017,* Warsaw, 2017, p. 32).

[138] E. Zalan, *NGOs Divided by Italy's New Rescue Code*, EU Observer, 1 August 2017.

[139] ANSA, *NGOs Are Facing Difficult Times in Italy*, Infomigrants, 21 March 2018.

[140] Including commercial, navy and Italian coastguard vessels, see Amnesty International, Between the Devil and the Deep Blue Sea. Europe Fails Refugees and Migrants in the Central Mediterranean, 2018, pp. 7-10.

[141] European Council, *European Council conclusions, 28 June 2018*, Press Release 421/18, p. 1.

[142] When the Libyan coast guards were confronted with accusations of increased aggression towards NGOs, they blamed it on the NGOs (A.K. Assad, 2018), and officials responded that they were aiming at causing a good impression on their European partners, since NGOs can constitute a threat to coastal security (C. Loschi, F. Rainieri, L. Strazzari, 2018, p. 8).

[143] G. Panigiani, *Malta Cracks Down on a Humanitarian Ship That Carried Migrants*, The New York Times, 2 July 2018.

against NGOs,[144] as well as political criticism have added to the criminalisation and intimidation of NGO activities.

1.5. *What Remains*

As a donor, through direct institutional involvement, and by providing a mission framework for Member States, the EU has established a strategy of externalised obstruction of asylum that is contributing to the complete containment of asylum-seekers in a situation of fundamental rightlessness in Libya. Drawing on this support, the Libyan coast guards – among them militia groups and (former) smugglers – apprehend and intercept those aiming to access asylum in Europe, either before their departure,[145] in Libyan territorial waters, or in international waters.[146]

Attempts at crossing the Central Mediterranean route from Libya have abruptly decreased since July 2017,[147] mostly due to the co-option

[144] For the case against Jugend Rettet, see Reuters, *Italy Seizes NGO Rescue Boat for Allegedly Aiding Illegal Migration,* 2 August 2017. For the case against Proactiva Open Arms, see N. Squires, H. Strange, *Italy Impounds Rescue Vessel After Crew Refuses to Hand Migrants to Libya*, The Telegraph, 19 March 2018.

[145] Interceptions also take place on land, for example during raids at warehouses used by smugglers (M. Micallef, T. Reitano, 2017, p. 8). As there is not a robust legal framework for migrants in Libya, they are easy to become targets of detention and abuse, and consequently many try to live as hidden as possible (Reach, *Mixed migration routes and dynamics in Libya The impact of EU migration measures on mixed migration in Libya*, study for UNHCR, April 2018). The UN High Commissioner for Human Rights in a statement in late 2017 expressed strong concern about the impact of EU policies (see OHCHR, *UN Human Rights Chief: Suffering of Migrants in Libya Outrage to Conscience of Humanity*, 14 November 2017). For an example of interception before departure, see The Associated Press, *Libyan Coast Guard Intercepts More Migrants in Mediterranean*, The New York Times, 7 May 2018.

[146] Whereas in the period January-September 2017, the percentage of migrants brought back to Libya stood at an estimated average of 14.46%, during the same period in 2018 this number raised to 50.62%. To put this into perspective, when the dead or missing are excluded, in between January-September 2017 an estimated 83.22% of those who left Libya reached a European coast, and during the same period in 2018, the average was 43.98%. These figures are computed from the records of the Italian Institute for International Political Studies, which are routinely updated, and are available at: https://docs.google.com/spreadsheets/d/1ncHxOHIx4ptt4YFXgGi9TIbwd53HaR3oFbrfBm67ak4/edit#gid=0 (accessed 9 November 2018). See also Forensic Oceanography, 2018, pp. 57-85.

[147] Guardia Costiera, 2018, p. 11. A relevant share of asylum-seekers who make it to Italy come from countries of origin with currently relatively high recognition rates

of armed groups into anti-smuggling activities (which ignited local conflicts and engrossed the lists of migrant detainees),[148] rather than a decline in the number of persons seeking to access asylum in the EU or the activities of NGOs.[149] The latest analyses also highlight a distressing spike in relative mortality rates at sea since June 2018,[150] immediately following the hardened position of the new Italian government towards rescuers, epitomised in the informal ban on disembarkation at Italian ports.

UNHCR has noticed a recent increase in the number of refugees and asylum-seekers who, despite being registered with the organisation by mid-2018, are reportedly attempting to cross the Mediterranean.[151] An additional factor discouraging to remain in the country might be the escalation of armed violence between rival groups in the summer of 2018 in Tripoli, where an estimated 22% of migrants in Libya[152] find themselves. The re-ignition of the conflict created a despairing scenario, where many were evicted,[153] kidnapped or left to survive by their own means, while UNHCR and IOM personnel were hardly able to provide assistance.[154]

in the EU (data from UNHCR, available at https://data2.unhcr.org/en/situations/mediterranean/location/5205 [accessed 9 November 2018]). The recognition rates by the third quarter of 2018 stood at: Eritrea 80.6%, Sudan 40.3%, Iraq 38.5%, Pakistan 22%, Nigeria 18.8%, Côte d'Ivoire 20.2%, Mali 27%, Guinea 21.8% and Libya 37.7%, see http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asydcfstq&lang=en [accessed 9 November 2018]).

[148] T. Abderrahim, *Advancing the Impossible? Progress of The Joint African, European and International Response to the Migration Crisis in Libya, ECDPM, Discussion Paper No. 229*, September 2018, p. 5.

[149] Frontex recognises the most notable reason behind this drop are "internal developments in Libya" (Frontex, *Risk Analysis for 2018,* p. 18). See further reasoning by the Italian Coast Guard in Guardia Costiera, 2018, pp. 18-9. Co-option of militias and in-fighting is also recognised as a key factor in M. Micallef, T. Reitano, 2017, p. 8.

[150] M. Villa, R. Gruijters, E. Steinhilper, *Outsourcing European Border Control: Recent Trends in Departures, Deaths and Search and Rescue Activities in the Central Mediterranean*, Border Criminologies, 11 September 2018. Whereas the latter study estimates the number of casualties for June 2018 to be 451, data from the IOM Missing Migrants Project recorded 564.

[151] In addition, many IDPs are allegedly seeking ways to leave the country (UNHCR, September 2018b, pp. 16-7).

[152] IOM, *Libya's Migrant Report: Round 21 July-August 2018, for DTM LIBYA - Flow Monitoring*, August 2018, p. 3.

[153] UNHCR, *Militias evict and disperse 1,900 displaced people in Libya*, 14 August 2018.

[154] S. Hayden, *Libya is a war zone. Why is the EU still sending refugees back there?*, The Guardian, 4 October 2018. At the time of writing, the head of the UN

Asylum-seekers in Libya continuously await grave human rights violations, including systematic detention. Because of the intensified control of the coast that the EU demands, more asylum-seekers remain for extended periods of time in unsafe accommodations on the route, exposed to traffickers and waiting for smugglers to arrange onward movement.[155]

Fledgling efforts to improve the situation do exist: the EU and its partners are aiming at addressing detention conditions,[156] evacuating individuals,[157] and resettling them to Europe.[158] Some may also have the chance to be released from detention after a UNHCR request,[159] to be hosted in the UNHCR Gathering and Departure Centre in Tripoli to

Support Mission in Libya stated that "the violence in Tripoli finally ended" (UNSMIL, *Remarks of SRSG Ghassan Salamé to the United Nations Security Council on the Situation in Libya*, 9 November 2018). Intermittent clashes were still being reported until recently, after repeated failures to implement a UN-sponsored ceasefire signed in early September (Mahmoud, *Libya: UN Ceasefire Collapses As Clashes Erupt in Tripoli*, Asharq Al-Awsat, 17 October 2018). Most recently, the Al-Jalaa Hospital in Tripoli was attacked by militias (UNSMIL, *UN Statement on Attacks against Medical Facilities and Personnel,* 5 November 2018*)*.

[155] Reach, April 2018.

[156] See, for example, the EUTFA's "*Supporting protection and humanitarian repatriation and reintegration of vulnerable migrants in Libya*" program or measures outlined under the title "*Cooperation on migration and protection of migrants*" on the European External Action Service briefing on EU-Libya relations.

[157] UNHCR reported that, by 2 November 2018, 2,082 refugees have been evacuated from Libya through the Emergency Transit Mechanism, which started in November 2017 by resettling vulnerable refugees from Libya. From those 2,082 individuals, an estimated 407 were taken to facilities in Italy and Romania, while the remaining 1,675 were taken to the ones in Niger (see UNHCR, *Flash Update 26 October - 2 November,* 2 November 2018*).*

[158] Between 1 September 2017 to 2 November 2018, a further 930 refugees were submitted for resettlement directly to six European countries and Canada (ibid.). Currently, UNHCR can only register individuals from nine nationalities which the Libyan government recognise that can have a claim for international protection (see footnote 98 in UNHCR, September 2018b, p. 11). Furthermore, those on board of apprehended vessels (reaching a port that UNHCR has access to) are processed and scanned to evaluate eligibility for international protection (UNHCR, *Libya Fact Sheet - April 2018*, 2018, p. 2).

[159] This had been the case for 950 people from January to December 2017 (Amnesty International, 2017, p. 29), whereas by early November 2018, there were 56,444 refugees asylum-seekers registered with UNHCR (see UNHCR, *Flash Update 2 – 9 Nov. 2018,* 9 November 2018). In November 2018, UNHCR reported that an "estimated 5,413 refugees and migrants are presently held in DCIM-operated detention centres in Libya, of whom 3,988 are persons of concern" (UNHCR, 9 November 2018).

await evacuation or resettlement,[160] or to join an IOM return program.[161] Overall, however, the fundamental rightlessness of individuals trapped in Libya[162] devoid of access to asylum currently remains unchallenged.

The effects generated by EU policies on migration towards Libya are ambiguous. A shift towards the Western Mediterranean Route can be observed, but not for all nationalities.[163] The quantitative repercussions of the efforts to control the Nigerien-Libyan border are hard to verify due to the inaccessibility of the territories in question. The Fezzan region in southern Libya, which is inhabited by rivalling tribes who rely on the income of different smuggling activities,[164] is far from being under the GNA's control and is affected by skirmishes which involve neighbouring foreign fighters who seek control over these profits.[165] IOM numbers suggest a drastic decrease, whereas other sources observe

[160] UNHCR, *First Group of Refugees Evacuated from New Departure Facility in Libya*, Press Release, 6 December 2018.

[161] Voluntary return operations have been scaled-up by early 2018 with EU support (IOM, *Mixed Migration Flows in the Mediterranean, Compilation of Available Data and Information,* March 2018a, p. 13). By November 2018, IOM had coordinated the return of 14,622 people from Libya (International Organization for Migration, *Suspended for Two Years, IOM Resumes Voluntary Humanitarian Return Flights from Southern Libya*, 9 November 2018).

[162] Amnesty International reported in May 2018 that a „group of around 145 people – including women and children – [that] had fled Libya because of the brutal conditions they endured there, and had been living in a displacement camp in the Nigerien city of Agadez where they hoped to claim asylum", have been deported back to Libya (see Amnesty International, *Niger: More than a hundred Sudanese nationals deported to Libya in critical situation and at risk of serious abuses including torture*, 11 May 2018).

[163] Y. Brenner, R. Forin, B. Frouws, *The "Shift" to the Western Mediterranean Migration Route: Myth or Reality?*, Mixed Migration Centre, 22 August 2018. Over the summer of 2018, the number of migrants who arrived in Italy claiming to have departed from Turkey or Tunisia exceptionally surpassed those who left via Libya (International Organization for Migration, DTM Europe Displacement Tracking Matrix (DTM) July – September 2018, October 2018, p. 8). The latest reports analysing the increased importance of Tunisia in the sub-Saharan migration routes point to a possible but still unclear dynamic of illegal land crossings from Libya into Tunisia (Reach, *Tunisia, Country of Destination and Transit for sub-Saharan African migrants,* October 2018, p. 3).

[164] T. Westcott, *The Tebu: the Little-Known Community at the Heart of Libya's People Smuggling Trade*, IRIN, 6 September 2018.

[165] For thorough analysis of dynamics see F. Wehrey, *Insecurity and Governance Challenges in Southern Libya*, Carnegie Endowment for International Peace, 30 March 2017; J. Tubiana, C. Gramizzi, *Tubu Trouble: State and Statelessness in the Chad-Sudan-Libya Triangle, Small Arms Survey report*, Geneva, 2017, pp. 111-121.

that the smuggling business has been pushed underground, negatively impacting the safety of migrants, while remaining intact.[166] The consequences of the deteriorating conditions in Libya on the willingness of asylum-seekers and other migrants to move through the country also remain unclear.[167] As illustrated in the case scenario above, it is not an entirely incomprehensible option for a potential asylum-seeker from Western Africa to move towards the shores of Libya to seek protection in Europe. It seems, however, that increased insecurity and decreasing transit possibilities through Libya have incited at least some groups to move back southwards. Yet, conditions for asylum-seekers in Niger remain dire and lead to a situation of limbo and uncertainty.[168]

2. *Applying the Right to Asylum*

Several commentators have already convincingly spelt out the illegality of the approach of European states towards Libya.[169] In this article, we add a perspective to the discussion based on the right to asylum in Art. 18 of the EU Fundamental Rights Charter (EUCFR). With this approach – which naturally involves obvious enforcement limitations – we hope to contribute to the development of an encompassing framework that allows a more coherent assessment of the multi-layered reality of the containment of asylum-seekers in Libya.

[166] Reach, April 2018.

[167] Ibid.

[168] As seen in a case of Sudanese refugees who were fleeing the desperate situation in Libya towards Niger only to find themselves pushed back again by Nigerien authorities to Libya.

[169] Traditionally, arguments against interception at sea draw on the *non-refoulement* principle in connection with the rules of state responsibility in cases of derived responsibility for aiding and abetting. In the Libyan case, the right to leave has been rightly added to the debate, allowing an adequate legal assessment of actions undertaken within Libyan territory or territorial waters; see eg. V. Moreno-Lax, M. Giuffré, 2017; P. Biondi, *The Case for Italy's Complicity in Libya Push-Backs,* 24 November 2017; N. Markard, *The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries*, EJIL, 2016, p. 591; J.C. Hathaway, T. Gammeltoft-Hansen, *Non-Refoulement in a World of Cooperative Deterrence*, 2015, Colum. J. Transnat'l L. 53, no. 2: 235-84; M. Den Heijer, *Europe and Extraterritorial Asylum*, 2010, PhD Thesis, University of Leiden, 2010; J.P. Gauci, *Back to Old Tricks? Italian Responsibility for Returning People to Libya,* 6 June 2017, available at https://www.ejiltalk.org/back-to-old-tricks-italian-responsibility-for-returning-people-to-libya/ (accessed 29 May 2018).

The establishment of the right to asylum in the EU was from the outset linked to the efforts to create a Common European Asylum System (CEAS). First steps were taken in 1998, when, after the war in Kosovo and Bosnia and Herzegovina, a consensus on the need to harmonise national asylum systems emerged.[170] In Tampere, it was decided that, within the gradual development of a common system, the "absolute respect of the right to seek asylum" and full commitment "to the obligations of the Geneva Refugee Convention and other relevant human rights instruments" should be upheld. The EU asylum system should be "open to those who forced by circumstances, legitimately seek protection".[171]

Some months before Tampere, the European Council had already decided that "[…] the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident".[172] The Tampere conclusions then established the conditions for the implementation of this Charter in "close connection with the area of freedom, security and justice". In the EUCFR, which was given full legal effect only by the entry into force of the Treaty of Lisbon on 1 December 2009, the 'right to asylum' was included in Art. 18. The Lisbon Treaty conferred legally binding status on the EUCFR, obliging the EU to respect the rights that it enumerates. Today, virtually all EU asylum instruments reflect the Tampere conclusions and ask for the "full observance" of the right to asylum in their preambles.[173]

Art. 18 EUCFR states:

> *The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.*

[170] See K. Hailbronner, *Immigration and Asylum Law and Policy in the European Union,* 2000, Leiden; E. Guild, *Immigration Law in the European Community*, 2011, The Hague; G. Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection,* 2011, EJML 3(3-4): 475-478.

[171] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice – Text adopted by the Justice and Home Affairs Council of 3 December 1998, Official Journal C 019, 23/01/1999 P. 0001 – 0015.

[172] Cologne European Council, 3-4 June 1999, Conclusions of the Presidency.

[173] See V. Moreno-Lax, 2017, p. 371 ss.

The EU itself has made clear through the formulation of policy documents and legislation that the Charter shall also guide the external dimensions of asylum and migration policy. The Global Approach to Migration and Mobility (GAMM) stated that "respect for the Charter of Fundamental Rights of the EU is a key component of EU policies on migration." In the Partnership Framework, it was later confirmed that "all of this work must take place in a context which fully respects international law and fundamental rights." Furthermore, according to Art. 21(1) TEU, the EU's international action shall, amongst others, be guided by the universality and indivisibility of human rights and fundamental freedoms, and respect for human dignity and international law.[174] The Frontex Regulation,[175] which also elaborates on the competencies of the agency to cooperate with third countries,[176] states that it "seeks to ensure full respect for […] the right to asylum."[177]

Art. 18 itself is not limited in its territorial scope.[178] It applies to the Libyan case because EU institutions and bodies are involved, and EU law applies.[179] Formally, EU cooperation with Libya is viewed mostly as part of the Common Foreign and Security Policy (CFSP) or CSDP framework under Section 2 TEU[180] as well as development policy. In

[174] The CJEU confirmed that this applies to the CFSP area (see C-263/14).

[175] Regulation (Eu) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

[176] Art. 52 and 54 of the Regulation.

[177] Recital 49 of the Regulation; for an analysis of the cooperation of Frontex with third countries, see V. Moreno-Lax, 2017, p. 173 ss.

[178] See V. Moreno-Lax, 2017, p. 381.

[179] While the Charter itself does not contain a jurisdictional clause and the EU does not even possess its own sovereign territory, Art. 51(1) of the Charter clarifies that its provisions apply to both EU organs and Member States when they implement EU law; see also V. Moreno-Lax, C. Castello, *The Extraterritorial Application of the EU Charter of Fundamental Rights*, in S. Peers, T. Hervey, J. Kenner, A. Ward (ed.), *The EU Charter of Fundamental Rights*, 2014, Oxford and Portland; S. Peers, *Immigration, Asylum and the European Union Charter of Fundamental Rights*, EJML, 2001, p. 146-48; D.M. Curtin, *The Sting is Always in the Tail, The Personal scope of Application of the EU Charter of Fundamental Rights*, 2001, Maastricht Journal, 102; for relevant CJEU case law, see e.g. C-400/10 PPU McB, 2010, C-377-98, The Netherlands v Parliament and Council, 2001, C-404/92 P X v Commission, 1994, and C-185/98 P Baustahlgewebe v Commission, 1998.

[180] Missions EUNAVFOR MED Operation Sophia and EUBAM Libya are being implemented under the CSDP framework; see Council Decision 2016/1339/CFSP of

substance, however, Art. 78(2)(g) Treaty on the Functioning of the European Union (TFEU) is the overall treaty basis for action in Libya, clarifying that "cooperation with third countries for the purpose of managing inflows of people applying for asylum […]" is part of the CEAS.

2.1. *Understanding Asylum*

Commentators disagree considerably on the scope or content as well as the character of the right to asylum in Art. 18 CFR. This disagreement may, to some degree, be grounded in the linguistically vague formulation of Art. 18,[181] a general uncertainty as regards the term asylum, and the fact that there exists no equivalent right to asylum in the ECHR.[182] Moreover, the CJEU has so far only contributed to the rather obvious, namely that the *non-refoulement* principle in Art. 4 of the Charter is also covered by Art. 18.[183]

Unfortunately, legal commentary has too often opted for positions that limit Art. 18 to a minimum or misconstrue its character. Some have argued that the right to asylum does not entail an (individual) right to asylum,[184] that Art. 18 is confined to the rights provided by the Refugee Convention[185] or to the principle of *non-refoulement* therein.[186] These

4 August 2016 amending and extending Decision (CFSP) 2013/233 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), and Council Decision 2017/1385/CFSP, of 14 July 2017 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA).

[181] See G. Noll, 2005, p. 548.

[182] While a right to enter and to obtain asylum might be derived from the *non-refoulement* principle and other ECHR rights, the ECtHR has repeatedly stated that contracting states have the right to regulate entry, residence and extradition according to relevant human rights treaties; e.g. in *Ahmed/Austria*, 25.964/95, 11 January 2007, *Salah Sheekh/Netherlands*, 1948/04; see also Nußberger, *Flüchtlingsschicksale zwischen Völkerrecht und Politik - Zur Rechtsprechung des EGMR zu Fragen der Staatenverantwortung in Migrationsfällen*, NVwZ 2016, p. 815.

[183] CJEU in *N.S. and ME*, and *Halaf*.

[184] See G. Jochum, *Art. 18 GRC*, in K. Stern, M. Sachs (ed.), *Europäische Grundrechte-Charta*, 2016.

[185] See M. Graßhof, *Art. 18 GRC*, in J. Schwarze (ed.), *EU-Kommentar*, 2012; M. Rossi, *Art. 18 GRC*, in C. Calliess, M. Ruffert (ed.), *EUV/AEUV*, 2016; M.P. Folz, *Art 18 GRC*, in C. Vedder, W. Heintschel Von Heinegg (ed.), *Europäisches Unionsrecht*, 2012.

[186] W. Obwexer, *Völker-und unionsrechtliche Rahmenbedingungen für eine Begrenzung*

restrictive positions adhere to the outdated notion of asylum as a right of the state and lack contextual as well as textual foundations.

Art. 18 itself refers to the Refugee Convention and EU treaties. However, neither of those defines asylum. Consequently, one must consult other sources. At the outset, the history of asylum[187] informs the content of Art. 18. This history reflects, amongst others, the evolvement of a territorial and normative conception of asylum under the influence of varying social and political circumstances and agreements[188] – from its normative roots in the context of Jewish tradition,[189] as well as the ancient Greek[190] and Roman[191] conceptions, to the strengthening of the territorial notion through the Church,[192] and, later, its expression

des Zustroms von Schutzsuchenden (Richtwert/"Obergrenze"), JRP, 2016, 152 (163); H.M. Wolffgang, *Art 18 GRCh*, in C.O. Lenz, D. Borchardt (ed.), *EU-Verträge Kommentar*.

[187] References to the protection provided to individuals by sovereigns are found in the oldest religious scriptures as well as in the legal practices of most ancient civilisations; the oldest international legal agreement for which content is documented, the Egyptian-Hittite peace treaty ('Kadesh Treaty') from 1258 BC, already contained clauses addressing the protection of individuals, holding that populations should be exchanged between the two powers under the condition of amnesty.

[188] For an encompassing account of the territorial conception of asylum, see A. Grahl-Madsen, *Territorial Asylum*, 1980, Stockholm.

[189] When asylum was, according to the holy text, granted to the innocent who took refuge at the altar, and later in cities; it is contested, however, whether cities ever actually served as places of refuge (see C. Trauisen, *Das sakrale Asyl in der Alten Welt*, 2004, Tübingen; see also T. Gil-Bazo, *Asylum as a General Principle of International Law*, in IJRL, 2015, p. 18 ss.; I. Bau, *This Ground is Holy: Church Sanctuary and Central American Refugees*, in *Refugee Law and Policy*, 2011, p. 8 ss.).

[190] There, asylum was understood as an expression of divine power, where human justice had led to unsatisfactory situations. E.g. in cases of involuntary crimes when the temples served as a refuge; ibid.

[191] In Rome, the Temple of Asylaeus on the Capitoline Hill, founded by Romulus, provided protection to those outside the pale of law; see T. Gil-Bazo, *cit*., 2015, p. 18 ss.; I. Bau, *cit*., 2011, p. 8 ss.

[192] A turning point for the evolvement of the institution of asylum was the influence exercised on it by the Christian Church in the fourth Century. As Christianity became the dominant religion in the Roman Empire during the reign of Constantine the Great, the Church also contributed to the strengthening of the territorial character of asylum; there is, however, no direct link between the tradition of asylum as referenced in the Old Testament and church asylum (C. Trauisen, 2004, p. 308); what connects both, however, is the personal character of asylum deriving from a particular place that provides protection based on Greek religion (ibid., p. 309); territorial protection, thus, could be projected to the different Church territories, such as convents, monasteries, etc.; the Codex Theodosianus codified the authority of churches to grant asylum, as

in the legislation of European kingdoms.[193] As the concept of sovereignty also obtained a territorial rather than a personal form, the development of the modern nation-state consolidated the process of territorialisation of asylum and the understanding of asylum as an expression of sovereignty.[194] The Age of Enlightenment established asylum as an institution for the protection of the politically persecuted.[195] Together with the evolvement of the notion of a sovereign people and the strengthening of democratic principles, asylum eventually also became an expression of an obligation – a perspective that was also translated into state constitutions.[196]

However, international relations and international law did not reflect these developments. In particular, following the establishment of the modern nation-state, the understanding that asylum is an exclusive right of states persisted.[197] Echoing this view, the Universal Declaration of Human Rights (UDHR), in Art. 14, merely recognises a right to

well as its territorial limits (see T. Gil-Bazo, 2015, p. 21); the various Christian Councils reinforced and expanded the position of the Church on the institution of asylum, transferring the universal claim of the Church also to the sphere of asylum and the growing importance of asylum in the Church found its climax in the twelfth century, when the inviolability of asylum within the limits of Church territory was established, while its infringement was punished by excommunication (ibid.).

[193] For instance, in Spanish legislation of the 13th century, the Church's privilege was confirmed. Not only a duty to respect asylum was codified but also a standard of treatment for asylees (ibid.).

[194] Ibid., p. 22; this process also led to the codification of asylum in state legislation and the weakening of the Church's authority in relation to asylum; contrasting this development, asylum as an authority of the Church continued to exist in the German states until the nineteenth century as well as in Spain (ibid.; see also L. Bolesta-Kowiebrodzki, *Le droit d'asile*, 1962, p. 14).

[195] Following the French Revolution and the division between the political conceptions of monarchies and republics, the category of the political refugee was established; see G. Burgess, *Refuge in the Land of Liberty*, 2008.

[196] The political perspective on asylum as an obligation or duty based on the people's sovereignty was, amongst others, reflected in the French Constitution of 1793 (T. Gil-Bazo, 2015); in the view of Reale (*Le droit d'asile*, 1938), the sentiment of the public conscience that the extradition of political refugees was an offence to humanity and honour was transformed into a legal principle; Article 120 of the French Constitution stated that "[The French people] give asylum to foreigners banished from their homeland for the cause of freedom." which today still constitutes a reference for other constitutions in their definition of asylum (Gil-Bazo, 2015, p. 23).

[197] See also G. Goodwin-Gill, J. McAdam, *The Refugee in International Law*, 2007, Oxford, p. 355.

seek and enjoy asylum, but not a right to be granted asylum.[198] The weak wording of Art. 14 encouraged further attempts to codify a right to asylum, which, however, likewise failed, such as, most prominently, the Convention on Territorial Asylum.[199]

Despite the failure to explicitly codify an individual right to asylum in international law, the second half of the twentieth century witnessed legal developments that effectively contributed to the strengthening of protection mechanisms for asylum-seekers. Through the emergence of modern refugee and international human rights law – the 1951 Refugee Convention, and in Europe notably the European Convention of Human Rights (ECHR) – a comprehensive legal framework was created that includes rights which are substantially comparable to or even coextensive with a right to asylum.[200] These developments moreover led to a new category of refugee – adding to the political understanding of the French Revolution a human right based perspective.[201] Building upon the ancient tradition of asylum and its normative character, the institution of asylum is furthermore embedded in the constitutions of numerous states worldwide[202] as well as regional human rights documents.[203] It is thus evident that the right to asylum of the individual precedes Art. 18.[204]

[198] Within the drafting process of Art. 14 UDHR, the conception of asylum as a right of individuals was also put forth; however, no agreement could be achieved in this regard (see also T. Gammeltoft-Hansen, H. Gammeltoft-Hansen, *The Right to Seek Revisited*, in EJML, 2008, p. 442 ss.); against it the argument was presented that there is no right of foreigners to access territories of sovereign states (see V. Moreno-Lax, 2017, p. 339).

[199] The establishment of the right of asylum in the ICCPR failed against the same argument (see Commission on Human Rights, Report to the Economic and Social Council on the eighth session of the Commission, held in New York, from 14 April to 14 June 1952, para 201 and 202).

[200] Both the ECHR and the Refugee Convention (notwithstanding evident shortcomings in respect of enforceability and clarity, eg. in relation to access to citizenship) establish state obligations and corresponding rights and freedoms of individuals which contribute to abolishing discrimination between asylum-seekers or refugees and the nationals of asylum states.

[201] The definition of "refugee" in the Refugee Convention encompasses also properties of the individual that exist independent of political opinion.

[202] Ibid.; see also T. Gil-Bazo, 2015; the Member States Germany, France, Italy, Spain, Slovakia, the Czech Republic, Hungary, Poland, Portugal, Romania, Slovenia and Croatia codified a constitutional right of asylum (see M. Den Heijer, 2014, p. 534).

[203] See Art. 22(7) of the American Convention on Human Rights or Art. 12(3) of the African Charter on Human and Peoples' Rights.

[204] See UNHCR public statement in relation to Zuheyr Freyeh Halaf v. the

That Art. 18 provides an individual right can, therefore, be derived from Art. 52(4) of the Charter, which requests that the right to asylum must be interpreted "in harmony with" the constitutional traditions in Europe.[205] Asylum "is an integral part of the common heritage of European traditions", the Parliamentary Assembly of the CoE had already stated in 1965.[206] The use of the phrase "right to asylum" instead of "right to seek asylum" or "right of asylum" also requests this interpretation, as well as the fact that Art. 18 is embedded within the EUCFR, explaining that the EU "places the individual at the heart of its activities" (Preamble of the Charter).[207]

Understanding asylum as an individual right has implications for any approach the EU pursues in all asylum-related actions, including its current attitude towards migration from Libya. While it is true that asylum-seekers may often be affected by situations of material need and vulnerability, and thus require aid that developed states may wish to provide, the right to asylum calls for a rights-based answer. As laudable as the efforts to improve the living conditions of asylum-seekers in Libya as well as towards resettling a few to other countries or facilitating voluntary return may be, they cannot release the EU from its obligations to uphold the right to asylum.

2.2. A Response to Rightlessness

The necessity of a right to asylum, as well as the limitations of a purely humanitarian approach, become particularly evident when exploring the development of the Refugee Convention. The 1951 Refugee

Bulgarian State Agency for Refugees pending before the CJEU; *Maduro*, 9 September 2008, Conclusions in C-465/07; T. Gil-Bazo, *The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law*, in *Refugee Survey Quarterly*, 2008, p. 51.

[205] See also M. Den Heijer, 2014, p. 55.

[206] Parliamentary Assembly, *Granting of the Right of Asylum to European Refugees*, Recommendation 434, 1965.

[207] See UNHCR public statement in relation to Zuheyr Freyeh Halaf v. the Bulgarian State Agency for Refugees pending before the CJEU, for the discussions regarding the wording of Article 18 of the EU Charter within the travaux préparatoires of the EU Charter, see: Doc. CHARTE 4332/00 CONVENT 35, at pp. 496-528; see also, T. Gil-Bazo, *The Charter of Fundamental Rights of the European Union and the right to be Granted Asylum in the Union's Law*, 2008, *Refugee Survey Quarterly*, vol. 27 no. 3, p. 46.

Convention and its 1967 Protocol are rightfully considered the centrepiece of international refugee law, containing a binding definition of the category 'refugee' as well as related rights of individuals and obligations of states. Although the Convention itself does not touch upon the topic of asylum, refugee protection under the Convention and asylum are often viewed as the same. While this position does not consider the broader development of the institution of asylum and its extensive history, it is accurate that the Refugee Convention strongly influences the modern conceptualisation of asylum.

The establishment of the Refugee Convention was a consequence of the collective European experience of rightlessness and displacement[208] in the first half of the twentieth century. The dilemma in the relationship between refugees and the international order became apparent[209] when the refugee had lost the protection of the country of origin which was tantamount to losing the protection of the entire system of international law. States thus decided it was in their mutual interest to establish a legal basis for the protection and assimilation of the millions of displaced persons as an exception to the norm of communal closure.[210] It is a common misunderstanding that the Refugee Convention provides protection only against persecution. As the absence of persecution does not resolve the fundamental predicament of rightlessness that has accrued, the Convention instead also aims at reconnecting the refugee to the international system, that refugees who have become rightless shall again "shall enjoy fundamental rights and freedoms without discrimination."[211]

In this sense, the reality of asylum-seekers stranded in Libya today is comparable to that of European refugees in the first half of the twentieth century. The Libyan case is evidence for the fact that despite the developments in international refugee and human rights law, asylum-seekers can still fall outside the entire international legal order, depending primarily on humanitarian discretion to escape massive human rights violations. By circumventing the application of a framework designed to protect

[208] See N. Oudejans, *Asylum, a Philosophical Inquiry into the International Protection of Refugees*, 2011, Oisterwijk, p. 10.

[209] "A refugee is an anomaly in international law", the International Refugee Organization wrote in 1949, "and it is often impossible to deal with him in accordance with the legal provisions designed to apply to aliens who receive assistance from their national authorities".

[210] See J.C. Hathaway, *The Rights of Refugees Under International Law*, 2005, Cambridge, p. 85.

[211] Preamble of the Refugee Convention.

refugees, the EU has decided to pursue a strategy that contributes to the same rightlessness that had initially given rise to its emergence.

2.3. *Non-Refoulement*

Among the essential rights and obligations the Convention provides, the duty of *non-refoulement*, as stipulated in its Art. 33(1), has traditionally received most attention, and has been understood as its core principle.[212] This principle – that states must not return any person to face the risk of a severe human rights violation – is also codified in a number of human rights instruments, including the 1966 International Covenant on Civil and Political Rights (ICCPR)[213] and the ECHR,[214] and there has been considerable state practice reflecting this norm since. Against this backdrop, it has been claimed that the principle of *non-refoulement* has even become universally binding customary international law.[215]

During the drafting process of the Refugee Convention states had insisted they be allowed to decide who should be admitted to their territory and to remain there.[216] However, because a person is a refugee

[212] See UNHCR public statement in relation to Zuheyr Freyeh Halaf v. the Bulgarian State Agency for Refugees pending before the Court of Justice of the European Union; on the principle of *non-refoulement* see also G. Goodwin-Gill, J. McAdam, 2007, p. 201 ss.; In EU law, the principle of *non-refoulement* is already guaranteed by Art. 78(1) TFEU; however, contrary to e.g. Art. 3 ECHR, Art. 33(1) is not an absolute right, as 33(2) states that "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country" may not claim *non-refoulement*.

[213] The ICCPR was ratified by Libya in 1976.

[214] See also the 1984 Convention Against Torture, the 1989 Convention on the Rights of the Child, and the 1989 American Convention on Human Rights.

[215] See E. Lauterpacht, D. Bethlehem, *The Scope and Content of the Duty of Non-Refoulement*, in E. Feller, *Refugee Protection in International Law*, 2001, 87-177; but arguing against it see J.C. Hathaway, *Leveraging Asylum*, 2009, Texas ILJ, p. 503. In this connection it is also worth noting that that CJEU has clarified that both Art. 18 and Art. 19 of the Charter can be used as a source for this principle (see CJEU, 24 June 2015, C-373/13).

[216] From the position that prioritizes state sovereignty derives also the failure to include any duty to grant asylum in the Refugee Convention; see also A. Castillo, J.C. Hathaway, *Temporary Protection*, in J.C. Hathaway, *Reconceiving International Refugee Law*, 1997. A. Grahl-Madsen (*Territorial Asylum*, 1980, p. 52) had noted in the context of the drafting of the Convention on Territorial Asylum: "As 'asylum' is used in the draft conventions as a notion different from *non-refoulement* and non-

because of circumstances rather than by validation, states will be confronted by persons legally entitled to *non-refoulement* as soon as they come under that state's jurisdiction.

Through Art. 3 ECHR,[217] this notion is even expanded to include all asylum-seekers, and the explanations to Art. 18 in conjunction with the Protocol on Asylum[218] and the Preamble to the Charter[219] clarify that the ECHR is a relevant source for understanding Art. 18. EU legislation, the ECHR and its interpretation by the ECtHR have considerably penetrated the field of asylum and gave rise to the notion of subsidiary protection.[220]

extradition, it would seem that it must have something to do with residence. In my opinion, this ought to be reflected in the text of the Convention." Residence, according to him, amounts to allowing refugees to live in the territory, instead of lingering there.

[217] Also through Art. 7 ICCPR, which Libya has ratified.

[218] As the explanations to Art. 18 elucidate, this Article has been based on Art. 63 TEU (now Art. 78 TFEU), "which requires the Union to respect the Geneva Convention on refugees", and that this "Article is in line with the Protocol on Asylum annexed to the Treaties", see Official Journal of the European Union C 303/17, 14 December 2007; Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 24) on asylum for nationals of Member States of the European Union; and in the Protocol on Asylum it is already affirmed that the ECHR is part of EU law as general principles (see also CJEU Case C-36/75); the argument that Art. 18 cannot add anything to Art. 78 is thus rather flawed.

[219] See Recital 4 and 5 of the Charter.

[220] See also M. Den Heijer, 2014, p. 534; for an analysis of the notion of subsidiary protection in relation to the ECHR and ECtHR case-law, see IARLJ-Europe, *Qualification for International Protection (Directive 2011/95/EU)*, 2016; against this backdrop it can also be argued that subsidiary protection must be covered by Art. 18, as essentially, in the EU context, refugee status was complemented by the status of subsidiary protection to provide protection to those who would face a real risk of suffering serious harm in case of return, but who do not qualify as refugees; a person entitled to subsidiary protection, like the refugee, is effectively unable to (re-) establish a meaningful link to his or her country of origin. It is thus only reasonable and a conceptual necessity to provide refugees and other individuals who must not be returned the same legal protection and include both statuses within the right to asylum; see also Art. 15-18 of Directive 2011/95/EU; and according to Recital 39 of Directive 2011/95/EU "[…] with the exception of derogations which are necessary and objectively justified, beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by refugees under this Directive, and should be subject to the same conditions of eligibility"; it must be noted that, despite there not being any legitimate reason to protect refugees better than those who cannot be returned based on the broader principle of *non-refoulement*, since they all share the same need for international protection, EU law still draws a distinction between asylum status and subsidiary protection status (see Art. 78 TFEU) and individuals entitled to subsidiary protection often still fall within a discriminatory regime; see for

Practically, then, the *non-refoulement* principle amounts to a de-facto duty to admit asylum-seekers. Naturally, this poses a significant limit to attempts of controlling the movement of asylum-seekers.[221] There is rather an inevitable tension between efforts to manage migration and upholding *non-refoulement*. It is in this connection that the *non-refoulement* principle provides a right to access asylum procedures and residence rights for the duration of a procedure.[222]

As discussed, the current EU approach towards Libya is a response to an interpretation of the *non-refoulement* principle put forth by the ECtHR in the case of Hirsi Jamaa.[223] The ECtHR established that push-backs to Libya constitute a breach of *non-refoulement* in cases of both *de jure* and *de facto* control over a vessel and independent of territoriality. The migration control strategy towards Libya is an attempt to avoid the applicability of this variation of the *non-refoulement* principle.

In the current arrangement, however, there are good reasons to assume that the *non-refoulement* principle is being violated through complicit action – not only by Italy but also through the acts of EU institutions. Whenever the Libyan coast guards act in international waters to intercept asylum-seekers and return them to Libya where rampant human rights violations await them, this act constitutes a breach of *non-refoulement*.[224] When EU institutions or missions provide "aid or assistance with knowledge of the circumstances" – e.g. through providing training and equipment for interception and return –, they are responsible for the wrongful act according to Art. 16 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ASR). The violation of the absolute

example also T. Gil-Bazo, *Refugee Status, Subsidiary Protection, and the Right to be Granted Asylum Under EC Law*, 2006, UNHCR Research Paper No. 136.

[221] See K. Hailbronner, *Comments on the Right to Leave, Return and Remain*, in V. Gowlland-Debbas, *The Problem of Refugees in the Light of Contemporary International Law Issue*s, 1996, p. 114; J.C. Hathaway, T. Gammeltoft-Hansen, *Non-Refoulement in a World of Cooperative Deterrence*, Colum. J. Transnat'l L. 53, no. 2, p. 237-238.

[222] See also H.D. Jarass, *Charta der Grundrechte der Europäischen Union*, 2016, *Art. 18 GRC.*

[223] *Hirsi Jamaa and Others v. Italy*, ECHR, Application no. 27765/09, 23 February 2012.

[224] Libya is bound by the *non-refoulement* principle enshrined in the ICCPR framework.

non-refoulement principle is foreseen, while the support is directly aiming at allowing Libyan actors to conduct the intended operations.

2.4. *Beyond Non-Refoulement*

Thus, the question remains whether Art. 18 also embeds rights beyond the Refugee Convention and the broader principle of *non-refoulement*. Art. 18 itself implies that it does not only entail Convention rights – using the formula "with due respect for", thus leaving space for other asylum rights. Furthermore, the rich history of the institution of asylum presented above informs the understanding that the term asylum denotes a concept that is not limited to refugee protection and *non-refoulement*.[225]

It is reasonable to assume that, for an adequate understanding of Art. 18, both the CEAS as well as relevant international treaties addressing the rights of asylum-seekers must be taken into consideration. The relevance of the fundamental propositions and aims of CEAS for interpreting the scope of the right to asylum is prompted by Art. 18 itself, which makes explicit reference to the rules of the EU Treaties. Through secondary EU asylum law, which regularly refers to the right to asylum, the EU legislator expresses its understanding of asylum.[226] It follows that Art. 18 must be interpreted in harmony with the fundamental tenets of the CEAS, including the right to access an asylum procedure,[227] and the right to be granted territorial protection.[228] Ultimately, the historical use of the term

[225] A closer look at the use of the term in the EU context points towards the same direction. While in Art. 78(1) TFEU the term asylum is used to denote protection under the Refugee Convention as distinguished from subsidiary protection, the universal use of the term international protection in secondary EU legislation, encompassing both refugee status and subsidiary protection status, relativises the differentiation made by Art. 78(1) TFEU. Furthermore, in EU policy documents asylum is used as a general term for the activities under Art. 78, including measures addressing subsidiary protection status; see also M. Den Heijer, 2014, p. 532; this reading is also supported by the case law of the CJEU. In the case of B and D, the Court assumed the understanding that asylum may refer to protection beyond the Refugee Convention (CJEU C-57/09 and C-101/09).

[226] As Art. 52(3) of the Charter further elucidates, EU law is not prevented to (even if Article 18 would correspond to a right guaranteed by the ECHR) provide more extensive protection; see also M. Den Heijer, 2014, 18.41.

[227] Art. 7(1) Directive 2013/32/EU; see also V. Moreno-Lax, 2017, p. 379.

[228] Art. 13 and 18 Qualifications Directive; See e.g. C. Teitgen-Colly, *Article II-78-Droit d'asile*, 2005, p. 265; V. Moreno-Lax, 2017, p. 377. T. Gil-Bazo, 2006, p. 228. See also UNHCR public statement in relation to Zuheyr Freyeh Halaf v. the Bulgarian

asylum as set out above similarly requests an interpretation of the right to asylum as an individual right to territorial protection.

Furthermore, Art. 53 EUCFR, which aims at maintaining the level of protection afforded by "Union law and international law and by international agreements", requests that international human rights that give effect to access to asylum should inform the interpretation of Art. 18. Among these rights is certainly the right "to leave any country, including his own" in Art. 12(2) ICCPR – a human rights treaty of general applicability.[229] This freedom, which relates to the right to seek asylum in Art. 14 UDHR, applies irrespective of the legal status of individuals concerned.[230] Moreover, while limitations are permissible,[231] they must not render the right to leave ineffective in law or practice. Restrictions must remain exceptions and not impair the essence of the right. They must be proportionate and not discriminatory.[232] As a precondition for the right to an asylum procedure, the right to leave thus complements the principle of *non-refoulement,*[233] practically amounting to a right to access asylum in the EU.

State Agency for Refugees pending before the CJEU; but also V. Moreno-Lax, *cit*., 2017 or M. Den Heijer, *cit*., 2014; regarding the connection between the principle of *non-refoulement* and access to asylum procedures, see also the Concurring Opinion of Judge Pinto de Albuquerque in the case of *Hirsi Jamaa and Others v. Italy*, ECHR, Application no. 27765/09, 23 February 2012.

[229] The right to leave is also enshrined in Article 2(2) of Protocol No. 4 to the ECHR.

[230] In this connection it is relevant to note that the case law of the HRC has excessively addressed the extraterritorial applicability of the right to leave.

[231] For restrictions the CCPR and ECtHR have accepted, see N. Markard, 2016, pp. 591-616.

[232] See V. Moreno-Lax, 2017, p. 343; also N. Markard, 2016.

[233] See N. Markard, 2016; G. Goodwin-Gill, J. McAdam, 2007, p. 370; Goodwin-Gill, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, IJRL, 2011, p. 444; S. Trevisanut, *The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea*, LJIL, 2014, p. 667; a possible right to enter that may be available to asylum-seekers beyond cases of *non-refoulement* is highly contested. While there are reasonable arguments for its existence, most commentators, however, deny that there is a human right to enter the territory of an asylum state; V. Moreno-Lax (2017, p. 389) has argued for an "implicit right to gain effective access to (territorial) asylum". The right to access territories of states to apply for asylum can be seen as a necessary corollary to the right to asylum, she claims; see also K. Hailbronner, D. Thym, *Die Flüchtlingskrise als Problem europäischer Rechtsintegration*, 2016, Juristen Zeitung, Volume 71, Numbers 15-16, pp. 753-763; also, Lord Bingham of Cornhill, in House of Lords, 9 December 2004, UKHL 55.

In the Libyan case, commentators have already made the argument for the violation of the right to leave in conjunction with Art. 16 ASR.[234] Unlike *non-refoulement*, the right to leave does not have absolute character and restrictions are possible. However, measures restricting the departure of asylum-seekers are permissible only in cases of life-saving operations.[235] In relation to a coastal state like Libya, rescue and assistance obligations regarding persons in distress according to the Law of the Sea[236] must similarly be considered; particularly the duty of states to operate adequate SAR services that deliver individuals to a place of safety.[237] As long as Libya cannot be regarded as safe,[238] international obligations require the establishment of Libyan SAR services which will not disembark asylum-seekers (rescued in Libyan waters) at Libyan ports.

Thus, when interpreted in harmony with international law and the CEAS, and applied to the Libyan case – notwithstanding evident challenges of enforceability – Art. 18 practically and conceptually amounts to a right of asylum-seekers to leave Libya, not be returned to Libya (after life-saving operations), and access an asylum procedure – once rescued in international waters – with the prospect of obtaining territorial asylum.

3. *Conclusion*

In an attempt at impeding movements of asylum-seekers from the African to the European continent, the external dimensions of EU asylum and migration policy have gained unprecedented prominence in

[234] Despite detrimental effects on the safety of the route and the stability of the economy, attempts to restrict the right to leave (and thus the right to access asylum in Europe) before arrival in in Niger may constitute a legally less problematic issue.

[235] See N. Markard, 2016.

[236] Under Art. 98(1) of the United Nations Convention on the Law of the Sea (UNCLOS), Regulation V/33 of the International Convention for the Safety of Life at Sea (SOLAS Convention), para 2.1.10 of the International Convention on Maritime Search and Rescue (SAR), Art. 10 of the Salvage Convention, as well as under customary international law (see also B. Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, CJTL (1998) 399, 1998).

[237] Resolution MSC.155(78) (adopted on 20 May 2004) amendments to the International Convention on Maritime Search and Rescue, 1979, as amended, 3.1.

[238] See also UNHCR, September 2018, p. 22.

the last years. While migration control cooperation with states on the road to Libya, such as Niger, might be useful for the somewhat legitimate aim of curbing movements northwards, notwithstanding detrimental effects on the safety of the route and the stability of the country, the Libyan dynamics are of a different nature. There, the excess of externalisation policy has led to the implementation of a strategy of obstruction of asylum in collaboration with Libyan actors that contributes to the containment of asylum-seekers in fundamental rightlessness – the same dilemma in the relationship between asylum-seekers and the international order that had initially given rise to modern refugee law. This approach assumes that enabling non-EU actors – amongst them militia groups and (former) smugglers – to prevent the movement of asylum-seekers towards Europe would absolve the EU from its legal responsibilities.

The Libyan case exemplifies the seemingly irresolvable tension between the right to asylum and the prioritisation of border security. As a right of the individual, the right to asylum encompasses several consecutive phases in the movement of asylum-seekers towards accessing territorial protection in the EU, aiming at overcoming situations of rightlessness. For this purpose, it not only embeds within its reach the Refugee Convention and the *non-refoulement* principle, but it extends its scope to include further essential dimensions, such as the right to leave. In the context of the movement of asylum-seekers from EU neighbours that do not protect refugee rights, the right to asylum practically and conceptually amounts to a right to overcome rightlessness through accessing asylum. The acts of EU institutions in support of Libyan actors currently stand in contradiction to this European right to asylum.

The Rights of Asylum Seekers in Europe Beyond the EU Charter of Fundamental Rights: Shortcomings and Potential of the European Social Charter

Giuseppe Palmisano*

1. *Protecting Social Rights of Asylum Seekers at the European Level in Times of Economic Crisis and Austerity Measures: the Potential of the European Social Charter*

In the last three years, more than a million migrants and refugees crossed into Europe, seeking refuge from war, terror, torture, persecution and poverty, and creating division in Europe, namely in the EU and EU member States, over how best to deal with resettling people.

Whatever may be the international legal obligations of the European States concerned to grant the persons in question asylum (or other kind of protection) by an administrative recognition of refugee status (or other specially protected status), guaranteeing this million people hospitality, respect for their dignity and fundamental rights, prompt and proper social integration in host countries, when such people actually stay in Europe and live under the jurisdiction of European State authorities, is a major challenge for

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European States and EU institutions, one that cannot be missed.

Unfortunately, meeting such challenge is made even more difficult due to the fact that, in the last decade, social rights and social justice are under stress throughout Europe, mostly as a result of the economic crisis. In fact, since 2008 the economic crisis – maybe not a temporary but a structural one – had an extremely negative impact on European workers, families and most vulnerable people; and the measures adopted by States and EU institutions to cope with such crisis, in particular so-called austerity measures, also disproportionately affected those who are most vulnerable – the poor, the elderly, the sick. In this respect, one could indeed say that traditional and consolidated high standards in the protection of social rights, and some basic features of the welfare state – which are essential for the enjoyment of such rights, and of which European States should be proud – have begun to be in danger. Increasing poverty and unemployment rate (in particular youth unemployment); social and economic inequalities; job insecurity for many categories of employees; regressive changes in social security schemes and benefits; increases in the cost of healthcare: these are among the most worrying signals about the state of health of social rights in Europe, today.

But by consequence such signals also tell us that reinforced attention must be paid to the need for effectively protecting social rights, of both European citizens and asylum seekers, at the European level, and not only at the national level, as well as to the need for ensuring access to remedies in case of violation of social rights.

In this sense, the economic and migration crisis also represent an opportunity to grasp the importance of achieving such rights, and help the political conviction growing that respect for social rights constitutes the best way forward to prevent and way out of crises, and – what is even more important – to increase people's participation in democratic processes, reinforce their trust in European construction, by promoting inclusion and social cohesion.

On this background, consensus seems to be progressively gathering around the idea that there is an urgent need both to bring the European instruments for the protection of social rights back to the centre of the European legal and political stage, allowing it to show their full potential, and to enhance existing synergies, at the European level, to better protect social rights and strengthen the European model, centred on respect for social rights and advanced welfare systems.

In this respect, the revised European Social Charter has been in

particular identified as a living, integrated system of guarantees, whose implementation at national level has the potential to reduce economic and social tensions, and promote political consensus to facilitate the adoption of the necessary reforms.[1]

The decision of the Council of Europe to launch, in October 2014, the so-called "Turin process" stemmed precisely from such conviction. In fact, the Turin process is nothing but a number of political and diplomatic initiatives aimed precisely at re-situating the Revised Social Charter at the centre of the European human rights architecture, and at improving the implementation of the Charter at national level, as well as the synergy between the Charter and EU law, especially in times of economic crisis and austerity measures.[2]

And it is worth noting that not only the Council of Europe but also the EU institutions recently decided to make a meaningful reference

[1] The European Social Charter (ESC) is a legally binding treaty for the protection of social rights, which is embedded in the institutional framework of the Council of Europe. It has been signed in Turin more than fifty years ago, in 1961, but it has progressively changed by virtue of a process of institutional reform started in the late Eighties and continued during the Nineties of the last Century. This process took the form of three Protocols, adopted in 1988, 1991 and 1995, and the Revised Social Charter, in 1996. In 1988 came the first additional Protocol which added new rights. In 1991, it was adopted the Amending Protocol improving the supervisory mechanism; and in 1995 another additional Protocol, providing for a system of collective complaints, was adopted. The culmination of this reform process came in 1996 with the adoption of the Revised Charter, which added a number of new rights, while at the same time incorporating the basic content of the 1961 Charter and its Protocols. To date, 43 out of the 47 member States of the Council of Europe have ratified either the 1961 Charter or the Revised Charter. The countries that have not yet ratified the Charter at all are Liechtenstein, Monaco, San Marino and Switzerland.

On the European Social Charter, see *inter alios*: J.-F. Akandji-Kombé, S. Leclerc (Eds.), *La Charte Sociale Européenne* (Actes des Premières Rencontres Européennes de Caen organisées à Caen, le 17 mars 2000), Bruxelles, Bruylant, 2001; J. Darcy J., D. Harris, *The European Social Charter*, 2nd edition, New York, Hotei Publishing, 2001; A.M. Świątkowski, *The Charter of Social Rights of the Council of Europe*, The Hague, Kluwer Law International, 2007; O. De Schutter (ed.), *The European Social Charter: a Social Constitution for Europe*, Bruxelles, Bruylant, 2010; C. Benelocine, *La Charte Sociale Européenne*, Strasbourg, Council of Europe Publishing, 2011; O. Dörr, 'European Social Charter', in S. Schmahl, M. Breuer (Eds.), *The Council of Europe: Its Laws and Policies*, Oxford, OUP, 2017, pp. 507-541.

[2] On the "Turin Process" see https://www.coe.int/en/web/turin-process. See also J. Luther, L. Mola (Eds.), *Europe's Social Rights Under the 'Turin Process' / Les droits sociaux de l'Europe sous le «processus de Turin»*, Napoli, Editoriale Scientifica, 2016.

to the Social Charter within the framework of the EU acts establishing the European Pillar of Social Rights: I refer namely to the reference to the Charter in paragraph 16 of the Preamble to the European Pillar of Social Rights, as solemnly proclaimed by the European Parliament, the Council and the Commission, on 17 November 2017, in Gothenburg.

And rightly so.

The European Social Charter is indeed today, at the European level, the major legal instrument, the most wide-ranging and effective legal tool, specifically devoted to the protection of social rights.

The 31 substantive articles of the Revised Charter cover a broad range of individual and collective rights, spanning across many social areas.

Among such rights, employment rights represent certainly one of the main pillars of the Charter, probably the most traditional one. Social protection is another pillar of the Charter and a cornerstone in the construction of the Council of Europe concerning social rights. The Charter addresses all aspects of social protection. It provides for the right to social security in its various branches, such as pensions, sickness cover, unemployment benefits, occupational accident insurance and family benefits; and it guarantees an enforceable right to social and medical assistance for persons in need.

But the Revised Charter goes far beyond employment rights, labour law and social protection, providing an overarching approach to what are known today as "societal" issues. I refer, for example, to the right to protection of health, the right to housing, the protection of the family, the protection and education of children and young persons, the right of disabled persons to social integration and participation in the life of the community, the right to protection against poverty and social exclusion. And it is worth stressing that the Charter guarantees all the above rights in a non-discriminatory way. Non-discrimination is not only guaranteed in matters of employment and between men and women, but it is a fundamental principle which indeed applies to all the rights of the European Social Charter.

Therefore, from the standpoint of persons protected, it is correct to say that the Charter, more than any other international (and European) normative instrument, takes care of the essential social needs of individuals in their daily lives, and that the common rationale of all its provisions is the assumption that human beings must have the right to enjoy decent living conditions as members of the organized community in which they live: conditions such as to allow for them to live in

dignity, rather than merely survive. At the same time, from the standpoint of the political and legal commitment required by States Parties, it can be said that the European Social Charter, more than any other international instrument, pushes States to provide themselves with an advanced and efficient public welfare system.

Furthermore, the Charter is not a mere "bill of rights", that is, a simple catalogue of rights that States declare to uphold, or which they try to promote. It also provides for a specific monitoring mechanism aimed at guaranteeing the implementation of the obligations assumed by States parties, which has a significant impact on national laws and practices (and by consequence, on the effective enjoyment of the rights by the individuals and groups protected by the Charter).

Such a mechanism, which focuses on the role played by the European Committee of Social Rights (ECSR),[3] envisages two main distinct supervision procedures. One is a typical "reporting procedure", consisting in the evaluation by the ECSR of periodic reports presented by States on the implementation of the Charter in their legislation and actual practice. The other is the so-called "collective complaints procedure", which concerns only those States Parties that have expressly accepted it (only 15 States at the moment, unfortunately). According to this procedure social partners and non-governmental organisations are enabled to directly apply to the European Committee of Social Rights for rulings on possible violations of the Charter in the country concerned.[4]

[3] See https://www.coe.int/en/web/turin-european-social-charter/european-committee-of-social-rights.

[4] The collective complaints procedure was inserted into the Social Charter system with the Additional Protocol of 9 November 1995. To date, only 15 States (out of the 43 States Parties to the European Social Charter) have accepted it; they are: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Slovenia, and Sweden. According to this procedure, four categories of organisations may lodge complaints, alleging that a State Party is in breach of the Charter: firstly, international organisations of trade unions and employers organisations; secondly, non-governmental organisations which have consultative status within the Council of Europe and have been put on a special list; thirdly, the trade unions and employers' organisations in the country concerned; and fourthly, national non-governmental organisations (this last category is only entitled to submit complaints if the State Party concerned has expressly agreed to it; to date, only Finland has accepted this option). Complaints are examined by the ECSR, which, if the complaint is declared admissible, proceeds to decide on the merits of the case, that is whether the situation is in conformity with the Charter or not. The decision is taken on the basis of an exchange in writing of arguments between the parties. If necessary, the Committee may also decide

In the last years the collective complaints procedure – which is indeed a quasi-judicial procedure – has proved to be an effective and efficient mechanism for supervising State compliance with social rights. And this for many reasons. In the first place, the collective complaints procedure allows to identify specific cases of social rights violations, giving – on the one hand – the opportunity to the State concerned to remedy them and to prevent new violations, and giving also – on the other hand – the possibility to affected groups of individuals to obtain the reestablishment of their rights.

Second, such a procedure permits to put the abstract normative prescriptions of the Social Charter to the test of reality, that is to the test of specific, concrete situations. In other words, it permits to specify what states actually have to do, or must avoid to do, or have to prevent, in order to guarantee in a given situation the rights of many individuals.

Last, but not least, the collective complaints procedure is important because it opens the door of the Social Charter to the civil society, to NGOs and the world of workers. This means opening the European system for the protection of social rights to its beneficiaries, who are – more than States and governments – directly and individually interested in the implementation and enjoyment of such rights. This kind of subjects are indeed the best guardians, I would say, of the rights established by the European Social Charter.[5]

to hold a public hearing where arguments are presented orally by the parties. Finally, the ECSR transmits its decision to the Committee of Ministers of the Council of Europe, which adopts a resolution and may invite the State concerned to take the necessary measures to bring the situation into conformity with the Charter.

On the collective complaints procedure see, *inter alios*, R.R. Churchill, U. Khaliq, *The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?*, in *European Journal of International Law*, 2004, pp. 417-456; R. Priore, *Les systemes de contrôle de l'application de la Charte sociale européenne: la procedure de réclamations collectives*, in M. D'Amico, G. Guiglia (Eds), *European Social Charter and the Challenges of the XXI Century* , Napoli, Edizioni scientifiche italiane, 2014, pp. 159-170.

[5] Evidence of the importance of the collective complaints procedure is the fact that, since its entry into force, it has become the Charter's flagship procedure, thanks to which the Charter is now talked about and attracts the kind of media coverage it had never experienced before. And it also caused the European Committee of Social Rights to build up an important body of case law, clarifying the meaning, implications and actual effects of the Charter rights with respect to many different subject matters.

And it is also worth noting that is precisely due to the contribution of the jurisprudence produced by the European Committee of Social Rights within the

2. *The Limits of the European Social Charter in Terms of Persons Protected and the Protection of the Rights of Refugees*

Having said this, it has to be noted that if it is true that taking advantage of the Social Charter system's potential represents indeed a major tool for building up a more social and democratic Europe, it is also true that such system does have some shortcomings and has to be strengthened, improved and even updated if we want it to adequately meet the challenges that confront, today, the protection of social rights in Europe. And I refer in particular to the migration challenge and the presence of millions migrants and asylum seekers in Europe.

In this regard, the major shortcoming in the system of the European Social Charter derives from its personal scope of application, as it is established in paragraph 1 of the Appendix to the Charter (which constitutes an integral part of the Charter).

According to this paragraph: "Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19".

In essence, and regardless of the special regime related to the Charter provisions expressly excepted by the Appendix (Arts. 12, para. 4; 13, para. 4; 18 and 19), the effect of this paragraph is that the system for the protection and control of social rights provided for by the European Social Charter does not apply to third State nationals, and to nationals from other States parties who, in a short but not appropriate definition, are usually referred to as "irregular migrants".

Fortunately, paragraph 2 of the same Appendix to the Revised Charter provides for a different regime for the specific case of refugees.

Paragraph 2 of the Appendix reads: "Each Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 and in the Protocol of 31 January

framework of the collective complaints procedure, which has clarified contents and also possible direct effects of many provisions of the Charter, that in the last years we are seeing an increasing application of the Charter by national judges and courts in many States, like Spain, Italy, Greece and France, particularly in areas such as labour relationships, workers' rights, and pensions. And we refer not only to ordinary judges but also to Constitutional Courts.

1967, and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Party under the said convention and under any other existing international instruments applicable to those refugees".

In 2015, the European Committee of Social Rights has adopted a Statement of Interpretation concerning precisely this paragraph of the Appendix and the rights of refugees under the European Social Charter.[6] In such Statement of Interpretation, the Committee clearly highlighted the responsibilities undertaken by States Parties under the European Social Charter to provide protection to refugees in Europe, to treat them with dignity, and to guarantee their fundamental rights.

The Committee pointed out, *inter alia*, the following:

> "11. The wording of the Appendix to the Charter demonstrates the express undertaking to provide 'treatment as favourable as possible' to the persons it covers. The Committee thus considers that the rights contained in the Charter should as far as possible be guaranteed to refugees on an equal footing with other persons subject to the jurisdiction of the host State. It is therefore incumbent upon them to take meaningful steps towards the achievement of equality for refugees under each article of the Charter by which they are bound. In any case, as is expressly stated in the Appendix to the Charter, the treatment of refugees must not be less favourable than that guaranteed by the CSR [Convention relating to the Status of Refugees].
> […]
> 13. The CSR coincides with the Charter in guaranteeing many social and economic rights to refugees.
> 14. Refugees must be accorded treatment equal to nationals in respect of elementary education (Article 22 CSR), which is guaranteed by Article 17§1 of the Charter; and public relief and assistance (Article 23 CSR), which is accorded under Article 13 of the Charter (social and medical assistance) and implied by Article 30 of the Charter (the right to protection against poverty and social exclusion).
> 15. Labour legislation and social security (Article 24 CSR) are the areas of greatest correspondence between the two instruments. The following Articles of the Charter all cover rights for which the CSR guarantees the same treatment as nationals: Article 2 (working hours, holidays with pay, overtime arrangements); Article 4 (remuneration); Article 6 (the enjoyment of the benefits of collective bargaining); Ar-

[6] European Committee of Social Rights, Conclusions 2015, *Statement of Interpretation on the rights of refugees under the European Social Charter.*

> ticle 7 (a minimum age of employment, young persons' employment rights and apprenticeships); Article 8 (rights of women in the workplace); Article 10 (training opportunities); Article 11 (healthcare); Article 12§§1, 2, 3 (the right to social security covering healthcare, sickness, unemployment, old age, employment injury or disease,family benefits and maternity benefits); Article 16 (family benefits); 19§7 (access to courts); and Article 23 (rights of the elderly).
> 16. The CSR guarantees the right to the most favourable treatment accorded to nationals of a foreign country in respect of the right to belong to trade unions (Article 15 CSR), which is guaranteed by Articles 5 and 19§4 of the Charter; and the right to engage in wage-earning employment (Article 17 CSR), which is guaranteed by Articles 1 and 18 of the Charter.
> 17. [T]he CSR guarantees treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, in relation to the right to self-employment (Article 18 CSR), which is covered in Article 1 and 18 of the Charter; the right to access to housing (Article 21 CSR), which is dealt with under Articles 16 and 31 of the Charter; and the right to further education (Article 22 CSR), which is guaranteed by Article 10 (vocational education) and Article 17 (secondary education) of the Charter.
> […]
> 20. Finally, Article 32 of the CSR stipulates that the Contracting States shall not expel a refugee lawfully on their territory save on grounds of national security or public order, in which case expulsion shall take place only in pursuance of a decision reached in accordance with due process of law. The Committee thus considers that refugees must be guaranteed the protection of the Charter in respect of expulsion (cf. Article 19§8) on an equal footing with nationals of other States Parties to the Charter".

3. *The Problematic Issue of Asylum Seekers and Irregular Migrants: the Anomaly and Inadequacy of the Social Charter as regards the Exclusion of Third State Nationals*

But if the above protection applies, by virtue of the Appendix, to "*refugees lawfully staying in the territory of a State party* to the European Social Charter", what about asylum seekers who do not fall under this category of persons, either because they do not meet the conditions provided for by the CSR and its 1967 Protocol, or because their status as refugees is uncertain or doubtful and it takes a long time to be assessed by

host State authorities, or because they are seeking asylum and protection for (humanitarian) reasons other than those provided for by the CSR?

With respect to all such cases, the application of the European Social Charter is unfortunately highly problematic, due to paragraph 1 of the Appendix to the Charter, according to which the persons covered by the Charter, as we have said, "include foreigners *only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned*."

The most questionable aspect of this limit in the personal scope of the Charter concerns indeed the exclusion of foreigners who, though being within the jurisdiction of the States parties and legally resident within their territory, are third State (non-European) nationals.

Whatever the reasons for deciding – decades ago – not to extend the scope of the European Social Charter to third State nationals, such a decision hardly appears consistent with the rationale and legal nature of the Charter, intended as a human rights instrument aimed at protecting human dignity and rights which are essentials for upholding such dignity. From the point of view of the personal scope of application, the Charter is indeed a sort of anomaly: one cannot find the same kind of limitation in other international legal instruments aimed at protecting human rights in general, or social rights in particular. A few references suffice to confirm this fact.

At the universal level, the 1966 International Covenant on Economic, Social and Cultural Rights, for example, obliges States parties to apply its provisions to all individuals, without distinction between citizens and foreigners, or between foreigners according to their nationality.[7] In similar way, the various Conventions on labour rights and standards adopted within the framework of the International Labour Organization consistently provide that their respective provisions be applied by States parties to all workers (legally) residing in the State territory, regardless of their nationality.

Turning towards the regional level, the system of the American Convention on Human Rights – on the basis of the 1969 Convention, as well as the provisions of the Additional Protocol of 1988 on Economic, Social and Cultural Rights – does not provide any restriction to the scope of application of its provisions due to the nationality of the

[7] The only exception in this regard is provided for with reference to developing countries, which "with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights in the Covenant to non-nationals" (Art. 2, para. 3, of the Covenant).

persons concerned. The approach of the African Charter on Human and Peoples' Rights of 1981 is exactly the same: all states Parties must guarantee the rights enshrined in the Charter, including social rights (which are dealt with specifically in Arts. 15 and 16), to every individual, and not only to their own nationals and nationals of other States parties to the African Charter.

At the European level, it is hardly necessary to recall that under Art. 1 of the 1950 European Convention of Human Rights – in relation to which the European Social Charter is rightly considered as complementary – States parties are under the obligation to secure the rights and freedoms enshrined in the Convention (and its successive Protocols) "to everyone within their jurisdiction", and not just to their own citizens and to nationals of other States parties to the Convention.

In brief, the facts and remarks so far reveal that, on the one hand, the exclusion of third State nationals from the scope of the European Social Charter represents a real anomaly in the framework of international instruments dealing with human rights.

Moreover, It has to be added that today, more than a decade ago, the demographic and social changes brought about by the increasing migration to Europe, due also to the massive influx of refugees, make more evident the inadequacy of the personal scope limitation imposed by the Appendix to the European Social Charter, as well as the need to overcome this limitation. In other words, it becomes less and less understandable and acceptable that under the European Social Charter a State party (e.g. Sweden, Italy or Germany) is obliged to ensure the right to a fair remuneration, or to safe and healthy working conditions, or to adequate medical assistance, to workers from another European country (nationals from, for example, Ukraine, Portugal, or Turkey), while it is not obliged to ensure the same rights to workers from non-European states (e.g., Syria, Somalia, Afghanistan, or Niger), even if the person is permanently resident in the State or holds a long term residence or working permit. The fact that the latter – non-European – persons, in contrast to the former, cannot under the European Social Charter invoke and obtain, from the State in which they live and work, respect for social rights constitutes a serious discrimination.

It is in full awareness of such a criticality of the European Social Charter that the ECSR, following an extensive interpretation of the Charter's provisions – on which I will come back when dealing with the issue of so-called "irregular migrants" – sought to temper the limit set out in the Appendix to the Charter.

In its Conclusions in 2004, the Committee in fact noted that "the Parties to the Charter (in its 1961 and revised 1996 versions) have guaranteed to foreigners not covered by the Charter rights identical or inseparable from those of the Charter by ratifying human rights treaties – in particular the European Convention of Human Rights – or by adopting domestic rules whether constitutional, legislative or otherwise without distinguishing between persons referred to explicitly in the Appendix and other non-nationals. In so doing, the Parties have undertaken these obligations". In light of this, according to the Committee, "the implementation of certain provisions of the Charter could in certain specific situations require complete equality of treatment between nationals and foreigners, whether or not they are nationals of member States, Party to the Charter".[8]

However, beyond the possibilities offered by the *ars interpretandi*, as applied by the ECSR in view of overcoming the limit imposed by the wording of the Appendix, it is clear that overcoming it completely – which is indispensable for improving the European Social Charter as an instrument for the protection of human rights and for bringing it in line with the social changes that have taken place in recent decades – could only come from a deletion or substantial modification of the limitation, which would have to be expressly established and formally accepted by the States parties to the Charter.

Of course, the main road to achieving such a result would be an amendment to paragraph 1 of the Appendix, to be adopted in accordance with the procedure envisaged in Article J of the Charter, or in the context of a new additional Protocol.

However, by comparison with a formal amendment to the Appendix, an alternative way (procedurally and politically less problematic) of reducing the *ratione personarum* limitation of the European Social Charter, could be that of unilateral declarations made by willing States parties aimed at affirming their intention to extensively apply the provisions of the Charter (or most of them) not only to foreigners who are nationals of other States parties to the Charter but also to all other foreigners lawfully resident or working regularly within their territories.

Having precisely this option in mind, the ECSR took the initiative – in 2011, on the occasion of the 50th anniversary of the Social Charter – to send a letter to all States parties containing a proposal of adopting a dec-

[8] European Committee of Social Rights, Conclusions 2004, *Statement of Interpretation*, p. 10.

laration of this kind.[9] In advancing the proposal, the Committee rightly highlighted that the unilateral extension of the rights guaranteed by the Social Charter to all foreigners, far from being contrary to the system of the Charter, would be fully in line with Paragraph 2 of the Appendix, according to which the interpretation of the scope of the Charter set out in Paragraph 1 "would not prejudice the extension of similar facilities ["*de droits analogues*", in the French text] to other persons by any of the Parties".

It must nevertheless be noted that the Committee's initiative has not thus far been able to achieve the desired result: only two States have replied to the Committee's invitation (Lithuania and the Netherlands), and both have responded negatively.

One reason for the initiative's lack of success probably lies in the fact that the ECSR's proposal was perceived as too wide-ranging and questionably including the situation of "irregular" migrants. In fact, the Committee did not limit the proposed extension of the personal scope of the Charter to third State nationals lawfully resident or working legally in the territory of States parties; but drafted it in such a way so as to present States parties with the possibility of applying the Charter (by analogy to Art. 1 of the European Convention of Human Rights) "to everyone within their jurisdiction".

In view of the well-known strong resistance of many European States with respect to any recognition and granting of social rights to "irregular" migrants which may have the effect of both increasing illegal immigration and limiting the possibilities and procedures for expulsion or repatriation, it can be surmised that had the Committee been less generic and more circumscribed in its proposal, restricting it solely to third State nationals "legally" present in the territory of States parties, perhaps its initiative would have been more successful.

4. *The Questionable Total Exclusion of So-Called Irregular Migrants from the Scope of Application of the European Social Charter and the Jurisprudence of the European Committee of Social Rights Aimed at Not Excluding Irregular Migrants from All Forms of Protection*

The reasonable assumption that at the basis of the failure of the ECSR's initiative to encourage States to extend the personal scope of

[9] See, European Committee of Social Rights, Conclusions 2011, *Personal Scope of the Charter*, p. 9. In its letter the Committee also provided a possible "model declaration".

the Charter there is also – if not primarily – the opposition of States to taking care of social rights of irregular migrants brings me to the last part of my reflections on the scope of the Charter in terms of persons protected. I refer in particular to the fact that the Charter is applicable, as regards foreigners, only to nationals of other Parties who are *lawfully resident* or *working legally* in the territory of the State party concerned, thus entirely excluding nationals of States parties (or obviously, third State nationals) who do not find themselves in this situation, and whom I can refer to – for the sake of brevity – as "irregular migrants".

In this case, the restriction imposed by the Appendix to the Charter cannot, in all honesty, be defined as an anomaly, since the exclusion of irregular migrants from the list of persons who benefit from the obligations which States commit themselves to (whether concerning social and economic rights, or political rights, or certain civil rights) is a common feature of many international instruments for the protection of human rights.[10] Therefore, in a general context of lack of consideration for the specific situation of irregular migrants, the fact that the personal scope of the European Social Charter does not cover this category of persons, or that the text of the Charter does not provide them with any social rights, does not constitute an anomaly, nor can it be stigmatized – however much one disapproves it – as a contradiction with the nature and purpose of the Charter itself, considered as a human rights treaty.

However, what constitutes a problem in this respect is the fact that the personal scope limitation envisaged in the Appendix ends up completely excluding irregular migrants from the application of all the provisions of the Charter, including those provisions whose lack of application on the part of a State may lead to a serious violation of certain fundamental rights (such as the right to life, to physical integrity and respect for human dignity).

A rigid interpretation of such a summary and total exclusion of irregular migrants from the protection afforded by the Charter would determine, therefore, a paradoxical situation whereby State conduct (legislative or administrative practice, acts or omissions) denying the respect for the rights established by the Charter to irregular migrants,

[10] On the recognition and protection of the rights of irregular migrants at the international level, let me refer to G. Palmisano, 'Trattamento dei migranti clandestini e rispetto degli obblighi internazionali sui diritti umani', (2009) *Diritti umani e diritto internazionale*, vol. 3, pp. 509-539.

so as to endanger or jeopardize their fundamental rights, would nevertheless be considered in conformity with the European Social Charter due to the restriction of its personal scope set out in the Appendix.

In addition to clashing with a common sense of humanity and with the spirit and purpose of the Charter, intended as an instrument for the protection of human rights, such an outcome of the Appendix is indeed difficult to reconcile – at the legal level – with the fact that the obligation not to allow or admit conduct which would infringe the most basic rights of any person (and in particular, which would undermine the right to life, physical integrity and respect for human dignity) is imposed on all States, as members of the so-called international community, by peremptory norms of general international law. Furthermore, it must be recalled that States parties to the European Social Charter are also parties to other human rights insatruments, according to which certain State conducts failing to respect the social rights of irregular migrants (which in the light of a rigid interpretation of the Appendix would be in conformity with the Charter) would constitute violations – and in some cases, serious violations – of legal obligations assumed by the same States. I refer to, for example, the European Convention of Human Rights, the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, the United Nations Convention on the Rights of the Child, and the United Nations Convention on the Rights of Persons with Disabilities.

Despite the letter of the Appendix, it would be in other words hardly acceptable and consistent to conclude that the European treaty specifically designed to protect social rights would, with respect to irregular migrants and on the sole basis of their irregular situation of stay in the territory of the State, consent to violations of social rights that the States parties to the same treaty consider unlawful in the framework of other human rights instruments, even when such violations are committed against irregular migrants.

In order to avoid such a contradictory result – and so as not to deprive irregular migrants (including asylum seekers who do not have the status of refugees) of minimum protection – the ECSR has, in the framework of the so-called "collective complaints procedure", developed a significant jurisprudence, aimed at limiting the undesirable effects of the limited personal scope of the Charter set out in the Appendix.

This ECSR's case law originated in complaints submitted in the last fifteen years by non-governmental organisations concerning mostly the situation of foreign minors in an irregular situation of stay within

the territory of a State party, that is, a category of persons who, according to the provisions of paragraph 1 of the Appendix, are excluded from the scope of the European Social Charter.[11]

What clearly stands out in this case law is the tendency of the Committee on the one hand, to distinguish between provisions of the Charter that are more or less essential for protecting the most fundamental human rights (such as the right to life, to physical integrity, and to preservation of human dignity) and, on the other hand, to subordinate the exceptional possibility of applying the Charter to so-called irregular migrants on the basis that the failure to apply the provisions of the Charter would end up determining, in the specific case, a serious injury to the safeguarding of such fundamental rights.

The ECSR has thus far considered that the risk of such an injury may occur in case of non-compliance with the rights envisaged in Arts. 7, 17, 11, 13, 16 and 31, para. 2, of the Charter, in the event that victims of the violation are minors (children or adolescents). Of course, it is not ruled out that the Committee could in the future arrive at the same conclusions also for other provisions of the Charter – for example Art. 3, para. 3 (on the enforcement of safety and health regulations in the working environment), Art. 8 (the right of employed women to protection of maternity), or Art. 15 (on the rights of persons with disabilities) –, and not necessarily with reference to children but also to "irregular" adult migrants.

However, even if the number of provisions and concrete situations for which the Committee considers applicable the protection offered by the European Social Charter to irregular migrants should in the future become wider, it is likely that – given the limitation expressly imposed by Paragraph 1 of the Appendix to the Charter – such an application

[11] See in particular the following decisions: *Fédération Internationale des Ligues des Droits de l'Homme (FIDH) v. France*, Complaint No. 14/2003, of 8 September 2004; *Défense des Enfants International (DEI) v. The Netherlands*, Complaint No. 47/2008, of 20 October 2009, *Défense des Enfants International (DEI) v. Belgium*, Complaint No. 69/2011, of 23 October 2012; *European Federation of National Organisations working with the Homeless (FEANTSA) v. The Netherlands*, Complaint No 86/2012, of 2 July 2014; *Conference of European Churches (CEC) v. The Netherlands*, Complaint No 90/2013, of 1st July 2014. For an in-depth analysis of this jurisprudence, and in particular of the decision in Complaint 69/2011 (*Défense des Enfants International (DEI) v. Belgium*), see G. Palmisano, *On the Limits of the European Social Charter in Terms of Persons Protected*, in B. Cortese (Ed.), *Studi in onore di Laura Picchio Forlati*, Torino, Giappichelli, 2014, pp. 97-103.

would still be considered as exceptional by the Committee, "justified solely – to use the Committee's words in the Decision of Collective Complaint 69/2011 – in the event that excluding unlawfully present foreigners from the protection afforded by the Charter would have seriously detrimental consequences for their fundamental rights […] and would consequently place the foreigners in question in an unacceptable situation, regarding the enjoyment of these rights, as compared with the situation of nationals and of lawfully resident foreigners" (Paragraph 35 of the Decision).