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ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
ACHR	American Convention on Human Rights
AFSJ	Area of Freedom Security and Justice
AG	Advocate General
AIDA	Asylum Information Database
AMIF	Asylum Migration and Integration Fund
CARA	Centri di Accoglienza per Richiedenti Asilo
CAT	Convention Against Torture
CEAS	Common European Asylum System
CICLJ	Creighton International and Comparative Law Journal
CIE	Centres for Identification and Expulsion (Centri di Identificazione ed Espulsione)
CJEU	Court of Justice of European Union
CMLR	Common Market Law Review
CPT	Committee for the Prevention of Torture
CSPA	Centro di soccorso e prima accoglienza
CSR	Convention Relating to the Status of Refugee
CVCE	Centre Virtuel de la Connaissance sur l'Europe
CWSL	California Western International Law Journal
DCIM	Directorate for Combating Illegal Migration
DRIII	Dublin III Regulation
DUDI	Rivista Diritti Umani e Diritto Internazionale
dUE	Il diritto dell´Unione Europea
EASO	European Asylum Support Office
EC	European Council
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association

EJC	European Journal of Criminology
EJCCLCJ	European Journal of Crime, Criminal Law and Criminal Justice
EJIL	European Journal of International Law
EJML	European Journal Migration Law
EP	European Parliament
ERF	European Refugee Fund
EU	European Union
EUCFR	European Union Charter of Fundamental Rights
EXCom	Executive Committee of the High Commissioner's Programme
FRD	Family Reunification Directives
HCR	UN Human Rights Committee
HRLR	Human Rights Law Review
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
IJIL	Indian Journal of International Law
IJRL	International Journal of Refugee Law
ILO	International Law Community
IOM	International Organization for Migration
IRRC	International Review of the Red Cross
ISF	Internal Security Fund
JHA	EC Justice and Home Affairs
JRS	Journal of Refugee Studies
LJIL	Leiden Journal of International Law
MEDU	Medici per i Diritti Umani
MRCC	Maritime Rescue Coordination Centre
NGO	Non-Governmental Organization
NJIL	Nordic Journal of International Law
NQHR	Netherlands Quarterly of Human Rights
OAU Convention	Convention Governing the Specific Aspects of Refugee Problems in Africa
OHCHR	Office of United Nations High Commissioner for Human Rights

OUP	Oxford University Press
PD	Procedures Directive
PRRA	Pre-Removal Risk Assessment
QD	Qualification Directives
QIL	Questions of International Law
RCD	Reception Conditions Directive
RQDI	Revue Québécoise de Droit International
SAR Convention	International Convention on Maritime Search and Rescue
SRIEL	Swiss Review of International and European Law
SRR	Search and Rescue Region
TCN	Third-country national
TEC	Treaty establishing the European Community
TEU	Treaty of European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
VIS	Visa Information System

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INTRODUCTION

A variety of contemporary factors has contributed to the swift rise on the number of asylum-seekers coming to Europe after 2011, and since then is raising concerns on how the European Union (EU) will manage the financial and social burdens resulted of such events. The high inflow of refugees at a time, combined with the overspread economic crisis and the unbalanced distribution of asylum-seekers among Member States, have systematically been driving State authorities towards conducting more severe assessment of asylum claims and immigration control at the borders, further affecting procedural guarantees of asylum-seekers and putting in check the effectiveness of the Dublin System in co-ordinating responsibility allocation on asylum among European countries[1]. Moreover, the unpredictability of asylum-seekers' movements once inside European territory and the continuous shifting on travel routes used to reach the region are making not only the deliverance of assistance challenging[2], but are likewise hindering asylum-seekers' registration, thereafter collaborating to form situations of limbo and to collapse with the orderly model of asylum management envisaged under the auspices of the Dublin regime.

A first cause to this massive migratory influx towards Europe is in great part due to the conflicts in the Middle-East and Africa, resulted from the uprising of the Arab Spring revolts that obliged millions to flee their homes. This crisis involved countries like Libya and Tunisia that had been used in the past as protective barriers to migrants coming from other African States toward the EU and that, given the referred circumstance of internal political instability, relaxed the Mediterranean coast patrolling[3]. Despite these movements did not affected in a large extent the usual influx of migrants coming from the affected countries to Europe, they have provoked a wave of irregular border crossing through the Mediterranean Sea, which represented an

[1] Munari, F., *The perfect storm on EU Asylum Law: The need to Rethink the Dublin Regime*, DUDI, Vol.10, No.3, 2016, pp.525-526.
[2] UNHCR (2016), *UNHCR Global Report 2016*, p.90, Available at: http://reporting.unhcr.org/sites/default/files/gr2016/pdf/06_Europe.pdf [Accessed 09 February 2018].
[3] Munari, F., *The perfect storm on EU Asylum Law: The need to Rethink the Dublin Regime*, 2016, cit., p.525.

opportune condition for asylum seekers and economic migrants[4], trying to access the EU devoid of proper traveling documents and visas[5].

Secondly, even though the wars in Iraq and Syria initially produced large amount of refugees locally[6] as the expectation was to rapidly go back home when peace reinstalled, the improbability of reaching short-term solution precluded any possibility for these individuals to returning. This, added to restrictive actions taken by hosting neighbouring States in reason of the extraordinary increase in the number of immigrants entering their own territory and of their deteriorating economic situation, redirected the inflow of asylum-seekers towards Europe[7].

The peak of arrivals occurred between 2015[8] and 2016[9], periods in which Europe received approximately 1.2 million new asylum applications per year, large majority from Afghanistan, Iraq and the Syrian Arab Republic. These represented the most critical moments since 2011, not only for the high numbers of migrants they accounted for, but also for the increased use of unsafe and risky travelling routes, being the three major ones: the Eastern Mediterranean route, crossing the Mediterranean Sea from Turkey to Greece; the Central Mediterranean route, crossing the Mediterranean Sea from North Africa to Italy or Malta; and the Balkan land route, crossing by land from Turkey to Bulgaria[10]. These paths not only offered danger to the life of individuals

[4] According to the UNHCR, migrants and asylum-seekers differ in their definition. UNHCR: Asylum-seeker is "*when people flee their own country and seek sanctuary in another country, they apply for asylum – the right to be recognized as a refugee and receive legal protection and material assistance. An asylum seeker must demonstrate that his or her fear of persecution in his or her home country is well-founded*." Available at: https://www.unrefugees.org/refugee-facts/what-is-a-refugee/ [Accessed 06 November 2017] Instead, migrant is an individual that "*choose to move not because of a direct threat of persecution or death, but mainly to improve their lives by finding work, or in some cases for education, family reunion, or other reasons. Unlike refugees who cannot safely return home, migrants face no such impediment to return. If they choose to return home, they will continue to receive the protection of their government*." Available at: http://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html [Accessed 06 November 2017].

[5] Fargues, P., Fandrich, C., *Migration after the Arab Spring*, European University Institute: Migration Policy Centre - Robert Schuman Centre for Advanced Studies, Florence, 2012, p.4.

[6] De Bel-Air, F., *Migration Profile: Syria*, European University Institute: Migration Policy Centre - Robert Schuman Centre for Advanced Studies, Florence, 2016, pp.3-6: By November of 2015, there was an amount of 5.6 million Syrian nationals that have fled the country since 2011, being the majority – 68% of the total – hosted in neighbouring countries such as Turkey, Lebanon, Jordan, Egypt and Iraq.

[7] Ibid., pp.1-2.

[8] UNHCR, *UNHCR Global Report 2015 - Europe regional summary*, 2017, p.82, Available at: http://www.unhcr.org/574ed7b24.html [Accessed 3 August 2017].

[9] UNHCR, *UNHCR Global Report 2016*, 2016, pp.88-91, Available at: http://reporting.unhcr.org/sites/default/files/gr2016/pdf/06_Europe.pdf [Accessed 3 Aug. 2017].

[10] OHCHR, *In search of Dignity – Report on the human rights of migrants at Europe's borders*, 2017, p.7, Available at: http://www.ohchr.org/Documents/Issues/Migration/InSearchofDignity-OHCHR_Report_HR_Migrants_at_Europes_Borders.pdf [Accessed 29 November 2017].

travelling through them, but further affected in a large extent States geographically linked to the Mediterranean Coast and the Turkish borders, such as Greece, Bulgaria, Romania, Italy and Spain[11].

It is important to consider that, even though the EU-Turkey Statement closed the Balkan-land route decreasing in 79 percent the inflow throughout in 2016[12], the Mediterranean Sea routes were still being used and ever since turned into the main channel to reach Europe. The UNHCR's European Region Report confirmed this assumption by showing that between 2015 and 2016 almost 1.4 million people used the sea paths, large majority individuals in need of humanitarian protection[13]. This led to an agreement struck by the EU, Italy and Libya in 2017 envisaging to train Libyan authorities to intercept boats carrying migrants. If in one side this measure resulted in considerable reduction in the number of arrivals through the Mediterranean routes[14], in the other side it contributed for the detention of thousands of migrants under inhuman conditions in Libya[15].

Furthermore, regardless of the efforts engaged in sea operations such as EUNAVFOR Med operation Sophia[16] and Frontex operation Triton[17], recently replaced by the Frontex

[11] Munari, F., *The perfect storm on EU Asylum Law: The need to Rethink the Dublin Regime*, 2016, p.526.
[12] OHCHR, *In search of Dignity – Report on the human rights of migrants at Europe´s borders*, 2017, p.10, Available at: http://www.ohchr.org/Documents/Issues/Migration/InSearchofDignity-OHCHR_Report_HR_Migrants_at_Europes_Borders.pdf [Accessed 29 November 2017].
[13] UNHCR, *Europe key data Q1 + Q2 Jan-Jun 2017*, 2017, pp.1-2, Available at: https://data2.unhcr.org/en/documents/download/58504 [Accessed 3 August 2017].
[14] UNHCR, *Desperate Journeys – January 2017 to March 2018*, 10 April 2018, p.1: The number of people arriving in Italy from Libya dropped from 181,436 and 119,369 in 2016 and 2017 respectively to 6,295 in the first three months of 2018; the number of sea arrivals in Greece decreased significantly compared to 2016 that accounted for 173,450, receiving in 2017 and the first three months of 2018 29,718 and 5,318 migrants traveling through the Mediterranean sea paths respectively, Available at: https://data2.unhcr.org/en/documents/download/63039 [Accessed 07 May 2018].
[15] BBC, *Matteo Salvini: Interior minister´s claims about immigration*, 11 June 2018, Available at: https://www.bbc.com/news/world-44397372 [Accessed 20 June 2018]; Amnesty International, *Libya: European governments complicit in horrific abuse of refuges and migrants*, 12 December 2017, Available at: https://www.amnesty.org/en/latest/news/2017/12/libya-european-governments-complicit-in-horrific-abuse-of-refugees-and-migrants/ [Accessed 20 June 2018]; BBC, *EU migrant deal with Libya is 'inhuman' – UN*, 14 November 2017, Available at: https://www.bbc.com/news/world-africa-41983063 [Accessed 20 June 2018]
[16] EUNAVFOR Med operation Sophia: "*The mission core mandate is to undertake systematic efforts to identify, capture and dispose of vessels and enabling assets used or suspected of being used by migrant smugglers or traffickers, in order to contribute to wider EU efforts to disrupt the business model of human smuggling and trafficking networks in the Southern Central Mediterranean and prevent the further loss of life at sea*". Available at: https://eeas.europa.eu/csdp-missions-operations/eunavfor-med-operation-sophia/36/about-eunavfor-med-operation-sophia_en [Accessed 09 February 2018].
[17] EC, definition of the Frontex Joint Operation Triton: "*Frontex does not replace border control activities at the EU's external borders but it provides additional technical equipment and border guards to EU countries that face an increased migratory pressure. Triton is a Joint Operation coordinated by Frontex. This operation brings together border guard authorities and assets from 25 Member States and*

Operation Themis[18], yet many people continue to lose their lives during the cross, including women, children and other vulnerable groups. While in 2015 it was registered 1,015,078 arrivals through the sea and 3,771 missing or dead (being almost 0.4 percent the population that didn't succeed to conclude the passage), in 2016 the variation was of 361,709 arrivals against 5,096 of dead or missing (1.4 percent)[19]. All the same, from January until September of 2017, the UNHCR provided that there were 148,200 individuals that concluded the path and an average of 2,700 that did not (representing 1.8 percent)[20]. This means that, although the number of migrants arriving through the Mediterranean Sea have considerably reduced from 2015 to 2017, the percentage of those that were considered dead or missing during the cross, largely increased along the last two years.

The deficiencies along the Mediterranean operations and the high number of deaths registered in the aforementioned statistics raised the first issue of this work. Based on existing international obligations derived from the minimum content of international refugee law, framed under the respect for the principle of *non-refoulement*, codified in Article 33 of the 1951 Geneva Convention[21], and the duty to render assistance to any person found at the sea in danger of being lost, ruled under Article 98 of the UN Convention on the Law of the Sea (UNCLOS)[22], it is necessary to analyse what are the

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it is hosted by Italy", Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/frontex_triton_factsheet_en.pdf [Accessed 09 February 2018].

[18] Frontex – European Border and Coast Guard Agency: "*Frontex, the European Border and Coast Guard Agency, is launching a new operation in the Central Mediterranean to assist Italy in border control activities. The new Joint Operation Themis will begin on 1 February and will replace operation Triton, which was launched in 2014. Operation Themis will continue to include search and and rescue as a crucial component. At the same time, the new operation will have an enhanced law enforcement focus. Its operational area will span the Central Mediterranean Sea from waters covering flows from Algeria, Tunisia, Libya, Egypt, Turkey and Albania*". Available at: https://frontex.europa.eu/media-centre/news-release/frontex-launching-new-operation-in-central-med-yKqSc7 [Accessed 04 June 2018].

[19] UNHCR, *Europe key data Q1 + Q2 Jan-Jun 2017*, 2017, pp.1-2, Available at: https://data2.unhcr.org/en/documents/download/58504 [Accessed 3 August 2017].

[20] UNHCR, *Desperate Journeys – January to September 2017*, 2017, Available at: https://data2.unhcr.org/en/documents/download/60865 [Accessed 09 February 2018].

[21] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, Article 33(1): "*No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*", Available at: http://www.refworld.org/docid/3be01b964.html [Accessed 14 February 2018].

[22] UN General Assembly, *United Nations Convention on the Law of the Sea*, 10 December 1982, Article 98 defines under para.1 that every State has the duty to render assistance to "*any person found at sea in danger of being lost*" and "*to proceed with all possible speed to the rescue of persons in distress*". Further, in para.2 it highlights the need of "*every coastal State to promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the*

legal responsibilities binding the EU towards co-operating with and facilitating the access of asylum-seekers to European shores.

It is to take into account that the European case-law expressed the need of interpreting the principle of *non-refoulement* through an extraterritorial regard, deeming the hosting State shall not only to refrain from using removal against an individual found within its territory to any places that offer him real and personal risk of suffering threat to life, acts of torture and ill-treatment, but further to enable and facilitate the access of asylum-seekers trying to reach domestic shores, including those found in the high seas on board of irregular embarkations. This idea extends the responsibility of States towards asylum-seekers found outside its jurisdiction and reinforces the necessity of adopting positive measures in order to accomplish the purposes and objectives of the provision. In this sense, Article 98 reinforces and contributes for the accomplishment of such duty by defining that States have not only the responsibility to render assistance to any person found at sea in danger of being lost, but also to provide search and rescue services when necessary[23].

The principle of *non-refoulement* is vastly approached within the course of this work, not only for the essential role it plays along the context of asylum protection, but also for the *jus cogens* status attributed to it[24], creating an obligation of peremptory nature for the State. The compliance with its prerogatives are to be respected even under circumstances in which the asylum-seeker does not fulfil the requirements to obtain refugee status[25], and in which it prevails situations of state of emergency such as that of the massive inflow of migrants, triggered by the current European refugee crisis. Therefore, this draws a bottom line in the application of the right of asylum, defined under Article 14 of the Universal Declaration of Human Rights (UDHR)[26], which binds

sea… where circumstances so require, by way of mutual regional arrangements". Available at: http://www.refworld.org/docid/3dd8fd1b4.html [Accessed 9 February 2018].

[23] Severance, A.A., *The Duty to Render Assistance in the Satellite Age*, CWSL Scholarly Commons, Vol.36, 2004 p.392 ff., Available at: https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?referer=https://www.google.it/&httpsredir=1&article=1141&context=cwilj [Accessed 14 February 2018].

[24] UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, paras. 4-8, 31 January 1994, Available at: http://www.refworld.org/docid/437b6db64.html [Accessed 15 February 2018].

[25] Salerno, F., *L´obbligo internazionale di non-refoulement dei richiedenti asilo*, DUDI, Vol.4 No.3, 2010, p.492 ff.

[26] UN General Assembly, *The Universal Declaration of Human Rights (UDHR)*, Resolution 217 A, 10 December 1948.

even States not part to the 1951 Geneva Convention, departing from a customary obligation of negative character, implying the prohibition to commit actions contrary to the premises established under such principle[27]. It is still established that the application of the principle of *non-refoulement* cannot be disassociated from other fundamental rights that represent procedural guarantees to ensure the asylum-seeker is not going to be victim of torture and inhuman or degrading treatments. Such guarantees are based on rights that shall secure the asylum-seeker is having access to an individual assessment of his application, is not being victim of arbitrary detention in reason of irregular entry, and, in case removal is unavoidable, that he is being sent towards a safe "third-country"[28]. These are minimum rights that thence allow the universal enforcement of the minimum content of asylum, relied upon principles of customary nature.

Looking through indicators of EU Member States separately, Eurostat[29] showed that in 2017 those that received the largest amount of first-time applications within the EU-28 were Germany with 31 percent of the total share, followed by Italy with 20 percent (127,000 applications), France with 14 percent (91,000), Greece with 9 percent (57,000), the United Kingdom with 5 percent (33,000) and Spain with 30,000 applications. The data further informed that among Member States with more than 5,000 first-time asylum-seekers in this period, Spain, France, Greece and Italy were those that suffered higher increase in their total numbers compared to the previous year, reaching respectively a total raise of 96 percent (15,000 more applications), 19 percent (14,000 more), 14 percent (7,000 more) and 4 percent (5,000 more). Instead, Germany, Austria, the Netherlands and the United Kingdom passed through considerable reductions in their total first-time applications from 2016 to 2017, amounting respectively in less 73 percent (520,000 less), 44 percent (18,000 less), 17 percent (3,000 less) and 15 percent (6,000 less). This means that, despite the general numbers of first-time applications reduced during the referred period[30], some countries still suffered

[27] Ibid., p.502.
[28] Gil-Bazo, M.T., *The safe third country concept in international agreements on refugee protection*, NQHR, Vol.33/1, 2015, p.44: "*The safe third country concept is founded on the notion that States´ obligations towards refugees who have not been granted the right to enter and/or stay in the country where they seek asylum do not go beyond the principle of non-refoulement, that is, the prohibition to be returned to a territory where they may face prohibited treatment*". Available at: http://www.unhcr.org/59c4be077.pdf [Accessed 20 May 2018].
[29] Eurostat, *Asylum statistics - Statistics Explained*, 2017, Available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics [Accessed 20 June 2018].
[30] Ibid., In 2016 the EU-28 received 1.2 million first-time applicants, while in 2017 the number dropped to 650,000.

a considerably increase, receiving extensively higher amount of applications than other Member States, demonstrating certain level of inequality along the EU. In the same study, it is also demonstrated that the assessment of asylum claims obtained quite different results among Member States. Even though the general result in 2017 accounted for nearly half (46 percent) of positive first instance decisions[31] within the EU-28, the range varied across the region. While countries like Ireland (89 percent), Lithuania (78 percent) and Latvia (74 percent) presented high level of positive first-instance decisions, Czech Republic, Poland and France recorded more than 70 percent of rejections. As for the final decisions[32], while Finland, the Netherlands, the United Kingdom and Austria provided nearly more than 50 percent of positive decisions, Slovakia, Slovenia and Estonia presented 100 percent of rejections.

In view of such disparities, the second issue of this work seeks to identify what are the main factors that have contributed for building so different realities in the asylum management across the Dublin area. If in one side, the distribution of asylum seekers was not occurring in a proportional manner along the region, in other words respecting each Member States' capacity, in the other side the examination of international protection claims were producing quite varied results across different Member States. Therefore it is important to understand how the Dublin Regulation has been allocating responsibility among Member States, finding out whether this mechanism has been promoting burden sharing on asylum or whether instead it has been contributing for the increase of inequality within the EU; subsequently demonstrating how these factors affect the way in which Member States have been applying the Asylum Directives, created in light of the Common European Asylum System (CEAS) in order to harmonise asylum procedures.

[31] Eurostat: "*First instance decision means a decision granted by the respective authority acting as a first instance of the administrative/judicial asylum procedure in the receiving country*", Available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Asylum_decision [Accessed 2 October 2017].

[32] Eurostat: "*Final decision on appeal means a decision granted at the final instance of administrative/judicial asylum procedure and which results from the appeal lodged by the asylum seeker rejected in the preceding stage of the procedure. As the asylum procedures and the numbers/levels of decision making bodies differ between Member States, the true final instance may be, according to the national legislation and administrative procedures, a decision of the highest national court. However, the applied methodology defines that 'final decisions' should refer to what is effectively a "final decision" in the vast majority of all cases: i.e. that all normal routes of appeal have been exhausted*", Available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Asylum_decision [Accessed 2 October 2017].

The Dublin Regulation was developed with the purpose of guaranteeing that every third-country national seeking asylum in the Dublin area had equal access to status determination within the EU, at the same time, of preventing multiple claims among distinct Member States[33]. Its development concerned the unification of procedural rules pertinent to asylum protection, implementation of mechanisms to determine a responsible State to examine each asylum application, and the application of mutual recognition for decisions taken at a domestic level, meaning that, once a decision is taken by a Member State, the others automatically accept that decision, excluding the possibility for the asylum-seeker to submit an application in another Dublin State.

The system presented a variety of downsides. The direct dependence of its functioning with the way Member States apply its prerogatives presumed certain degree of flexibility that, as a consequence, still produces different patterns of treatment. This factor, in combination with the criteria applied to determine the "responsible State", defined under Article 7 of the Dublin III Regulation (DRIII)[34], not only deprived asylum seekers from choosing the State in which they believe to possess higher chances of being granted international protection and of social integration, but it further contributed to increase feeling of uncertainty, encouraging situations of irregularity and limbo. In this sense, many individuals for fearing to be designated a State with high levels of refusals or low reception standards prefer to remain in anonymity. Moreover, the fact that so far the "responsible State" rule had been mostly applied under the criteria related to documentation and the first country in which the individual acceded the EU[35], overcharged the European States with external borders to the Mediterranean

[33] Policy Department C - Citizens' Rights and Constitutional Affairs - European Parliament, *The Reform of the Dublin III Regulation*, Brussels, 2016, pp.11-12, Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf [Accessed 2 October 2017].

[34] Regulation (EU) No.604/2013 of the European Parliament and of the Council of 26 June 2013, see Article 7 on the hierarchy of criteria: "*The criteria for determining the Member State responsible shall be applied… on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State…, Member States shall take into consideration any available evidence regarding the presence, on the territory of a Member State, of family members, relatives or any other family relations of the applicant, on condition that such evidence is produced before another Member State accepts the request to take charge or take back the person concerned,… and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance*".

[35] European Commission, *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) 270 final, 2016/0133 (COD), Brussels, 04 May 2016, p.9; European Commission, *Evaluation of the Dublin III Regulation (Final Report)*, DG Migration and Homme Affairs, B-1049 Brussels, 4 December 2015, p.4, Available at: https://ec.europa.eu/home-

during the current migratory crisis[36]. This affected the quality of their reception and qualification policies that, accordingly, not only motivated asylum-seekers to attempt manoeuvres to move to other European States with higher standards of protection, provoking secondary migratory flows, but it also lowered the overall effectiveness of the EU Asylum Protection System.

This work then is divided in a two-level analysis, seeking firstly to demonstrate how the EU law has been implementing international obligations derived from sources of international human rights law and international refugee law into the European Asylum Protection System, and secondly how the development of regional instruments such as the Dublin System and the Asylum Directives has complemented its scope. The general aim of this research is to provide a critical assessment on the EU Asylum Protection System, triggering existing gaps between the normative and its implementation within the context of the Mediterranean refugee crisis, thus providing evidences on how such deficiencies has been interfering on international obligations of Member States and the EU itself on the protection of refugees.

Therefore, this thesis is divided into three parts. The first chapter approaches how main aspects of International Refugee Law, particularly in what regards international obligations derived from the principle of *non-refoulement*, has been incorporated within the EU Law. The second chapter addresses the developments brought by the Qualification Directives and the Dublin System in grounding international protection within the EU. The third chapter presents an assessment of the Italian case law reflecting on how Italy has been affected by the Mediterranean refugee crisis, and how this determined the way in which international obligations derived from the minimum content of International Refugee Law, and the prerogatives of the European Asylum Protection System are being implemented at domestic level there.

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affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_dublin_iii_regulation_en.pdf [Accessed 17 April 2018]; Gilbert, G., *Is Europe Living Up To Its Obligations to Refugees?*, EJIL, Vol.15 No.5, 963-987, 2004, p.970-971; Policy Department C - Citizens' Rights and Constitutional Affairs, *The Reform of the Dublin III Regulation*, 2016, p.14, Footnote: "*The first State where an application is lodged may be responsible for a variety of reasons: because no other criterion is applicable; because a higher-ranking criterion makes that State responsible; because the State in question decides to apply the "sovereignty clause" of Article 17(1) DRIII; or because it subsequently becomes responsible, e.g. for missing the deadlines set out by Art. 29 DRIII for the implementation of transfers*"; *Setting Up a Common European Asylum System* (footnote 6), p. 158 f; Policy Department C - Citizens' Rights and Constitutional Affairs, *New Approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection* (footnote 6), 2014, p.9.

[36] Munari, F., *The perfect storm on EU Asylum Law: The need to Rethink the Dublin Regime*, 2016, p.526.

CHAPTER I:
THE INCORPORATION OF INTERNATIONAL REFUGEE LAW INTO THE EU LAW

The EU Asylum Protection System is characterized by a pluralist approach, mainly influenced by three different sources of International Law: the European Convention on Human Rights (ECHR)[37], the EU Law, and the International Refugee Law itself, regulated by the 1951 Geneva Convention and the 1967 related Protocol[38]. This represents a mode of engagement among regimes that is characterized by mutual monitoring and openness, in which is not only reinforced the existence of common human rights values present within distinct legal systems, but also acknowledged the importance relied upon their differences, as they complement each other, bringing a wider standard of protection within the region [39].

The objective of this chapter is mainly to create a common line bounding these legal sources, providing an overview on how they interact with each other, and in which way they have been contributing to frame the EU Asylum Protection System. An individual assessment on their respective case law is thus made necessary in order to identify how prerogatives of the International Refugee Law and the ECHR have been incorporated into the EU Law, and which international obligations they entailed to the EU and its Member States. In this sense, the content herein firstly approaches the legal sources governing International Refugee Law, establishing the minimum content of asylum and its implications on international asylum management, secondly demonstrating how they have been implemented within the EU Law, discussing how the ECHR have been influencing their application along the EU.

1. Sources of International Refugee Law

The first international instrument making reference to the right of asylum was the Universal Declaration of Human Rights (UDHR) establishing under Article 14 that "*everyone has the right to seek and to enjoy in other countries asylum from*

[37] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe, Rome, 2 November 1950.
[38] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, Naples, 2016, pp.32-33.
[39] Costello, C., *The human rights of migrants and refugees in European law*, Oxford, 2016, p.42.

persecution". This formulation, together with Article 13 that determines "*everyone has the right to freedom of movement*" and hence "*to leave any country, including his own*", constitutes a d*e facto* right of asylum once it suggests not only that every person is entitled of seeking asylum in another State, but also that States have the duty to allow this person to enter their territory, process his asylum claim and, if confirmed the existence of well-founded fear of persecution, to grant him asylum. Such definition contemplates a threefold interest, defined by the doctrine under the division of three distinct faces on the right of asylum, being them the "right of the State to grant asylum", the "right of the individual to seek asylum", and the "right of an individual to be granted asylum"[40].

Although the UDHR is void of binding legal force, the content of the right therein produced a consistent level of interpretative issues on the acceptance of its prerogatives as international obligations, and passed through a sequence of legal developments that evolved in a different manner among the three faces of the right of asylum. While the first that departed from the assumption that it was the right of the State to offer refuge and resist demands for extradition and the second that inferred the obligation of the State to do not prevent the inalienable and inviolable right to freedom of movement are deemed as part of customary international law, the same did not holds true for the third face on the individual's right to be granted asylum[41]. This last aspect still does not possess a homogeneous acceptance under International Law. Insofar scholars like Grotius and Suarez considers the right of asylum as a natural right of every person entailing a corresponding duty on States to grant asylum, Morgenstern sustains that there is no right of the individual to be granted asylum imposed against the will of the State granting it[42].

Grotius and Suarez were early writers of international law that conceived asylum "as a duty of the State or a natural right of the individual in pursuance of an international humanitarian duty"[43]. Despite these idea was developed much before, it was only in the early nineteenth century that this right became firmly inserted in general international

[40] Boed, R., *The State Of The Right Of Asylum In International Law*, Duke Journal of Comparative & International Law, Vol. 5:1, 1994, p.1 ff., Available at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1342&context=djcil [Accessed 16 February 2018].
[41] Ibid., pp.3-10.
[42] Ibid., p.8.
[43] Weis, P., *Territorial Asylum*, 6 IJIL, 1996, p.180: Weis lists 38 countries where the right to asylum for individuals is recognised.

law, resulted of the spread of democratic forms of government, in which it also came the recognition of the right of people to rebel against oppression and consequently the right of an individual to found refuge in another nation under such circumstances[44]. A contemporary author sharing this same view is Weis that, in these terms, defended that an individual State granting asylum acts as an agent of the international community. He cites Article 2(1) of the 1867 UN Declaration on Territorial Asylum[45], referring to asylum as a concern to the international community, and defends that although during the negotiations on the Declaration many disagreements on the matter occurred resulting in a not explicitly recognition of asylum as a human right, yet it would seem to be meaning of the Declaration that asylum should not be exercised in such a way as to refuse a person´s admission if such refusal would subject him/her to persecution[46].

Morgenstern instead, developed his rationale based on a context of post World War II, in which it was under discussion the concession of diplomatic asylum to war criminals, quisling, and traitors[47]. In that period, although the extradition of quislings or traitors were strongly condemned, several multilateral treaties provided for the extradition of war criminals, based on the justification that despite their crimes were political, the common crime element predominated and hence they should not be allowed to enjoy asylum[48]. Furthermore, such right was also criticised by a number of authors that considered diplomatic asylum as a derogation from the exercise by the sovereign of complete rights over his territory and subjects[49]. This brought the rationale that no one is above the law imposed by his own State through seeking refuge in another jurisdiction, prioritising the right to sovereignty of States[50].

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[44] Van Wynen, A., Thomas, A. J. Jr., *Non-Intervention: The Law and Its Import in the Americas*, 1956, pp.391-392.

[45] UN General Assembly, *Declaration on Territorial Asylum*, A/RES/2312(XXII), 14 December 1967, Available at: http://www.refworld.org/docid/3b00f05a2c.html [accessed 4 June 2018].

[46] Gil-Bazo, M.T., *Asylum as a General Principle of International Law*, IJRL, Vol.27, No.1, 2015, p.11-12; see also Weis, P., *Human Rights and Refugees*, IRRC, 1972, pp.537-54.

[47] Van Wynen, A., Thomas, A. J. Jr., *Non-Intervention: The Law and Its Import in the Americas*, 1956, pp.392: "*A war criminal is an offender against the international law rules governing war, while quislings and traitors can be defined as nationals of any state accused of having violated their national law by treason*".

[48] Moscow Declaration of 20 October 1943, para.4; London agreement concerning the prosecution and punishment of major war criminals of the European Axis of 8 August 1945; Peace Treaties with Italy, Article 45, Rumania, Article 6, Bulgaria, Article 5, Finland, Article 9, and Hungary, Article 6.

[49] Barcia-Trelles, C., *El Derecho de Asilo Diplomatico*, 59 Revista de Derecho Internacional 161, 1951; Morgenstern, F., *The Right of Asylum*, 26 British Yearbook of International Law 259, 1949; Morgenstem, F., *Diplomatic Asylum*, 67 Law Quarterly Rev. 362, 1951.

[50] Van Wynen, A., Thomas, A. J. Jr., *Non-Intervention: The Law and Its Import in the Americas*, 1956, pp.393; See also Fernández, F., *El Asilo Diplomitico*, 49 Revista de Derecho Internacional 203, 1946.

As shown through the analysis of preparatory works and premises of traditional International Law that attributes full sovereignty of States regarding admission, staying and removal of aliens, the initial purpose of Article 14 was further to be regarded as a right of States to offer refuge than a right of the individual to be granted asylum protection. Such prerogative was reinforced by the Institute of International Law (ILO) that declared in 1950 that "*asylum is the protection which a State grants on its territory or in some other place under the control of its organs to a person who comes to seek it*"[51], confirming the idea of not looking through the concept as an imposition upon States to secure asylum, but merely as a pre-existing right of States to admit a foreign national on its territory[52].

This perspective can be illustrated through the *Asylum Case (Colombia v. Peru)*[53]. The starting point of this case occurred when a Peruvian citizen, Victor Raul Haya de la Torre, accused of taking part in a military rebellion in Peru, asked diplomatic asylum in the Colombian Embassy in Lima after an arrest warrant. Mr. Haya de la Torre was granted with a political refugee status by the Colombian diplomatic authority, in accordance with Article 2 of the Montevideo Convention on Political Asylum of 1933; and the Colombian Ambassador proceeded with a request addressed to the Peruvian Government to concede Mr. Haya de la Torre's safe passage to leave the country, under the premises of Article 2(2) of the Havana Convention on Asylum of 1928. Peru refused to accept both, the Colombian unilateral qualification and the allowance for the safe passage, alleging sovereignty violation.

The main issue herein questioned whether Colombia, as the country granting asylum, was competent to unilaterally qualify the offence committed by the refugee in a manner binding on that territorial State, also affording necessary guarantees to enable the refugee to leave the country in safety. The Court held that in the normal course of diplomatic asylum, a diplomatic representative has the competence to make a provisional qualification of the offence and the territorial State has the right to give consent to this qualification. It meant that, since Peru did not express consent on that, the Colombian diplomatic authority was not entitled of taking such unilateral decision,

[51] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo,* 2016, p.2.
[52] Janik, R., *The Right to Asylum in International Law*, Vienna 2017, p.7, Available at: https://ssrn.com/abstract=3076832 [Accessed 17 December 2017].
[53] ICJ, *Asylum Case (Colombia v. Peru)*, Judgment 20 November 1950, Available at: http://www.icj-cij.org/files/case-related/7/007-19501120-JUD-01-00-EN.pdf [Accessed 13 January 2018].

binding within the Peruvian territory. It further emphasized that Peru was not part on the Montevideo Convention, which precluded any possibility of evoking Article 2 of the Treaty to justify the unilateral declaration, as that did not qualify either as regional customary law. The way the Court adjudicated this case is an important reference on how State sovereignty prevailed over principles of human rights by that time, turning the appeal more into a dispute of sovereignty than the protection of one´s fundamental rights, among which encompassed the same way the right to asylum.

Despite the later efforts of the UNGA to implement a universal instrument of binding legal force securing the right of asylum as defined under Article 14, no significant developments in this sense were reached posteriorly. The attempt to do it through the settlement of a UN Convention on Territorial Asylum envisaged within the auspices of the 1977 UN Conference on Territorial Asylum[54] proved to be a complete fail. Whilst the Group of Experts entitled of producing the draft articles for the Convention worked on a proposal to reconcile the right of the State to grant asylum with the persecuted individual's interest in receiving asylum, the State parts showed disagreements on the method by which it should be framed. Countries like Austria, Colombia, Costa Rica, France and Italy were for a German proposal to recognize the duty of the State to grant asylum. Instead, majority of the State parts represented in the Committee of the Whole defended that such article should reflect more a right than a duty of the State to grant asylum, precluding any advance on the matter. Beyond that, more recent expressions of the international community like the World Conference on Human Rights[55], held in Vienna in 1993, reaffirmed the prevalence of State prerogative on granting asylum, presuming that such matter should still evolve under International Law. As posed in the words of the UN Secretary-General that year, Boutros-Ghali, in reference to the need of adopting a universal legal instrument to guarantee a *de facto* right to asylum, including the third face of the right of asylum: "*at this moment in time it is less urgent to define new rights than to persuade States to adopt existing instruments and apply them effectively*"[56].

[54] UN General Assembly, *United Nations Conference on Territorial Asylum*, 4 February 1977, Available at: https://www.cambridge.org/core/journals/international-review-of-the-red-cross-1961-1997/article/united-nations-conference-on-territorial-asylum1/8CDC145E7BEAF884D073AC5EAF37DE60 [Accessed 17 February 2018].
[55] OHCHR, *World Conference on Human Rights*, Vienna, 14-25 June 1993, Available at: http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx [Accessed 17 February 2018].
[56] Boed, R., *The State Of The Right Of Asylum In International Law*, 1994, pp.13-14.

What general practice has shown is that, if by one side the international society does not recognize the State's obligation to guarantee the right of asylum *vis-à-vis* the concession of refugee status, in the other side it sustains that "*States have a duty under International law not to obstruct the individual's right to seek asylum*". This means that although States are not tied to the obligation of granting asylum in a strict sense, the individual's right to seek asylum must be anyway preserved through the prohibition on the use of removal to places where he has real and personal risks of suffering persecution. These factors form the pre-conditions to the exercise of Article 14 under the premises of its second face, which accordingly, classify as an international obligation[57].

This prerogative is further codified under different sources of international law other than the UDHR, present through Article 12(2) of the Covenant on Civil and Political Rights (CCPR)[58] and Protocol No.4 to the ECHR, reinforcing the legal value endowed to the right of every person to leave any country, including his own. Such right is complemented by Article 3(1) of the Declaration on Territorial Asylum[59] that inferred hosting States should refrain from using measures "*such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State he may be subject to persecution*" against any individual "*entitled to invoke article 14 of the UDHR*", enabling the compliance with the purposes of the right so seek asylum. It means that, in the same way the country of origin shall not preclude the individual's right to leaving, the hosting State has equally the duty to do not obstruct his admission, as a necessary step in order to enable his access the referred right that represents the minimum content of the international protection of refugees, necessary to the accomplishment of the objectives of Article 14 of the UDHR[60].

Currently, the major document of reference in the national and international management of refugee status is the United Nations Convention relating to the Status of

[57] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.29.
[58] UN General Assembly, *International Covenant on Civil and Political Rights*, No.14668, 19 December 1966, Available at: https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf [Accessed 18 January 2018].
[59] UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), Available at: http://www.refworld.org/docid/3b00f05a2c.html [Accessed 18 January 2018].
[60] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.31.

Refugees (commonly known as the 1951 Geneva Convention on Refugees)[61]. It has been generally accepted as the most comprehensive legally binding instrument in international refugee law[62], and it holds three core regulatory functions related to: settlement of pre-requisites to qualify "*who is (and who is not) a refugee and who, having been a refugee, have ceased to be one*"; determination of "*their rights and duties*", including both, those already formally acknowledged with refugee status and asylum seekers; and finally, procedures to be followed by contracting States in the "*implementation of the instruments from the administrative and diplomatic standpoint*"[63].

The Convention is applied under the supervision of the UNHCR that was created as a subsidiary organ of the General Assembly in 1950, and later obtained permanent mandate[64]. The body not only controls the implementation of procedures and laws referred in by State Parties, but it also offers international protection itself and provides material support to refugees. Despite the UNHCR lacks enforcement powers over State Parties, State Parties are bound to cooperate with it, allowing its presence within their domestic territory and providing data and statistics.

The text of the document does not make any reference to the right to be granted asylum, as its main purpose is not to entertain further discussions on the interpretation of Article 14 of the UDHR. Instead, it contains a number of provisions necessary to secure the right to seek asylum, as a minimum guarantee to the compliance with the purposes and objectives of the Convention. These are clauses of binding force, referred in Article 42(1) of the 1951 Geneva Convention and in Article VII(1) of the New York Protocol, to which contracting States cannot derogate[65]. These guarantees represent duties of contracting States that shall apply, not only to formally recognized refugees, but also to those still not formally acknowledged with the status. They further serve to

[61] UN General Assembly, *Convention Relating to the Status of Refugees*, 1951.
[62] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, pp.32-33.
[63] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, para.12, Available at: http://www.unhcr.org/4d93528a9.pdf [Accessed 16 Jan. 2018].
[64] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.33.
[65] Both provisions determines impossibility of State Parties to apply for reservations on Article 1, regarding the definition of the term "refugee"; Article 3, referring to the prohibition of discrimination; Article 4, related to freedom of religion; Article 16(1), on the right to access to courts; Article 33, on prohibition of expulsion or return ("*refoulement*"); Article 36, referring to the State obligation to communicate the UNHCR about the laws and regulations which they may adopt to ensure the application of the Convention; and Article 44, on denunciation.

enable supervisory bodies to appoint inconsistencies on the implementation of the Convention procedures and laws by the contracting Parties. The respect for these principles are essential in order to prevent asylum seekers from suffering persecution in the hosting countries, ensuring minimum reception conditions, at the same time to impede the return or removal of these individuals to territories where they can be subject to torture and/or inhuman and degrading treatment.

The scope of international refugee protection system in a large extent relies on the prerogatives of the non-derogable provisions, in particular those of substantial nature, regulating the definition of the term "refugee" and the minimum obligations of Member States towards asylum-seekers and refugees. Since the aim of this work is to give a focus on the actual European refugee crisis, tackling the management of the ultimately massive arrivals in Europe, below I will mainly address the two aforesaid issues. Hence, in order to contextualize the concept of "refugee" and understand how it is being applied, I approach the first cited function of the 1951 Geneva Convention, related to the qualification of the term (para.1.1.). It not only justifies why refugees differ from other types of migration, but it also constructs the boundaries to the application of provisions inherent to asylum protection. Next, I explain the implications attached to the minimum obligations compelling contracting States in the exercise of asylum protection (paras. 1.2., 1.3. and 1.4).

1.1. The definition of "refugee" under International Refugee Law

The meaning of the term refugee is not only extensively treated under Article 1(A)(2) of the 1951 Geneva Convention, but it also represents one of the Treaty's most fundamental rules, to which is attributed non-derogable nature[66], expressed through Articles 42 and VII(1). The prerogatives therein stipulate three requirements for satisfying the conditions to be recognized as a refugee. It defines that the person must be "*owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*", find himself

[66] The non-derogable nature of this provision derives from the fact that it outlines the basis on which protection of refugees is granted, or denied, or discontinued, determining hence who are the beneficiaries of the right. This means that interpreting it in good faith and applying it in an accurate manner is necessary in order to avoid persons suffering from any of the referred forms of persecution to be denied the access to protection. UNHCR, *The Refugee Convention, 1951 – The Travaux preparatoires analysed with a commentary by Dr. Paul Weis*, p.7, Available at: http://www.unhcr.org/4ca34be29.pdf [Accessed 21 May 2018].

"*outside the country of his nationality*" and, due to this fear, be "*unwilling to avail himself of the protection of that country*".

The first requirement which refers to "*well-founded fear of being persecuted*" is rather vague in the text of the Treaty as it gives a number of reasons of persecution[67], but it does not provide a clear legal definition of the term itself[68]. This concept relies then on the interpretation of national and international courts that, as a general definition, classify it as severe deprivation of the individual's fundamental rights. It means that any threat to the life or freedoms of the individual, discriminatory treatment, and arbitrary penalty, producing substantial consequences to the life of the claimer, could be classified as persecution.

The provision specifies yet that persecution shall be accompanied of well-founded fear, which existence is justified through both, subjective and objective elements[69]. Subjective features encompass sex, age, health conditions, family and personal background, belonging to specific ethnical, religious, political and social groups, and so forth. Objective terms in the other hand are based on general conditions predominant in the claimer's origin country, referring to both, country of nationality and country of current residence. The combination of both is necessary as they bring together a twofold view of the claimer's individual situation, assessing his/her personal experience in one side, and the overall circumstance present in his/her place of origin in the other side. The UNHCR Handbook ascertains that, despite the subjective element is essential in order to determine the applicant's individual fears of persecution, the consideration to objective elements is crucial to evaluate the credibility of his/her personal statement in face of the real context in the country of origin: "*in general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there*"[70]. By affirming the applicant's need to prove with a *reasonable degree* that

[67] Found in the Convention provision itself, and extensively treated in *UNHCR Handbook* and *UNHCR Guidelines*, relating to specific situations.
[68] UNHCR Handbook, 1992, para.51 defines that there is no universally accepted definition of "persecution". It however makes reference to Article 33 of the 1951 Geneva Convention that brings a vague and broad concept of the term as "*threat to life or freedom on account of race, religion, nationality, political opinion or membership to a particular social group*".
[69] Ibid., para.38.
[70] Ibid., para.42.

his/her continuing staying in his/her country of origin would become intolerable, it is clear the need to appropriate of objective elements in the assessment of the claim.

It is likewise necessary to take into account the reasons of persecution as circumstances of generalized risk such as warlike conflict, indiscriminate violence, political instability and environmental catastrophe, are not enough to ground the right to asylum[71]. The person normally has to show good reasons why he/she individually fears persecution, taking into account one of the reasons mentioned in Article 1(A)(2) of the Convention: "*race, religion, nationality, membership of a particular social group or political opinion*". For instance, in *Jama Warsame v. Canada*[72] the applicant, a Somali descent, born in 1984 in Saudi Arabia but never been granted with Saudi Arabian citizenship, was lawfully residing in Canada since 1988. After two criminal convictions sentenced to imprisonment, he received in 2006 a deportation order from Canada for "serious criminality". In the occasion, the Pre-Removal Risk Assessment (PRRA) found that, if removed, the appellant would face risk to life and ill-treatment if removed to Somalia given his age, gender, lack of family of clan support, lack of previous residence in Somalia and lack of language skills. These represented evidences that the "*risk was personalized and distinct of that faced by the general population in Somalia*"[73]. The Committee acknowledged the claim and concluded that the State Party had to provide the appellant with an effective remedy for the crimes he was being prosecuted for, but deportation to Somalia was to be avoided.

The UNHCR Handbook additionally makes reference to situations of migration occasioned by extreme poverty and misery that, as a general manner, are excluded from the scope of application of the 1951 Geneva Convention since they depart from a generalised problem, affecting the population as a whole. It highlights that even though this category of individuals, migrating for reasons other than those contained in the definition and leaving their country voluntarily, were usually not refugees, it was necessary to carefully assess whether the reasons of the economic shortcomings were not deriving from economic discriminatory measures, affecting a particular section of

[71] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.35.
[72] HRC, *Jama Warsame v. Canada*, CCPR/C/102/D/1959/2010, view 1 September 2011, Available at: http://www.refworld.org/cases,HRC,4ee0f0302.html [accessed 17 January 2018].
[73] Ibid., para.7.8, on this issue see also Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.79.

the population[74]. In this case, the victims had the possibility of becoming refugees by leaving their countries of origin as the deprivation of their social and economic rights was occurring in reason of individual characteristics, classified under the premises of the grounds of persecution mentioned in Article 1(A)(2) of the Treaty. As expressed in the UNHCR Handbook: "…*what appears at first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinions of the individual that expose him to serious consequences, rather than his objections to the economic measures themselves*"[75].

In conclusion, it is possible to affirm that the nature of the actions of persecution is not of essentiality when defining well-founded fear of persecution. What counts in this case is to create a causal bound between the actions of persecution and the grounds of persecution. It means that, if the individual can prove his fear is founded on objective elements that can actually result in serious and severe threats to his fundamental rights, justified through a subjective perspective that reasons such fear on actions occurring on a discriminatory basis, then the primordial requirement of eligibility is fulfilled.

The second and third requirements that are based on the need of the individual to be found "*outside his country of his nationality*" and to be "*unable or willing to avail himself of the protection of that country*", respectively, are closely related. While there is no possibility to exclude the application of the second rule as international protection cannot interfere when the person is found within the jurisdiction of his home country[76], paradoxically, this person is only entitled of seeking international protection when his State of nationality is failing or unwilling to secure his fundamental rights. The formation of such conditionals must hence derive from the conduct of the State that in the given context, might whether be playing the role of the persecutor itself, whether not being effective in protecting individuals belonging to a specific group of people, victims of discriminatory actions executed by other entities; which consequently, drive such individuals to seek the enjoyment of protection elsewhere.

As the grounds of persecution already established, situations of generalised violence, state of war, civil war or other grave disturbance, where the State is prevented from

[74] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, paras. 63-64, Available at: http://www.unhcr.org/4d93528a9.pdf [Accessed 17 January 2018].
[75] Ibid., para.64.
[76] Ibid., para.88.

providing effective protection to its citizens, or to part of them, are not enough to secure the right to seek asylum. It is important however to make a more accurate assessment, similarly to the reflection proposed by the UNHCR Handbook on the case of economic migrants, to find out whether the deprivation of protection is actually occurring on an indiscriminate basis, or whether it is affecting individuals belonging to a particular social, ethnical or racial group, as described under Article 1(A)(2). It is possible that in such situations of scarcity and generalised chaos, the State prioritises the deliverance of aid and protection to particular groups in detriment of others, which accordingly fulfil the requirements that characterise persecution and entitle the affected individuals to the right to seek asylum[77].

Additional advances in this sense was brought by other Treaties adopted in the context of regional organisations, Declarations and Treaty provisions, created with the aim of regulating specific situations occasioning persecution particular of the context in which they are inserted in. The Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)[78] for instance, added to the actions of persecution "*external aggression, occupation, foreign domination or events, seriously disturbing public order in either part or the whole of the country of origin or nationality*", regulated through Article 1(2) of the referred Treaty. In turn, the Cartagena Declaration on refugees reiterates the need to enlarge the scope of protection to "*persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order*"[79]. Finally, the Recast of the Qualification Directives of 2011[80], adopted within the framework of EU, even though not recognizing those fleeing in consequence of generalized violence, created an alternative status to individuals in this condition, under

[77] Ibid., paras.97-100.
[78] Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 1001 U.N.T.S. 45, 10 September 1969, Available at: http://www.refworld.org/docid/3ae6b36018.html [Accessed 22 January 2018].
[79] *Cartagena Declaration on Refugees*, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, part III(3), 22 November 1984, Available at: http://www.unhcr.org/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html [Accessed 22 January 2018].
[80] *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, Available at: https://www.easo.europa.eu/sites/default/files/public/Dve-2011-95-Qualification.pdf [Accessed 22 January 2018].

the prerogatives a subsidiary form of protection, as referred in Article 15(c) of the document. All these texts seek to approach a more amplified sphere within the concept of refuge in which the grounds of persecution can be diversified than that contained under the 1951 Geneva Convention, but that are likewise necessarily in order to offer protection to those not being able to avail from the protection of their own State.

It is important to highlight that the status of refugee has a declaratory effect and not a constitutive one, meaning that a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition, and that this would necessary occur prior to the time at which his refugee status is formally determined[81]. Recognition of his refugee status does not therefore make him a refugee but declares him to be one[82]. This presupposes that a person is a refugee because of his background of persecution, and not because the State recognizes him as one. As a consequence, this person, even devoid of a formal acknowledgment of refugee status, as long as the risk of persecution is not formally excluded, shall still be endowed of minimum guarantees that ensure his protection against *refoulement*.

In the other hand, as refugee status is granted under the premise that an individual cannot avail himself from the protection of his country of nationality or usual residence, there are also clauses foreseeing its exclusion and cessation when such protection is no longer necessary. Article 1(C) of the 1951 Geneva Convention for instance, defines that in cases in which the individual "*voluntarily re-availed himself of the protection of the country of his nationality*", "*having lost his nationality…has voluntarily re-acquired it*" or, "*has acquired a new nationality and enjoys the protection of the country of his new nationality*", "*has voluntarily re-established himself in the country which he left*"; and when "*the circumstances in connexion with which he has been recognized as a refugee have ceased to exist*", implying that the individual any longer needs to avail from the protection of the hosting State, the right to a refugee status shall cease to exist. In addition, an individual can also be deprived of enjoying asylum if there are serious reasons for considering that "*he has committed crimes against peace, war crimes, crimes against humanity*", "*has committed a serious non-political crime outside the country of refuge*", and "*has been guilty of acts contrary to the purposes and principles*

[81] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, para.28.
[82] Ibid.

of the UN", as determined under Article 1(F). In such conditions, the reasons that led the individual to obtain asylum made any longer justifiable, hence terminating the obligations the hosting State has towards providing protection to him[83].

1.2. Obligations derived from International Refugee Law

Established the concept of refugee status and, consequently, the group of people entitled of receiving asylum protection, it is required to point out which principles derived from international refugee law entail obligations upon States and frame the minimum standards of protection. These are elements inspired by the UDHR that seek to provide both, formally recognized refugees and asylum seekers, with a minimum enjoyment of their fundamental rights and freedoms. Within the context of the 1951 Geneva Convention, the referred guarantees come through provisions foreseen under Article 3, sanctioning discriminatory measures by contracting Parties; Article 4, contemplating the freedom of religion in the same way as provided for nationals of the hosting country; Article 31, prohibiting the imposition of penalties on asylum-seekers for unlawful entry and staying; and Article 33, on the respect for the principle of *non-refoulement*[84]. While Articles 3 and 4 provide that a contracting State shall refrain from executing actions that continue to produce persecution to the asylum-seeker within its jurisdiction, Articles 31 and 33 acknowledge the vulnerability of the situation in which an asylum-seeker is found in; hence, binding hosting States to do not return the asylum-seeker to any territories where he can be subject to ill treatment, and also guaranteeing his right of entry and permanence within domestic territory, availing of the protection of that State while processing his asylum claim, regardless of his compliance with border control usual procedures[85].

Given the essentiality entailed to the principle of *non-refoulement* as its context encompasses the minimum guarantees necessary for enabling the application of the right to seek asylum, this part of the work will primordially deal with it. It not only represents the cornerstone of international refugee protection system, but it is also recognized as a rule of international customary law that is further codified within a

[83] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, pp.43-45.
[84] Ibid., p.51.
[85] Salerno, *L´obbligo internazionale di non-refoulement dei richiedenti asilo*, 2010, pp.492-493.

number of Treaties relating to the protection of human rights[86], in special under Article 33 of the 1951 Geneva Convention, inferring that "*no contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontier of territories where his [her] life or freedom would be threatened on account of his [her] race, religion, nationality, membership of a particular social group or political opinion*".

From the 1951 Geneva Convention it does not derive any obligation upon State Parties, neither to guarantee reception standards to those that do not present asylum application neither to necessarily recognize the status of refugee. Nevertheless, State Parties are bound to internally dispose procedures regarding the presentation and assessment of applications, steps that shall be secured within the premises of Article 33. Even in circumstances under which the State is not in conditions to host the individual the principle of *non-refoulement* shall be respected[87]. In this case, or the State have possibility to transfer the asylum-seeker towards a safe 'third-country' that will not pose any risk of persecution to the person in question, or, in case such transfer is not feasible, it shall concede the asylum seeker a temporary residence permit, ensuring this way he will have access to "*fair and effective procedures for determining status and protection need*"[88], not being victim of *refoulement*. There is only one exceptional circumstance that allows States to derogate from such prohibition, that is when there are reasonable grounds for believing that the refugee represents "*a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particular serious crimes, constitute a danger to the community of that country*", defined under Article 33(2) of the 1951 Geneva Convention.

1.3. The Extraterritoriality on the Principle of *Non-Refoulement* and the Prohibition of Collective Expulsion of Aliens

Although the text of Article 33 does not impose any territorial specification on the application of *non-refoulement*, the plural use of the term "*territories*" presumes that

[86] OHCHR, *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 26 June 1987, Article 3; *American Convention on Human Rights*, San José, 22 November 1969, Article 22(8), *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, Addis-Ababa, 20 June 1974; Article 2(3), *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, Cartagena, 19-22 November 1984, para.5, *Inter-American Convention to Prevent and Punish Torture*, 9 December 1985, Article 13(4).

[87] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.46, See also ECtHR [GC], *Khlaifia and Others v. Italy*, Application No. 16483/12, Judgment 15 December 2016, paras.137 and 158.

[88] Ibid., p.47.

removal is prohibited to any location where the individual can be victim of persecution, including his country of origin or any other places posing similar threat. The 'territories' in question can be, or the shores of another State offering real chances of persecution (direct *refoulement*), or the shores of a third State that, despite of being safe, offers the asylum-seeker the risk to be removed to another place where he possesses real chances of being persecuted (indirect *refoulement*). Moreover, although there is still denial from some States such as the U.S. and Australia to acknowledge the extraterritoriality attributed to the place from where one shall not be removed from[89], the developing course of the ECtHR case-law has shown its application cannot be excluded from circumstances in which the asylum-seeker is found outside, in situation of transit within international waters or terrestrial routes, trying to access domestic shores. This is grounded on the fact that when a State does not facilitate the access to its territory, or imposes obstacles to the entry of asylum-seekers through settlement of severe border control procedures, these elements might consequently lead to their returning to the place where they have fled from. In such circumstances, even though the State did not produce the removal itself, it has contributed to it somehow. The UNHCR confirmed this idea in its opinion on the matter, issued as a response to the decision of the U.S. Supreme Court in the case *Sale v. Haitian Centres Council*[90], where it expressed that: "*blocking the flight of refugees and summarily repatriating them to a place where their lives or freedom would be threatened is contrary to the applicable international refugee treaties and to the international principle of 'non-return' of refugees […] the obligation to not return refugees to persecution arises irrespective of whether governments are acting within or outside their borders*"[91]. Similarly, in the Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its Protocol issued by the UNHCR this view is reaffirmed, expressing that, in such grounds, even though the provision does not specify the limitations from where an individual shall not be removed from, it is necessary to attribute a contextual interpretation of the article, deeming that not only protection

[89] Kim, S., *Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context*, LJIL, Vol.30 No.1, March 2017, p.60.
[90] U.S. Supreme Court, *Sale v. Haitian Centers Council Inc.*, 509 U.S. 155, Judgment 21 June 1993.
[91] Lenzerini, F., *Il principio del non-refoulement dopo la sentenza Hirsi della Corte europea dei diritti dell'uomo*, Rivista di Diritto internazionale, Vol.XCV, Fasc.3, 2012, pp.751-752.

against removal from domestic territory is enough[92], but it is equally necessary to provide proper conditions for asylum-seekers to safely achieve and enter domestic shores, allowing the compliance with the purposes of the article[93].

Same reasoning is also valid when the State conducts returns outside its territory, in operations carried out within its official capacity. In *Hirsi Jamaa and Others v. Italy*[94] for instance, a group of about two hundred individuals who left Libya with the purpose of reaching Italy in 2009 were intercepted by ships of the Italian Revenue Police and the Coastguard, transferred onto Italian military ships and returned to Tripoli, without any due explanation to the procedures they were passing through. Despite in the occasion the Italian government alleged that this was an operation resulted of a bilateral agreement concluded with Libya in order to fight human trafficking, conducted beyond the Italian jurisdictional territory[95], the Grand Chamber recalled to the need of reflecting primordially upon the consequences such actions have produced[96]. The Court emphasized that in reports developed by a number of international organisations and NGOs it was demonstrated that returnees in Libya were treated with no distinction between irregular migrants and asylum-seekers, who accordingly were being systematically arrested and detained under inhuman conditions by their arrival, characterising therein the existence of a high and real probability of those individuals to be subject to treatments prohibited under Article 3 ECHR. This consequently provoked a breach with the principle of *non-refoulement* by Italy, justified therefore through the fact that, since the operation occurred on board of Italian ships, escorted by Italian crew, Italy was anyway bound by the obligations derived from it, reinforcing the idea that the role of the State in this context is crucial in order to define the attribution of responsibility[97]. What accounted in the end was the participation the State has taken along the process that produced the violation on Article 3, whether by playing the role of the author of such actions, whether by playing a secondary function, that of the actor

[92] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 2007, para.28, Available at: http://www.unhcr.org/4d9486929.pdf [Accessed 2 October 2017].
[93] Ibid., para.30.
[94] ECtHR [GC], *Hirsi Jamaa and Other v. Italy*, Application No. 27765/09, Judgment 23 February 2012.
[95] Ibid., para.95.
[96] Ibid., paras.114-115.
[97] Ibid., See also Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p. 128, on the issue see also Giuffré, M., *Watered-Down Rights on the High Seas: Hirsi Jamaa and Others v Italy*, ICLQ, 2012, p. 728 ff., and Liguori, A., *La Corte europea dei diritti dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: il caso Hirsi*, Rivista di diritto internazionale, Vol.95, 2012, p.415 ff.

that conducted the individuals in question to territories where he was submitted to it; whether through returns conducted from within its domestic territory, whether through those occurred on an extraterritorial basis.

The Court equally recognized that the fact the intercepted migrants were not brought to the territory of Italy, but instead pushed back to Libya from the high seas, seemed to be more an attempt from Italian authorities to 'escape' from the territorial connection, derived from the original context of the principle of *non-refoulement*, in order to circumvent domestic legal constraints[98]. It was further remarked that "*when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin, having regard in particular to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by the UNHCR*"[99], presuming Italy should have obtained concrete assurances that those on board would not be victims of treatments prohibited under Article 3 before conducting the returns. Despite bilateral agreements may provide legal basis for interception or interdiction of vessels in the high seas, such actions must respect certain procedures related to adequate identification of refugees that serves to ensure no one is going to be victim of *refoulement*[100]. As defended in doctrine, in such cases relevant authorities shall identify all the intercepted ones, and keep records regarding nationality, age, personal circumstances and reasons for passage[101].

In *Hirsi* there was not only a breach of Article 3, but also of Article 4 Protocol No.4 of the Convention on the prohibition of collective expulsion of aliens, evoked as actions of such nature would automatically conduct migrants to be removed without access to an individual assessment of their cases. The Court expressed its view on the matter by reiterating that "*the purpose of Article 4 Protocol 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the*

[98] Kim, S., *Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context*, 2017, pp.59-60.
[99] *Hirsi Jamaa and Others v Italy*, Application No.27765/09, para.156.
[100] Kim, S., *Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context*, 2017, pp.61-62.
[101] See e.g. Goodwin-Gill, G.S., *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, 23, IJRL 433, 2011, p.456.

measure taken by the relevant authority"[102]. Such rationality is further supported through Article 5 of the Draft Articles on the Expulsion Of Aliens[103], vindicating that the grounds of expulsion shall be based upon justification provided for by law, through assessment carried out in good faith and in reasonable terms, taking into account the gravity of the facts, the conduct of the alien or the current nature of the threat to which the facts gave rise, and not occur in a way contrary to obligations under international law. In this sense, the access to due process of law, defined under Article 6 ECHR, made itself a necessary procedural step in the application of the principle of *non-refoulement*, as it verified whether or not the individual was actually victim of violations described under Article 3[104].

Another case of collective expulsion can be shown through *Khlaifia and Others v. Italy*[105]. The case related to three Tunisian nationals who embarked on boats aiming to reach Italy in September 2011, during the "Arab Spring". The Italian coastguard intercepted the boat and took them to the island of Lampedusa. The passengers were transferred to the reception centre in Contrada Imbriacola, which according to the appellants was overcrowded with precarious sanitation, inadequate space to sleep and no contact with the outside world due to constant police surveillance. Two days after their arrival a revolt broke out among migrants and they managed together to evade the police surveillance and walk to the village of Lampedusa. Around 1,800 migrants were arrested in this action and transferred to Palermo where they were confined on ships. The described conditions were that the detainees were sleeping on the floor and had to wait several hours to use the toilets. They could go outside onto the decks twice a day for only a few minutes at a time. They further alleged to be insulted and suffered ill-treatment by the local police, who kept them under permanent surveillance, and they claimed to not receive any information concerning their situation from the authorities[106].

The Court found that the appellants suffered a violation on their right to liberty as defined in Article 5 ECHR, once their detention had no legal basis in the Italian domestic law, and they were neither provided with any information regarding the legal

[102] *Hirsi Jamaa and Others v Italy*, Application No.27765/09, para.177.
[103] United Nations, *Draft articles on the expulsion of aliens*, 2014, Available at: http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_12_2014.pdf [Accessed 25 January 2018]
[104] Janik, R., *The Right to Asylum in International Law*, 2017, pp. 9-10.
[105] ECtHR [GC], *Khlaifia and Others v. Italy*, Application No.16483/12.
[106] Ibid., paras.14-16.

or factual reasons of their detention[107]. It further appointed a breach on Article 3 ECHR, given the inhuman conditions of the applicants' detention in both, Contrada Imbriacola and on board of the ships in Palermo. The vulnerability of the migrants, combined with the state in which they were held confined, was sufficient to sustain the level of severity required under the provision. And even if Lampedusa was in state of emergency by that time with the wave of over 50,000 arrivals after the uprisings in Tunisia and Libya, the Court could not revoke responsibility attributed to Italy, given the cogent nature of the clause[108]. Finally, like in *Hirsi*, the applicants claimed to be victims of collective expulsion contrary to Article 4 Protocol No.4 ECHR. They alleged to be removed without an individual consideration of their personal situations. Since there had not been carried out any individual interview, and in the discharge decrees there was no reference to their personal circumstances, the Court acknowledged the claim.

Other cases on the matter were *Conka v. Belgium*[109], *Georgia v. Russian Federation (I)*[110], and *Sharif and others v. Italy and Greece*[111]. In all the three the applicants were not only victims of collective expulsion, defined under Article 4 Protocol No. 4 of the ECHR, but also, in the course of their removal procedure, were deprived of their right to liberty and security ruled under Article 5, and likewise of their access to an effective remedy before a national authority when their fundamental rights have been violated, as foreseen under Article 13.

In *Conka* for example, the applicants were members of a Slovakian family of Roma origin who, after a refusal on the admissibility of their political asylum claims and issuance of a deportation order, were unlawfully detained together with others of same nationality. They were summoned to the local police station under the justification of completing their asylum application files and then, by their arrival, were served with a fresh order to leave the national territory, together with the detention mandate. They were so conducted to a closed transit area where they remained for a period of five days, and then removed to Slovakia. The circumstances in which the procedure occurred were acknowledged by the Court as a breach with Article 5, not only for the controversial necessity to depriving the freedom of the applicants while waiting for the removal, but

[107] Ibid., paras.56, 65-66 and 70-73.
[108] Ibid., paras.137 and 158.
[109] ECtHR, *Conka v. Belgium*, Application No. 51564/99, Judgement 5 February 2002.
[110] ECtHR, *Georgia v. Russian Federation*, Application No. 13255/07, Judgement 1 April 2011.
[111] ECtHR, *Sharifi and others v. Italy and Greece*, Application No.16643/09, Judgement 21 October 2014.

also for the lack of information provided on available remedies in a language they could comprehend[112]. The Court found that even though there was the presence of an interpreter in the detention centre to inform the content of the verbal and written communications issued by the Belgian authorities, his services did not extend to provide clear information on the possibility of resorting to remedies, as foreseen under Article 5(4)[113]. This not only configured a violation of Article 13 on the right of "*everyone whose rights and freedoms… are violated*" to "*have an effective remedy before a national authority*", but also recalled the concern of the Court on whether such preclusion could lead to superficial assessment of the applicants' case which, accordingly, could result in risks of wrongly removing the applicants towards territories in which they could be subjected to ill-treatment.

Similar reasoning was applied in *Georgia v. Russian Federation* when Georgia alleged that Russian Federation has permitted or caused the existence of administrative practices involving the arrest, detention and collective expulsion of Georgian nationals from the Russian territory in 2006, entailing violations, particularly on Articles 5 of the Convention and of Article 4 Protocol No.4. The applicant State justified its claim on the fact that the widespread arrests which amounted to at least 2,380 Georgian nationals held, not only represented an interference on these individuals' right to liberty on arbitrary grounds, but also a violation of their legitimate right to remain in that State, attested by valid documents. In addition, it was also implied that, the manner in which the concerned persons were arrested on a discriminatory basis, detained under inhuman conditions, and deported without taking into account their family situations, breached with Articles 14[114], 3 and 8[115] respectively[116]; reinforced by the closure of borders between both countries that blocked any means for Georgian nationals who had been rapidly deported to resort to any kind of remedies, available under Russian domestic

[112] *Conka v. Belgium*, Application No.51564/99, paras.39-41, 44 and 50.
[113] Ibid., para.52.
[114] Article 14 ECHR on the prohibition of discrimination, determining that "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*".
[115] Article 8 ECHR on the right to respect for family and private life, determining that "*everyone has the right to respect for his private and family life*", and that "*there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary… in the interests of national security… for the protection of health or morals, or for the protection of the rights and freedoms of others*".
[116] *Georgia v. Russia*, Application No. 13255/07, paras.16, 18, 24.

law, breaching with Article 13[117]. Such circumstances, not only accounted for violations related to arbitrary and collective expulsion of aliens, but it likewise triggered a sequence of violations of other fundamental rights by the Russian Federation.

Finally, one last case I would like to cite on collective expulsion of aliens is *Sharifi and others*, in which the circumstances therein developed within the context of the Dublin System, involving both, Italy and Greece. The case departed from an application lodged against Italy that returned thirty-three Afghans, two Sudanese and one Eritrean back to Greece, under the rule of the "responsible State" foreseen within the Dublin Regulation[118]. The group after complaining on the reception conditions in Greece, embarked on clandestine vessels departing from Patra with destination to Bari, Ancona and Venice where, by their arrival, were intercepted by the Italian frontier police and in sequence returned to Greece[119]. The fact that Greece presented high probability of conducting forced returns of asylum-seekers without previously providing them with access to asylum procedures, and that the conditions of asylum-seekers' detention there were considered inhuman and degrading, imposed responsibility on Italy for executing such returns. In this sense, while the Court identified violations on Article 3 and 13 by Greece given that the evidences on the lack of appropriate asylum procedures could preclude the applicant´s protection against *refoulement*[120], Italy was considered responsible for breaching with Article 4 Protocol No. 4, under similar rationale as that applied in *Hirsi*[121], on collective expulsion of aliens. As pointed out by the Court, under the given circumstances, Italy was acting contrary to the premises of the referred provision that aimed to prevent removal under grounds that could configure violation on Article 3, hence emphasizing that the purpose of Article 4 was to avoid the possibility of States being able to apply removal without examining individuals' personal situation and, consequently, without allowing them to state their personal arguments against the measure taken by the competent authority[122].

[117] Ibid., paras.13-14.
[118] Council Regulation (EC) No.343/2003, 18 February 2003, Chapter III on the Hierarchy of Criteria, Article 5.
[119] *Sharifi and Others v. Italy and Greece*, Application No.16643/09, paras.1-5.
[120] Ibid., paras.135 and 139-140.
[121] *Hirsi Jamaa and Others v Italy*, Application No.27765/09.
[122] *Sharifi and Others v. Italy and Greece*, Application No.16643/09, para.210.

A more recent case in which the Court of Strasbourg gave its ruling was *N.D and N.T. v. Spain*[123], involving a Malian and an Ivorian national who crossed the border fence between Morocco and the Spanish enclave of Melilla in August 2014, where just after concluding the cross were apprehended by the Spanish Guardia Civil and returned to Morocco. The applicants were not subjected to any identification procedure neither had the chance to express their wish to apply for asylum, or received any legal or medical assistance and support of interpreters. Although Spanish authorities declared that the facts of the case occurred beyond the territory in which Spain exercises jurisdiction[124], the Court highlighted that from the moment a State exercises control and authority over a person through its officials operating outside its territory, this State is bound by the obligations derived from Article 1 ECHR, of recognizing and respecting rights and freedoms protected under Section I of the Convention[125]. Further, the Court also noted that the removals occurred without prior administrative or judicial decision, which thus meant there had not been any individual assessment of case. These circumstances connected to the facts occurred in the previous cases analysed in this part and led the Court to make consider a breach of Article 4 Protocol No.4 and Article 13 on the right to an effective remedy[126].

The prohibition of a State to conduct collective expulsion of aliens is consensually accepted among the international community, being regulated not only by Article 4 Protocol No. 4 ECHR, but likewise through a number of other normative instruments, mostly of regional character[127]. As shown on the analysed cases, its reasoning departs from the juridical notion that such practice leads to the preclusion of one's right to an individualized assessment of his particular situation, which accordingly constrains minimum procedural guarantees within the context of the principle of *non-refoulement*. Its relevance thus majorly regards the revoke of a procedural right that is equally

[123] ECtHR, *N.D. and N.T. v. Spain*, Application Nos.8675/15 and 8697/15, Judgment 3 October 2017.
[124] Ibid., para.44.
[125] Ibid., para.51; See also ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, Application No.55721/07, Judgment 7 July 2011, para.137; ECtHR [GC], *Hassan v. the United Kingdom*, Application No.29750/09, Judgment 16 September 2014, para.74.
[126] Ibid., paras.116-122.
[127] Gatta, F.L., *Le espusioni collettive di stranieri alla luce della giurisprudenza della Corte europea dei diritti dell'uomo*, Quaderni della Facoltà di Giurisprudenza, Cortese, F., Pelacani, G., *Il Diritto in Migrazione, Studi sull'integrazione giuridica degli stranieri*, Università degli Studi di Trento, 2017, p.234: Article 12(5) African Charter on Human and Peoples Rights (ACHPR), Article 22(9) American Convention on Human Rights (ACHR) and, on a Universal scope of application Article 22(1) International Convention on the Protection of the Rights of all Migrant Workers and Member of Their Families.

deemed as a norm of customary international law, inferring on the prerogatives of State sovereignty regarding migration control[128]. The six cases herein approached, "*Khlaifia and Others v. Italy*"[129], "*Hirsi Jamaa and Others v. Italy*"[130], "*Conka v. Belgium*"[131], "*Georgia v. Russian Federation*"[132], and "*Sharif and Others v. Italy and Greece*"[133] and *N.D. and N.T. v. Spain*[134] represent the totality of condemnations defined by the Grand Chamber on the matter. They served not only to build an evolutionary path through the development of the case-law, but also to reinforce the ideology behind it of which is attributed a non-derogable obligation under international law. Along this procedure the ECtHR could hence clarify constitutive elements that justified the peremptory nature of the clause, and also identify other human rights provisions that could not be disassociated of its application[135].

1.4. The Prohibition of Torture under the Principle of *Non-Refoulement*

Despite the prohibition of torture, cruel, inhuman or degrading treatment or punishment is vastly regulated through customary international law and written sources of international law, as contained under Article 5 of the UDHR, Article 3 of the ECHR, and Article 7 of the International Covenant on Civil and Political Rights (ICCPR), there are few explicit normative references linking the provision with situations of deportation, expulsion, or extradition[136]. One of them is found in Article 3(1) of the UN Convention against Torture[137], determining that "*no State shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture*". Similar rationale is expressed through the General Comment No. 31 on the nature of the general legal obligation imposed on States Parties to the ICCPR, inferring that State Parties are required to "*respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or*

[128] Ibid., p.235-237.
[129] *Khlaifia and Others v. Italy*, Application No. 16483/12.
[130] *Hirsi Jamaa and Others v. Italy*, Application No.27765/09.
[131] *Conka v. Belgium*, Application No. 51564/99.
[132] *Georgia v. Russia*, Application No. 13255/07.
[133] *Sharifi and Others v. Italy and Greece*, Application No.16643/09.
[134] *N.D. and N.T. v. Spain*, Application Nos.8675/15 and 8697/15.
[135] Gatta, F.L., *Le espusioni collettive di stranieri alla luce della giurisprudenza della Corte europea dei diritti dell'uomo*, 2017, cit., pp.239-241 and 255.
[136] Janik, R., *The Right to Asylum in International Law*, 2017, p.17.
[137] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27(1).

otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed"[138]. These passages reinforce the idea that the State responsibility toward such prohibition is evoked not only when the State itself commits actions of torture and ill treatment, but likewise when it contributes in any manner whatsoever to conduct any person to places where he could be subject to practices of this kind; rationale that justifies the necessity of making *refoulement* a prohibition under international refugee law as a manner of preventing States to indirectly preclude any person from the enjoyment of the referred right.

This same logic is further addressed within the case-law of the ECHR, stressing that 'prohibition of torture' is not to be regarded as an exclusive negative obligation in which the State shall refrain from conducting behaviours herein condemned, but it likewise imposes on Contracting States a duty to adopt positive measures that are necessary in order to render effective its application. Along the evolution of its practice it was demonstrated in diverse circumstances that the compliance with Article 3 ECHR depends directly on its close association with Articles 5 ECHR prohibiting arbitrary detention, and 6 ECHR guaranteeing the access to an effective and fair due process of law[139].

In this context, Article 5 ECHR that is generally evoked in situations of arbitrary arrest and detention of aliens for reasons of irregular entry, or against persons in course of their removal or extradition procedure, shall respect certain conditions of application. Firstly, the procedure must be in accordance with the domestic law of the contracting State, guaranteeing minimum protection as defined under the Convention. Secondly, it must be carried out with certain proportionality, followed by due diligence and respect for a reasonable period of time. Third, the individual shall be informed in a language of his understanding about the reasons for the arrest. In *Khlaifia*[140] none of these conditions were respected as the applicants were arrested without any due explanation about the reasons of their detention, and then were kept confined, whether in the

[138] HRC, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.12, Available at: http://www.refworld.org/docid/478b26ae2.html [Accessed 25 January 2018].
[139] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.144.
[140] *Khlaifia v. Italy*, Application No. 16483/12.

reception centre in Contrada Imbriacola whether in the ships in Palermo, under circumstances of inhuman and degrading nature. Also in *Conka*[141], the rule was recalled given the controversial necessity of depriving the freedom of the applicants while waiting for the removal, and equally for the lack of information provided on available domestic remedies the applicants were endowed of. The same way, Article 6 ECHR that is largely related to Article 4 Protocol No.4 on the prohibition of collective expulsion of aliens, showed in *Hirsi*[142] and *Sharif*[143] that, by returning all the migrants on board of the ship without a previous individual assessment of their cases, the Italian authorities deprived these individuals of their right to express their personal reasons before any authoritative measure in their regard be taken[144]. Both breaches not only resulted in non-compliance with the respective articles, but also were extended as a direct and indirect violation of Article 3[145].

General practice has shown that such prohibition nowadays is further to be interpreted within a broader scope of application exceeding the limits of the State territory, attributing responsibility to the State also for violations committed on an extraterritorial basis, as reasoned in the decision of the Grand Chamber in the case *Hirsi*, in which Italy was condemned for executing *refoulement* of a group of individuals on board of a vessel in the Mediterranean Sea. These kind of activities, such as interceptions of boats transporting migrants on the high seas, the so called 'push-back operations', and operations of migration control carried out in another State's territory, have become more prominent in the recent years, majorly due to the Mediterranean crisis. They have been denominated as 'commercialisation of sovereignty' or 'jurisdiction shopping'[146], departing from the idea that legal obligations related to asylum protection passed to be offshored whether to a third State whether to the private sector. This new situation has been leaving many individuals without the opportunity to

[141] *Conka v. Belgium* , Application No. 51564/99.
[142] *Hirsi Jamaa and Others v. Italy,* Application No. 27765/09.
[143] *Sharifi and Others v. Italy and Greece,* Application No. 16643/09.
[144] Mantoni, A.I., *Garanzie procedurali derivanti dall'art. 4 del Protocolo n.4 CEDU: il caso Khlaifia,* DUDI, Vol. 11, No.2, 2017, p.528 ff.
[145] Direct violation of Article 3 as in *Khlaifia* the conditions of the detention were considered of inhuman and degrading character, and indirect violation of the provision as in all the cases the violation of the procedural guarantees defined under Article 4 Protocol 4, Article 5 and 6, led the individuals to be victims of *refoulement.*
[146] Gammeltolf-Hansen, T., *Access to Asylum International Refugee Law and the Globalisation of Migration Control,* Cambridge, 2011: "*Jurisdiction shopping may involve a unilateral decision to move control activities to the high seas, or res communis, and thereby bring about a reduction of rights owed under international refugee law with the territorial setting*", p.31.

apply for asylum, which is hence precluding their access to a fair and individual assessment of their respective status and to an effective remedy; fact that generated concerns on the on applicability of general principles of international law, of which the principle of territoriality is central part, in the given context[147]. It is therefore defended that when the protection of human rights is at a stake as approached within the issues herein, territoriality shall not pose obstacles for the compliance with such fundamental obligations, being necessary to acknowledge under these exceptional circumstances an extension of State responsibility to anywhere a State exercises its jurisdiction[148].

This amplification in the jurisdiction of the State conduct is clearly demonstrated through the developments achieved under the cases law of the ICCPR and the ECHR, not only for breaches committed under the prohibition of torture and other forms of inhuman and degrading treatment, but equally for other practices proscribed in both treaties[149]. The Human Rights Committee acknowledged in different circumstances that Article 2(1) ICCPR that defines each State Party shall "*respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized*" was to be regarded under a delocalized logic, reinforcing that "*the reference in that article is not to the place where the violation occurred, but rather to the violation of any of the rights set forth in the Covenant, whenever they occurred*"[150], and that in such circumstances what counts is "*the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant*"[151]. With less limiting normative, in the jurisdiction of the ECHR not even a territorial reference was established, as foreseen in the text of Article 1 defining each contracting part was responsible for guaranteeing the rights set forth in the Convention to all persons within its 'jurisdiction'; accordingly favouring the proposition of appeals concerning violation of obligations occurred outside the territorial sovereignty of the State parties. Both cases

[147] De Boer, T., *Closing Legal Black Holes: The Role of the extraterritorial Jurisdiction in Refugee Rights Protection*, OUP, JRS, Vol.28, No.1, 9 October 2014, pp.119-124.
[148] Ibid., p.121.
[149] Both treaties refer to the obligation of State parts to respect the rights contained under their respective texts, to all persons found within the power of their jurisdiction, not imposing territorial limitations to their respective jurisdictions. *Optional Protocol to the International Covenant on Civil and Political Rights*, 23 March 1876, Article 1: "*A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant*", *ECHR*, Article 1: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*".
[150] HRC, *Lopez Burgos v. Uruguay*, Communication No.52/1979, view 29 July 1981, para.12.1.
[151] HRC, *Celiberti de Casariego v. Uruguay*, Communication No.56/1979, view 29 July 1981, para.10.2.

law hence recognize that the emphasis in order to identify the State jurisdiction in relation to extraterritorial situations shall be addressed to the power exercised by this State in producing the violation, meaning that what counts in this context is the existence of a relation of authority, power or effective control between the State and the victim, regardless of the place where it occurred[152].

In one side it is defended that human rights does not deal with State's rights, but with responsibilities and obligations to which the State has committed throughout its accession to an international treaty that were to be regarded in their notion of jurisdiction simply as a fact of actual authority and control a State has over a given territory or persons, whether exercised lawfully or not[153]. In the other side, the meaning of the extraterritorial application of human rights provisions was to be framed within the logic of the law, and not of the ethics or philosophy; implying that such practice should be limited to exceptional cases in which it is made necessary in order to comply with the purposes of the article, avoiding this way possible clashes with foreign territorial jurisdictions[154]. Even though each approach defends a different degree of extraterritorial application of the State jurisdiction, both made it necessary at a certain extent. This enabled to look through the principle of *non-refoulement* as an obligation that in any case cannot be detached of its extraterritorial application since, in this context, the extraterritoriality of the State jurisdiction represents a paramount element to turn effective the compliance with the premises of the provision in an era in which restrictive external migration control prevails and interdiction or interception practices within territorial and international waters accordingly emerged as a trend practice[155].

It is however important to highlight that the concept of torture is defined under certain limiting premises, as pointed out in Article 1 of the CAT. Not all forms of ill treatment and punishment qualify within this category, being necessary to assess the kind, purpose and severity of the action. The clause defines that the suffering, whether

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[152] De Sena, P., *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo,* Studi di Diritto Internazionale, edited by A. Giardina, B. Nascimbene, N. Ronzitti, U. Villani, Torino, 2002, pp.38-39, 43 and 118-120.

[153] Milanovic, M., *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy,* Oxford, 2011, p.41.

[154] McGoldrick, D., *Extraterritorial Application of the International Covenant on Civil and Political Rights*, in F. Coomans, F. and Kamminga, M.T., (eds.), *Extraterritorial Application of Human Rights Treaties*, 2004, pp.41-42; on the issue see Kim, S., *Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context*, cit., March 2017, pp.51-52.

[155] Ibid., pp.60-62.

physical or mental, must be "*intentionally inflicted on a person for such purposes as obtaining from him…information or a confession*", based on "*discrimination of any kind*", and "*inflicted by or at instigation of or with the consent of acquiescence of a public official*". It means that treatment must proportionate a personal risk, not being enough a situation of generalized violence or suffering inherent in or incidental to lawful sanctions.

While in the case of *Jama Warsame* the Court acknowledged that removal would result in a personalized and distinct risk of ill treatment to the applicant[156], the same did not hold true for the case of *Warda Osman Jasin v. Denmark*[157]. The claim involved a Somali national seeking asylum in Denmark and subject to deportation to Italy following a rejection of her application by Danish authorities. She firstly arrived in Europe through Italian shores, where she was fingerprinted and registered in 2008. There, she and her recent born daughter were granted subsidiary protection and issued residence permit valid for a period of approximately three years. The day after she received the residence permit, the reception centre informed she could no longer stay there and no further assistance to find housing and work was provided. Without success to find a place to stay and employment she went to live in the streets. As her situation became desperate in Italy, she attempted to move and apply for asylum in the Netherlands, where she got pregnant of her second child by a man of Somali origin. In 2009, she and her children were returned to Italy by Dutch authorities while her residence permit was still in course of validity. Back in Italy her situation was similar to that of the initial period and, in 2011, without being able to afford the financial costs of residence permit renewal, she travelled to Sweden to seek asylum there. When she was notified that the Swedish authorities were planning to return her to Italy, she travelled to Denmark, where she applied for asylum in 2012. The Danish Immigration Service determined in 2013 that her situation was a case of subsidiary protection, and that she should be transferred to Italy in reason of procedural matters in accordance with the Dublin Regulation (treated later in this work), inferring that protection was to be provided by the first EU country of asylum. The decision was further appealed before the Refugee Appeals Board, which achieved the same conclusion as the Danish Immigration Service.

[156] CCPR/C/102/D/1959/2010, para.7.8.
[157] HRC, *Warda Osman Jasin v. Denmark*, view 25 September 2015, CCPR/C/114/D/2360/2014, Available at: http://www.refworld.org/cases,HRC,59315b644.html [Accessed 25 January 2018].

The applicant submitted that, the forced return to Italy would expose her and her children to inhuman and degrading treatment, violating Article 7 of the ICCPR. Relied on her own experience, she alleged that reception conditions and human rights standards for refugees and individuals under subsidiary protection in Italy did not comply with international obligations of protection. The applicant further cites the case of *Tarakhel v. Switzerland*[158] that involved similar facts, in which the Grand Chamber acknowledged that the conditions of asylum reception in Italy were not in accordance with respect of fundamental rights contained in the ECHR. The Court recommended Switzerland to obtain assurances from Italy that the applicants would be receiving minimum facilities adapted to their needs otherwise Switzerland would be violating Article 3 ECHR by proceeding with the transference.

The State Party referred to the *Tarakhel* case by stating that the Court reiterated in the occasion that Article 3 "*could not be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home, nor did Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain certain standards of living*"[159]. Hence, the State Party concluded that Article 7 of the ICCPR did not preclude the enforcement of the Dublin System. Further, the State Party considered the communication manifestly ill-founded and therefore the claim was inadmissible. It was justified that "*when applying the country of first asylum, the Refugee Appeals Board requires, at a minimum, that the asylum seeker is protected against refoulement and that he or she be able to legally enter and take up lawful residence in the country of first asylum… However, requiring that the asylum seeker will have the exact same social and living standards as nationals of the country is not possible*"[160].

In conclusion, it is possible to affirm that the case-law application does not rely on the overall situation of the State where the individual is being removed. Information contained in reports issued by International Organizations and NGO's on the matter are not sufficient to prove the individual will be exposed to a situation of danger if returned. It is necessary instead, more concrete elements that exceed mere theory or suspicion, are highly probable to occur if removal is applied, and demonstrate the existence of

[158] ECtHR [GC], *Tarakhel v. Switzerland*, Application No.29217/12, Judgement 4 November 2014.
[159] CCPR/C/114/D/2360/2014, para.6.1.
[160] Ibid., para.4.

personal and present risk of the applicant to be victim of torture, unhuman and degrading treatment or punishment[161]. These elements are exhaustively treated in para. 8 of the General Comment No. 1 on the Implementation of Article 3 of the CAT[162], and they represent a clear guideline on how the assessment to identify the existence of a present, personal and real risk of ill-treatment should be conducted in order to avoid removal contrary to the principle of *non-refoulement*.

2. Sources of the EU Law regulating the European Asylum Protection System

In the actual development stage of the EU law, the rules governing the international refugee protection system are not just preserved within the core values of the Union, but they are further legally enforceable rights, foreseen under specific provisions present in the EU regulation. Article 18 of the European Union Charter of Fundamental Rights (EUCFR or The Charter) for instance, entails an obligation on Member States to guarantee the right to asylum "*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*"[163]. This provision obtained enforcement power through the insertion of Article 6(1) of the Treaty of European Union (TEU)[164] as a result of the agreements reached with the Lisbon Treaty, that recognized that the "*rights, freedoms and principles set out in the Charter…shall have the same legal value as the Treaties*". Article 78 of the Treaty on the Functioning of the European Union (TFEU) in turn, established the Union's duty to "*develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement*"[165], framed in accordance with the premises of the 1951 Geneva Convention and the related Protocol of 1967, and other relevant treaties. It means that the EU acknowledged the scope of international refugee law into its regulation and it also created a single asylum protection system within the EU. This

[161] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, pp.99-100.
[162] UN Committee Against Torture, *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, A/53/44, annex IX, 21 November 1997, para. 8, Available at: http://www.refworld.org/docid/453882365.html [Accessed 26 January 2018].
[163] *Charter of Fundamental Rights of the European Union*, 2012/C 326/02, Official Journal of the European Union, 26 October 2012.
[164] *Consolidated version of the Treaty on European Union*, 2008/C 115/01, Official Journal of the European Union, 09 May 2008.
[165] *Consolidated version of the Treaty on the Functioning of the European Union*, 2008/C 115/01, Official Journal of the European Union, 09 May 2008.

system has bounded Member States to entertain common procedures and rules, and enhanced the regional scope of protection by adding other humanitarian statuses such as the temporary protection[166] and subsidiary protection[167].

In order to explain how the EU enforces the referred system on Member States it is necessary to comprehend the extent of its legal personality, and then how procedural rules define the standards for its implementation. Thus, this part of the work approaches which sections of asylum protection switched from Member States´ competence to EU competence. Then it describes how the EU Asylum Protection System has been interacting with other sources of refugee law.

2.1. The legal value of the Charter within the EU Refugee Law

The European Union Charter of Fundamental Rights was issued in 2000[168] in line with the developments envisaged by the Treaty of Amsterdam regarding the settlement of an AFSJ promoting due respect for fundamental rights, and had by initial purpose reaffirming and stressing the presence of human rights´ values within the core principles of the EU. The collection of fundamental rights therein derived from a combination of a wide range of provisions contained in the ECHR, other human rights treaties, and common constitutional traditions of Member States. The document was devoid of binding force by its establishment, factor that was later reinforced in 2006, in the sentence of *European Parliament v. Council* in which the Court reaffirmed its exclusive relevance[169].

It was with the entry into force of the Treaty of Lisbon that the Charter finally obtained some legal value through the insertion of Article 6(1) TEU, which attributed it same legal value as treaties. In this context, it is important to highlight that the

[166] EC Migration and Home Affairs, definition of temporary protection: "*Temporary protection is an exceptional measure to provide displaced persons from non-EU countries and unable to return to their country of origin, with immediate and temporary protection. It applies in particular when there is a risk that the standard asylum system is struggling to cope with demand stemming from a mass influx that risks having a negative impact on the processing of claims*", Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection_en [Accessed on the 31 January 2018].

[167] EC Migration and Home Affairs, definition of subsidiary protection: "*The protection given to a non-EU national or a stateless person who does not qualify as a refugee, but in respect of whom substantial grounds have been shown to believe that the person concerned, if returned to his or her country of origin or, in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm and who is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country*", Available at: https://ec.europa.eu/home-affairs/content/subsidiary-protection_en [Accessed on the 31 January 2018].

[168] *Charter of Fundamental Rights of the European Union* (2000/C 364/01), Official Journal of the European Communities, 18 December 2000.

[169] CJEU, *European Parliament v. Council*, Application No.C-540/03, judgment 27 June 2006, para.38.

acknowledgement of such legal power remained limited to matters encompassed by the EU law, implying no enlargement on the EU institutional capacities was achieved as the provisions contained therein restricted its scope of application to "*institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law*", as foreseen under Article 51 of the Charter. This means the Charter passed to impose obligations, exclusively, on EU institutions and Member States, concerning issues that likewise had to be aligned with the principle of subsidiarity[170], which required that a previous assessment on whether or not the situation could be regulated through domestic instruments, without evoking the Union's intervention on the matter, was done, in this case, prioritising the non-interference conduct. Moreover, Article 52(1) determined that the rights therein contemplated had further to respect the principle of proportionality[171], implying their enforcement had to be restrained to situations in which they were strictly necessary in order "*to meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others*", limiting even more its sphere of application.

In the other hand, it is important to point out that the developments achieved within the Lisbon agreement also brought a certain extent of legitimacy to the Charter. The ECJ, for instance, interpreted Article 53, that defines "*nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised…by Union law, and international law and by international agreements to which the Union, the Community or all Member States are party*", as a framer of a minimum standards of human rights' protection of which Member States shall not derogate from, in the sense that the application of national standards of protection could not compromise the level of protection provided for by the Charter or

[170] EU, Definition of the principle of subsidiarity: "*The principle of subsidiarity is defined in Article 5 of the Treaty on European Union. It aims to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action at EU level is justified in light of the possibilities available at national, regional or local level. Specifically, it is the principle whereby the EU does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level. It is closely bound up with the principle of proportionality, which requires that any action by the EU should not go beyond what is necessary to achieve the objectives of the Treaties*", Available at: http://eur-lex.europa.eu/summary/glossary/subsidiarity.html [Accessed 03 February 2018].

[171] EU, Definition of the principle of proportionality: "*Under this rule, the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties*", Available at: http://eur-lex.europa.eu/summary/glossary/proportionality.html [Accessed 03 February 2018].

the primacy, unity and effectiveness of EU law[172]. This reasoning is equally confirmed in decision *Melloni v. Ministerio Fiscal*[173] in which the Court reiterated that "*rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State*", including the provisions contained in the Charter[174]. Article 52(3) reasserts this reflection determining that even though the Charter contained a wide range of rights corresponding to principles guaranteed within the ECHR, they were not of restrictive nature, meaning they just represented minimum standards to be followed, and that hence Member States owned certain latitude to adopt more extensive forms of protection at domestic level by their own.

The Charter addresses two specific articles on asylum. Article 18 on the right to asylum sets forth "*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 establishing the European Community*"; Article 19 codifies the principle of *non-refoulement* through condemnation of actions of collective expulsions of aliens, and determination that "*no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*". Although there are still some doctrinal disagreements regarding their legal value and interpretation[175], together they represent some of the few supranational instruments endowed of binding force that approaches the right to asylum in the way it is defined under Article 14 UDHR.

In one side, it is deemed that Article 18 of the Charter, as an instrument regulatory of human rights' values, should be interpreted in the same light as Article 14 UDHR, meaning it should be treated as a right of the individual, and not as a right of the State to consent in granting it[176]. In the other side, instead, it is defended that since Article 18

[172] *Opinion No.2/13(Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties)*, 18 December 2014, paras.187-188.
[173] CJEU [GC], *Stefano Melloni v. Ministerio Fiscal*, Application No.C-399/11, Judgment 26 February 2013.
[174] Ibid., paras.59-60.
[175] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, pp.284-285.
[176] Den Heijer, M., *Article 18 – Right to Asylum*, in Peers, S., Hervey, T., Kenner, J., Ward, A., *The EU Charter of Fundamental Rights*, 2014, cit., p.534; Gil-Bazo, M.T., *The Charter of Fundamental Rights of*

does not provide any autonomous legal content in terms of asylum, it should hence be regarded within the context of the EU law, following the prerogatives of Article 67 and 78 TFEU[177]. Withal, if Article 18 does not provide any clear definition on the right to asylum, making merely a reference to the provisions contained in the 1951 Geneva Convention and the 1967 related Protocol, then the right of asylum accounted in the Charter shall be read within the scope of interpretation applied in such Treaties, concluding the referred protection must be directly linked to the minimum content of asylum protection as foreseen under the prerogatives of the international refugee law.

2.2. The influence of the ECHR in the EU Asylum Protection System

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is the first international instrument regulating the protection of human rights that is endowed of both, legal enforcement and mechanisms of control, through the Commission and the Court. The Convention nowadays is not yet a written source of law directly related to the EU and its Member States, but it is still relevant within the EU law as an exogenous source, evoked through the Charter as determined by Article 52(3) of the Charter, and used for interpretative purposes and development of legal practice of the Court of Justice, as general principles of law[178]. Despite the efforts engaged in the Lisbon agreement to insert the ECHR within the EU's institutional scope, as provided for under Article 6(2) TEU, defining that "*the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedom…such accession shall not affect the Union's competences as defined in the Treaties*", this new legal status attributed to the ECHR in the EU legal order brought to table a number of institutional issues that had to be assessed in order to define the compatibility of the provision with the EU law.

The safeguard contained in the final part of this passage, inferring that such accession was not to affect the Union's competences as defined under treaties, not only confirmed the still existence of a State prerogative aiming to restrain the autonomy of EU over the State conduct, but it also imposed limitations to the EU's accession to the Convention that, in these terms, differed from the usual conditions applied for ordinary

the European Union and the Right to be Granted Asylum in the Union´s Law, Refugee Survey Quarterly, 3/2008, p.33 ss.

[177] Ippolito, F., *Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?*, EJML, 1/2015, p.20.

[178] Amalfitano, C., *Il diritto non scritto nell'accertamento dei diritti fondamentali dopo la riforma di Lisbona*, Il diritto dell'Unione Europea, Torino1/2016, cit., p.25.

memberships. Such premise is further reinforced in Article 2 of the Protocol No.8 of the Lisbon Treaty[179], where it is affirmed that the EU's accession to the ECHR must anyway preserve the specific characteristics of the Union and European Union law, the competences of the Union and the relationship between the EU and Member States and the ECHR; leaving the EU with a narrow path to effectively accede to the Convention[180]. It is relevant to account that this logic has constantly been preserved during the course of development of the EU in a way to do not overpass the premises of State sovereignty of Member States, as demonstrated within the Opinion No.2/94 on the Accession to the ECHR in 1996[181] relating to the competence of the European Community to accede the ECHR. The Court expressed its view by inferring that even though the respect for human rights was a condition to be preserved within the conduct of the Community, the "*principle of conferred powers must be respected in both the internal action and the international action of the Community*"[182].

There is no doubt that the effective accession of the EU to the ECHR would not only enhance the credibility of the Union when promoting human rights and democracy in its external relations, but also foster the protection of human rights internally as the Convention would become a formal binding source of law to the EU Member States. As affirmed by the Court of Justice itself in the Opinion No.2/13[183], in these terms "*the EU, like any other Contracting Party, would be subject to external control, to ensure the observance of the rights and freedoms the EU would undertake to respect in accordance with Article 1 ECHR. In that context, the EU and its institutions, including the Court of Justice, would be subject to the control mechanisms provided for by the ECHR and, in particular, the decisions and the judgments of the ECtHR*". However, it is still important to attempt for the adversities of being a non-State part of the treaty since

[179] *Protocol (No.8) Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms*, C 326/1, Official Journal of the European Union, 26 October 2012, Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FPRO%2F08 [Accessed 06 March 2018].

[180] Isiksel, T., *European Exceptionalism and the EU's Accession to the ECHR*, EJIL, 2016, p.566 ff.

[181] *Opinion 2/94 pursuant to Article 228 of the EC Treaty, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 28 March 1996, Available at: http://eur-lex.europa.eu/resource.html?uri=cellar:3645916a-61ba-4ad5-84e1-57767433f326.0002.02/DOC_1&format=PDF [Accessed 09 Nov. 2017].

[182] Ibid., para.24.

[183] *Opinion No.2/13 (Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties)*, para.181, Available at: http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN [Accessed 03 February 2018].

within this context, the commitments arisen from its accession would have to be reshaped in order to fit the particular characteristics of this body, in a way to do not compromise its internal functions. Firstly, the autonomy of the EU legal order should not be affected anyhow, meaning the accession agreement had to respect the ECJ exclusive competence over disputes falling within the scope of the EU treaties[184], as specified in Article 3 of the Protocol No.8[185]. This premise is further reinforced in the Opinion No.2/13, stating that "*any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of the EU law*" [186]. Secondly, it was necessary to establish a harmonious relation between the Courts of Strasbourg and Luxembourg, in a way to preserve both powers and final jurisdiction respective roles, not allowing one to jeopardize the autonomy and of the other, and vice-versa[187].

In this regard, it is important to take into account the legal mechanisms proposed under the development of the "prior involvement of the ECJ", envisaging a previous ruling by the Court of Luxembourg on "*the validity of an EU provision…as well as on the interpretation of primary law, when the issue of their compliance with the Convention is still pending in Strasbourg*"[188], as defined in Article 3(6) of the Draft Agreement[189]. Its central idea was to delimitate the power of the EU over disputes arisen against EU Member States before the ECtHR, allowing the ECJ to opine strictly on matters that equally involved the implementation of EU law. Such criteria had further to be followed by due application of the principle of subsidiarity, enabling the opinion of the Court of Luxembourg to a preliminary ruling, only after all domestic remedies of the respondent State was exhausted, as foreseen in Article 267 TFEU and also under the judicial system of control instituted by the ECHR, ruled under Article 35(1) of the Convention. If in one hand this tool imposed that the decisions taken before

[184] Baratta, R., *Accession of the EU to the ECHR: The rationale for the ECJ's prior involvement mechanism*, CMLR 50, 2013, p. 1311.
[185] *Protocol No.8 Relating To Article 6(2) Of The Treaty On European Union On The Accession Of The Union To The European Convention On The Protection Of Human Rights And Fundamental Freedoms*, C 326/1, Official Journal of the European Union, 26 October 2012, Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FPRO%2F08 [Accessed 07 March 2018].
[186] *Opinion No.2/13*, para.184.
[187] Baratta, R., *Accession of the EU to the ECHR: The rationale for the ECJ's prior involvement mechanism*, 2013, pp.1312-1313.
[188] Ibid., p.1312.
[189] *Draft Agreement*, Found at *Opinion 2/13 of the Court*, Part V, para.56.

Strasbourg regarding matters involving the EU law would bind EU institutions, including the CJEU[190], in the other hand it also guaranteed that Luxembourg would preserve its monopoly over the interpretation of EU law and its implementation, hence playing a supervisory role on the application of the ECHR provisions by EU Member States[191].

The ECJ so far seems to attribute solid relevance to the ECtHR, in the sense that it regularly refers to Strasbourg to matters of human rights, and that the first cited has never expressed disagreement or any other form of reservation in respect specific cases of the last cited[192]. This indicates that, despite the absence of an effective accession of the EU to the Convention, the Court of Strasbourg has been set up as a major arbiter on matters of human rights within the EU; implying that if a rejection by Luxembourg of any controversial finding appointed by Strasbourg involving matters of EU law occurs, it further must be justified through excellent reasoning grounds, in particular coming from a court of general jurisdiction as the ECJ, not specialised in human rights. The persuasive authority Strasbourg holds within the EU is what ensures that the scope of the Charter, which is part of the EU law, be corresponding to the rights foreseen under the Convention, as defined by Article 52(3) of the Charter[193]. This in the other hand restates the rationale of the previous paragraph inferring that, if the Charter is part of EU law, then the interpretation of Article 52(3) shall be subject to the ultimate interpretation of Luxembourg, ensuring the ECJ the final authority over Strasbourg jurisprudence in the EU law.

As demonstrated along this text, it is true that the integration between both jurisdictions can enhance the level of human rights protection within the EU, but is valid to point out that in similar grounds, this junction can at also pose institutional conflicts between both Courts. For instance, in what regards the right to asylum, in the view of Strasbourg, Member States are bound to accept responsibility for refugees, while under the EU law, following the premises of the Dublin System, Member States

[190] *Opinion No.2/13 of the Court*, para.181, 185; See also Kokott, J., Sobotta, C., *Protection of Fundamental Rights in the European Union: On the Relationship between EU Fundamental Rights, the European Convention and National Standards of Protection*, Yearbook of European Law, 2015, p.65 ff.
[191] Baratta, R., *Accession of the EU to the ECHR: The rationale for the ECJ's prior involvement mechanism*, 2013, pp.1314, 1316, 1323.
[192] Kokott, J., Sobotta, C., *Protection of Fundamental Rights in the European Union: On the Relationship between EU Fundamental Rights, the European Convention and National Standards of Protection*, 2015, p.66.
[193] Ibid., p.65.

are allowed to return refugees in accordance to the rule of the 'responsible State'[194]. This controversy occurred in a couple of different cases adjudicated by the ECtHR, among which there are *M.S.S. v. Belgium and Greece*[195] and *Tarakhel v. Switzerland*[196], both related to the forced return of applicants, in the quality of asylum-seekers, to their first European country of asylum, in accordance with the referred Dublin rule. Strasbourg emphasized in the first case that Greece presented major structural deficiencies in the treatment of refugees, and that the Belgian authorities, knowing that, could have refrained from transferring the applicant if they had considered that Greece was not fulfilling its obligations under the Convention[197]. In the second case, the Grand Chamber used similar words as those used in the first one in order to justify that also Switzerland, even though not being Member State of the EU, hence not bound by the Dublin Regulation, could have refrained from returning the applicants if they had considered that Italy was not a 'safe third-country'[198]. In both cases, the Strasbourg reinforced that "*the Convention did not prohibited Contracting Parties from transferring sovereign power to an international organisation in order to pursue cooperation in certain fields of activity. The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their legal obligations. State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides*"[199]. This means Strasbourg will not interfere in EU law matters or on the interpretation provided for by Luxembourg, as long as there are neither deficiencies within the application of the rights set forth by the Convention within the EU, neither a substantial violation of the Convention rights, composing material conflict between the EU law and the Convention itself[200].

Although institutional practice between the Convention and the EU is still in course of development, it is anyhow important to acknowledge the relevant role the ECHR has been playing in the protection of human rights within the EU. It represents the

[194] Ibid., p.67.
[195] ECtHR [GC], *M.S.S. v. Belgium and Greece*, Application No.30696/09, Judgment 21 January 2011.
[196] *Tarakhel v.* Switzerland, Application No.29217/12.
[197] *M.S.S. v. Belgium and Greece*, Application No.30696/09, para.340.
[198] *Tarakhel v. Switzerland*, Application No.29217/12, para.90.
[199] Ibid., para.88, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, para.338.
[200] Kokott, J., Sobotta, C., *Protection of Fundamental Rights in the European Union: On the Relationship between EU Fundamental Rights, the European Convention and National Standards of Protection*, 2015, p.68.

possibility for any individual claiming to be victim of any violation of the rights set forth therein to access an extra recourse when effective domestic remedies have been exhausted and Member States in general accept the decisions taken within the Court of Strasbourg. Particularly in asylum cases, despite the ECHR is neither competent to examine the 1951 Geneva Convention neither provides for a specific clause on the right to asylum, still, it adjudicates cases where there is imminent risk of violations of Article 3 on the prohibition of torture that has been attributed direct relation to the principle of *non-refoulement*, referred as the minimum content of International Refugee Law. Within this context, Strasbourg has already led a number of cases involving practices of *refoulement* where the Member State was condemned for taking indirect participation on the breach, for conducting the applicants to territories where there was real and personal risk of suffering treatments contrary to those foreseen under Article 3, as adjudicated in *Ahmed v. Austria*[201], *Sufi and Elmi v. United Kingdom*[202], *M.S.S v. Belgium and Greece*[203].

In this way, it is also important to make reference to the existence of an additional legal instruments denominated 'interim measures', available to the Court of Strasbourg for the purposes of rendering effective the protection of the rights set forth in the Convention; complementing hence the purposes of Article 34 that defines the right of every person to accede the Court when victim of a violation of one of the rights guaranteed within the Convention by one of the High Contracting Parties. Despite this mechanism is not regulated by the ECHR itself, it is referred in the Rules of procedure of the Court[204], under Rule 39(1) determining that "*the Chamber or, where appropriate, the President of the Section or a duty judge appointed… may, at the request of a party or of any other person concerned, or of their own motion, indicate… any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings*".

Despite its scope of application is not specified, the application of Rule 39 is deemed to be applied under a very limited sphere, comprising exclusively situations in which

[201] ECtHR [GC], *Ahmed v. Austria*, Application No. 25964/94, Judgment 17 December 1996.
[202] ECtHR, *Sufi and Elmi v. United Kingdom*, Applications Nos.8319/07 and 11449/07, Judgment 28 June 2011.
[203] *M.S.S. v. Belgium and Greece*, Application No.30696/09.
[204] Council of Europe, *Rules of Court*, 14 November 2016, Available at: http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf [Accessed 03 February 2018].

imminent risk of irreparable harm is present[205], as shown in *Mamatkulov and Askarov v. Turkey*[206]. The referred case started when two Uzbek nationals were extradited to Uzbekistan by Turkey after Uzbekistan claimed they had committed terror-related crimes. Turkey proceeded with the decision even under allegations of the appellants stating they were political dissidents, and that they would face ill-treatment and torture if returned. In 1999, the Turkish government issued a decree ordering the applicant's extradition, after Uzbek authorities assured to the Turkish Ministry of Foreign Affairs that the applicants would not be subject to acts of torture or sentenced to capital punishment. The Uzbek Supreme Court found the applicants guilty for setting up a criminal organization, terrorism attack on the President, seizing power through the use of force or by overthrowing the constitutional order, arson, uttering forged documents and voluntary homicide and sentenced them of imprisonment. The applicants' representatives claimed that the terms of the punishment were unknown, that the applicants did not have a fair and public trial, and that the conditions of the Uzbek prisons were bad and degrading[207].

In light of the present factors the Chamber declared the case admissible. The applicants alleged a breach of Articles 2 and 3, on the right to life and prohibition of torture, inhuman or degrading treatment or punishment respectively; Article 6 on the assumption that extradition proceedings in Turkey and the criminal proceedings in Uzbekistan were unfair; and Article 34 inferring that Turkey failed to comply with its obligations by the moment they extradited the applicants without following the measure under Rule 39. The Court denied a violation of Articles 2 and 3, since the findings on the general situation in Uzbekistan were not enough to configure personal risk, and defined Article 6 was not applicable since decisions regarding entry, stay and deportation of aliens did not concern the determination of the applicants' civil rights. However, the Grand Chamber acknowledged a breach of Article 34, sustaining that for the effective operation instituted under the referred clause, the applicants should be able to communicate freely with the Court without being subject to any form of pressure from the authorities, including direct coercion, flagrant acts of intimidation and any other actions that might dissuade applicants from acceding the remedy. Further, the

[205] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.134
[206] ECtHR [GC], *Mamatkulov and Askarov v. Turkey*, Application No. 46827/99 and 46951/99, Judgment 4 February 2005.
[207] Ibid., paras.28, 31 and 33.

Court added that Contracting States were required to refrain from any acts of omission which prevented the Court from considering the subject matter of an application under its normal procedure. Lastly, the Court pointed out that interim measures under Rule 39 was to be evoked only in cases of imminent risk of irreparable harm, in particular when the situation concern violation of Articles 2, 3 and 8[208], confirming the idea that such tool is to be applied when the protection of fundamental rights is at a stake.

[208] Ibid., paras.57, 71, 74-78 and 80.

CHAPTER II:
FEATURES OF THE EUROPEAN UNION ASYLUM PROTECTION SYSTEM

The purpose of this chapter is to present the distinct features, particularly inherent of the EU Asylum Protection System, and discuss how they have been impacting in the compliance of international obligations derived from the International Asylum Protection System in the context of the current refugee crisis. An assessment on this system's multi-level governance, framed by the interaction among the EU Law, the ECHR, International Refugee Law, and their respective applicability within the domestic asylum system of Member States, is thus made necessary. Therefore the content herein is divided in three parts, approaching firstly, the prerogatives of the Dublin Regulation and their role in shaping the EU Asylum Protection System; secondly, the forms of international protection recognized within the EU legal order and their related guarantees to third-country nationals and stateless persons seeking asylum within the EU; providing thirdly, an assessment on the coherence in the implementation of these elements, explaining how they compromise the level of protection offered within the EU.

1. The development of a EU Asylum Protection System

The idea to develop a common framework to deal with asylum protection started when regional issues related to circulation of people and security arose in the outcomes of the Schengen Agreement in 1985. Once the agreement forecasted gradual elimination of the community internal borders to enable free circulation of people, services and capital, it came also the need to think of common criterion and procedures to admit third-country nationals within the Schengen territory, including asylum-seekers and persons in need of humanitarian protection.

The Dublin Convention brought a first institutional development on this matter[209]. It was held in June 1990 and entered into force in 1997 after ratification by all Member States. The Convention's most important contribution was the establishment of a

[209] *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities* (97/C 254/01), Official Journal of the European Communities, 19 August 1997.

common framework for determining which country in the EU decides an asylum seeker's application, and to ensure that only one Member State processes each claim. However, despite of its innovative extent, the application of such measures showed to be rather ineffective. Article 3 for instance defined that the EU Member State designated to examine the claim, should carry out the procedure in line with the Dublin Convention and its own national laws[210]. That generated different levels of claim's assessment and conditions of removal among EU countries that required to be more standardized in order to create a single policy in the admission of third country nationals (TCN's) within the region[211].

A subsequent development came with the Treaty of Maastricht[212] by insertion of asylum protection issues into primary sources of the communitarian law, within the content of the third pillar of the European Community on cooperation in matters of Justice and Home Affairs (JHA). In this stage, the management of asylum protection operated in an intergovernmental cooperation mode, in the sense of considering this a common interest of Member States, but still not conferring any communitarian competence to implement it within the region[213].

Just with the Treaty of Amsterdam, adopted in 1997 and entered into force in 1999, that a first step to the settlement of a communitarian competence in the management of asylum protection was done[214]. The Treaty reshaped the cooperation on JHA by setting up an area of freedom, security and justice (AFSJ) that was to be gradually realized through the removal of obstacles to the free circulation in one side, and reinforcement of security in the other. This new incorporation in the JHA represented an evolution not only in substantive terms but also in procedural matters as issues treated under its competence, including asylum protection, were transferred to the EC Treaty, changing

[210] Refugee Council, *The Dublin Convention on asylum applications: What it means and how it's supposed to work*, 2002, p.2, Available at: https://www.refugeecouncil.org.uk/assets/0001/5851/dublin_aug2002.pdf [Accessed on the 27 August 2017].
[211] Ibid., p.3.
[212] *Treaty on European Union (Consolidated Version), Treaty of Maastricht* (C 325/5), Official Journal of the European Communities, 7 February 1992.
[213] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, pp.244-245.
[214] *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts* (97/C 340/01), Official Journal of the European Communities, 10 November 1997.

its scope of application from the modality of intergovernmental cooperation to specific competences of the European Community[215].

This was the most important change resulted from the Treaty of Amsterdam in normative terms. Once asylum matters passed to be competence of the EU, the actions adopted by the European Court of Justice (ECJ) on that was to be respected at a domestic level of Member States. In the other hand, the ECJ jurisdiction was still very limited in its scope as the Court of Justice could only pronounce its view in cases pending before domestic Courts of last instance. In other words, the Court could only interfere when domestic remedies are exhausted. As pointed out in Article 68(1) of the Treaty establishing the European Community (TEC), "*where a question on the interpretation… or on the validity or interpretation of acts of the institutions of the Community… is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon*"[216]. This limitation brought critics on the effectiveness of the EU in regulating asylum protection, especially because asylum seekers hardly access Supreme Courts, and lower instances courts do not have the power to suspend the application of secondary legislation. Further, as ruled in Article 68(3) TEC, the ECJ could only pronounce to open cases, precluding review of adjudicated cases, not being able to interfere in decisions already adopted by domestic Courts[217].

The commitment of the EU in institutionalizing a common framework on asylum protection within the region came also through insertion of Article 63 of the TEC, which determined that within the period of five years from the entry into force of the Treaty, the Council had the duty to adopt measures on asylum management, in accordance with the 1951 Geneva Convention and the Protocol of 1967, respecting the procedures described in Article 67. Further, this aim was reinforced within the discussions held in the European Council on Refugees and Exiles (ECRE) EU Tampere

[215] European Union, *The gradual establishment of an area of freedom, security and justice*, Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:a11000 [Accessed on the 31 January 2018].
[216] *Consolidated Version of the Treaty Establishing the European Community*, Official Journal C340, 10 November 1997.
[217] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, pp. 247-248.

Summit in 1999[218], where head of States and Head of Governments of Member States not only acknowledged the importance of making effective the respect for the right to seek asylum within the region, but also agreed to work for the institutionalization of a common European regime in matters of asylum, in line with the 1951 Convention's prerogatives and with due respect for the principle of *non-refoulement*[219]. The purpose was to conciliate these objectives with the advancements achieved under the negotiations of the Treaty of Amsterdam in order to develop a Common European Asylum System (CEAS). In a first instance, the policy envisaged to develop clearer and more effective procedures than those established under the Dublin Convention prerogatives, in terms of defining the State competent to assess each asylum claim, settling minimum standards of reception within the EU, and adopting complementary forms of protection in order to offer an appropriate status to those in need of such protection[220].

The aforementioned procedures at that stage was still strongly bounded to the conduct of Member States, as during the established transitional period the Council had to act unanimously on proposals brought by the Commission or, on the initiative of a Member State after consulting the European Parliament (EP)[221]. This meant that the EU had firstly to obtain approval of all Member State before enforcing any measure on asylum matters. This prerogative combined with the limitations posed by Article 68 on the scope of the ECJ through domestic adjudication on asylum cases proved that, despite asylum matters was attributed communitarian competence by that time, the decision-making procedures still safeguarded the state sovereignty at first place.

The UNHCR by that time, even though recalling to the institutional obstacles of typical supranational processes, highlighted that this was a unique opportunity to solve considerable differences in the Member States asylum policy, creating a more homogeneous and coherent protection system in the region. The UN agency further expressed that this measure should not frame the EU-wide arrangements on "*the lowest denominator*", instead it should be a mechanism to ensure asylum seekers equal chances

[218] European Council on Refugees and Exiles, *Observations by the European Council on Refugees and Exiles on the Presidency Conclusion of the Tampere European Council*, 15 and 16 October 1999.
[219] ECRE, *The ECRE Tampere Dossier*, June 2000, Available at: https://www.ecre.org/wp-content/uploads/2016/07/The-ECRE-Tampere-Dossier_June-2000.pdf [Accessed on the 27 August 2017]
[220] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.249
[221] *Treaty of Amsterdam*, 1997, Title IV EC, Visas, Asylum, Immigration and other Policies related to free movement of persons, Available at: http://www.unhcr.org/41b6ccc94.pdf [Accessed on the 27 August 2017].

of obtaining protection through the EU, and to avoid secondary migratory movements, guaranteeing more equal share of responsibility in the "region". It means that the harmonization of rules should not be framed in a way to limit to the concession of asylum through severe assessment of claims. On the contrary, it should be formulated in an inclusive manner by encouraging Member States that still hadn't achieved the expected standards of protection to improve their patterns[222].

Another important progress in the EU asylum system came with the entry into force of the Lisbon Treaty in 2009[223], with some relevant developments that strengthened the EU institutional capabilities on the matter. With the Treaty, the European Community is replaced and succeeded by the European Union that acquires full legal personality for issues related to the JHA competence. Further, the Treaty itself produced two normative documents: the TEU that was entirely reviewed, and the TFEU that substituted the TEC, both containing relevant passages in terms of communitarian management of asylum protection.

A first remark of such advances can be identified in Article 67 of the TFEU that reinforced the EU target to promote the AFSJ with due respect for fundamental rights and the different legal systems and traditions of Member States. Article 67(2) provides for a change in relation to the proposal developed within the Treaty of Amsterdam on the AFSJ that aimed the removal of internal borders and harmonization of rules. In the context of the Lisbon Treaty the idea was of a more incisive character, presuming the development of a common single EU policy, and likewise, the assurance that equal and fair treatment would be provided to third-country nationals along different Member States, as foreseen in the conclusions of the Tampere Summit[224].

It is important to add that Article 78 TFEU (ex-Article 63, point 1 and 2, and 64(2) TEC) strengthens even more the intentions expressed under Article 67, not only reaffirming the duty to develop a common policy on asylum with due respect for the premises of the 1951 Geneva Convention and the 1967 related Protocol, and other relevant treaties on the matter, but also including on this policy the treatment of individuals falling within the scope of subsidiary protection and temporary protection. It

[222] UNHCR, *Amsterdam Treaty: UNHCR calls for a fair and coherent EU asylum policy*, pp.19-20, Available at: http://www.unhcr.org/41b6ccc94.pdf [Accessed 3 July 2017].
[223] *Treaty of Lisbon: Amending the Treaty of European Union and The Treaty establishing the European Community* (2007/C 306/01), Official Journal of the European Union, 13 December 2007.
[224] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.254.

further determines under para.2 procedural rules in order to achieve such purposes, by the adoption of measures comprising the development of a uniform refugee, subsidiary protection and temporary protection statuses for TCNs valid throughout the Union, common system of temporary protection in the event of a massive inflow, common procedures for granting and withdrawing asylum and subsidiary protection, criteria for determining which Member State is responsible for considering an application, establishment of reception standards and formation of co-operative partnerships with third-countries for the purpose of managing inflow of asylum-seekers.

A second advance is found under Article 6(1) and (2) TEU which recognized the Charter the same legal value ascribed to the treaties and the adhesion of the EU to the ECHR respectively[225]. Furthermore, Article 6(3) established that fundamental rights guaranteed within the ECHR and derived from common constitutional traditions among Member States passed to be part of general principles of the EU law. So, if by one side the pre-Lisbon version detained that Member States had the obligation to respect such rights, with the entry into force of the Treaty of Lisbon, such notion became part of communitarian law, accordingly composing the general principles of the EU[226]. The Article in its entirety not only enhanced the Union's institutional commitment towards standardizing mechanisms on the protection of human rights within the EU, but it further reinforced the notion that these human rights values descended from distinct legal sources, confirming the EU pluralist approach as mentioned in the beginning of the chapter[227].

As demonstrated through the provisions discussed in the previous paragraphs, with the Treaty of Lisbon, the development of an EU common asylum protection system passed to be part of the primary sources of EU law. It means that, even though the EU is not a contracting Party of the 1951 Geneva Convention and the 1967 related Protocol in reason of its lack of institutional competence, the adoption of such provisions guaranteed the respect for the prerogatives of the accounted Treaties in the implementation of the CEAS. Moreover, the reference to other documents such as the Charter, the ECHR and principles derived from common legal traditions of Member States, showed the EU normative encompassed a broader scope of protection than that

[225] Amalfitano, C., *Il diritto non scritto nell'accertamento dei diritti fondamentali dopo la riforma di Lisbona*, 2016, p.22 ff.
[226] Ibid., p.23.
[227] Costello, C., *The human rights of migrants and refugees in European law*, 2016, p.41.

established under international refugee law. And finally, the fact that all EU Member States have ratified the 1951 Geneva Convention ensured within the EU the respect for minimum standards of protection, that if not in compliance with the aims of the Treaty of Lisbon, at least compatible with the international refugee protection system[228].

One last important outcome of the Treaty of Lisbon came with Article 267 TFEU, amplifying the competences of the Court of Justice that obtained a preliminary ruling competence not only on cases involving primary sources of EU law, but also secondary sources. Beyond that, the appeal to the ECJ was no longer exclusive recourse of courts of last resort, but also accessible to lower courts, that had that as a facultative recourse[229]. These represent relevant changes in comparison with Article 68 TEC, and controvert the critics done in respect to the competence of the Court of Justice within the context of the Treaty of Amsterdam, where only cases taken in front of highest instance courts could resort to the ECJ.

2. The forms of protection recognized within the EU Law

The EU legal order contemplates three forms of international protection. While the first two are foreseen within the Directive 2011/95/EU[230], beneficiating third-country nationals and stateless persons falling within both scopes, that of refugee status as set forth in Article 2(d) and that of subsidiary protection defined under Article 2(f); the third instead, provides for a 'temporary protection', deemed as a protection of collective nature that is recalled exceptionally in cases of massive inflows of migrants, evoked through Article 78(2)(c) TFEU and ruled since 2001 by the Directive 2001/55/EC[231]. All three are not only entailed by the legal obligations derived from the principle of *non-refoulement*[232], considered the cornerstone of the International Asylum Protection

[228] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.255
[229] Ibid., p.258.
[230] *Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, Official Journal of the European Union, 13 December 2011.
[231] *Council Directive 2001/55/EC on the 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*, Official Journal, 20 July 2001.
[232] In the cases of the refugees and persons eligible for subsidiary protection the respect for the principle of *non-refoulement* is foreseen under Article 21(1) of the Directive 2011/95/EU, and in the case of temporary protection it is found in Article 3(2) of the Directive 2001/55/EC. On this matter, it is also important to highlight that majority of doctrines sustain that the obligations arisen from the principle of *non-refoulement* cannot be derogated even under circumstances of massive inflow of migrants. See in Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.386, cit.1097, G. Goodwin-Gill, J. McAdam defended that "*temporary protection is not an attempt to displace*

System, but are also complemented by the duty of the hosting Member State to issue residence permit to the applicant along the entire course of his asylum procedure, as defines the Directive 2004/81/EC[233]. Given the distinct legal sources regulating each of these forms of protection, I will initially approach the first two as they are foreseen under the same Directive, and then, separately, address the third one that, given to the particularities of its purposes, detains a different framework of protection.

Before discussing the major elements formulating the concept of refugee status and subsidiary protection within the EU law, it is firstly necessary to frame the legal context in which they are inserted in, thus describing the prerogatives of the 'Qualification Directives' that are the legal sources regulating both forms of protection, and explaining the procedural matters entailed to them.

2.1. The Qualification Directives: The grounds for determining international protection within the EU

Currently defined as the 'Qualification Directive' (QD), the Directive 2011/95/EU is a recast of the Directive 2004/83/EC[234], of which major purpose is to settle standards for qualifying the beneficiaries of international protection within the EU and the content of the protection granted, as refers Article 1 on the purposes of the Directive. It represents the first supranational instrument endowed of legal binding force, entertaining a

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or renegotiate the 1951 Convention´s rules and standards, but rather is a pragmatic response intended to clarify the application of the principle of non-refoulement in certain circumstances, and to prioritize the granting of particular rights to persons arriving en mass"; On this matter, see also the documents UNHCR, *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, 19 February 2001, Available at: http://www.unhcr.org/protection/globalconsult/3ae68f3c24/protection-refugees-mass-influx-situations-overall-protection-framework.html [Accessed 24 March 2018]; EXCom, *Protection of asylum-seekers in situations of Large-Scale Influx*, Conclusion No.22 (XXXII), 21 October 1981, Available at: http://www.unhcr.org/excom/exconc/3ae68c6e10/protection-asylum-seekers-situations-large-scale-influx.html [Accessed 24 March 2018]; EXCom, *General Conclusion on International Protection*, Conclusion No.74 (XLV), sections(r)-(u), 7 October 1994, Available at: http://www.unhcr.org/excom/exconc/3ae68c6a4/general-conclusion-international-protection.html [Accessed 24 March 2018]; EXCom, *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection*, Conclusion No.103 (LVI), section (l), 7 October 2005, Available at: http://www.unhcr.org/excom/exconc/43576e292/conclusion-provision-international-protection-including-complementary-forms.html [Accessed 24 March 2018].

[233] *Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities*, Official Journal of the European Union, 29 April 2004.

[234] *Council Directive 2004/83/EC on the 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*, Official Journal of the European Union, 29 April 2004.

formalized juridical status to beneficiaries of alternative forms of protection, amplifying thus the group of individuals protected against *refoulement*[235].

Its premises are largely grounded in the 'Protection Theory' that stands for the idea that international protection shall be recognized, not only when State actors are responsible for committing serious harm to the life of an individual, but likewise when the such actors are not connected to the State, and in this case, the State fails to protect this individual[236]. This in other words summarize the idea that anyhow, when persecution or any other actions provoking serious harm is unavoidable in the country of origin of the applicant, being for actions the State has taken itself or for its lack of efforts to protect the individual against that, then the applicant´s well-founded fear of persecution is justified given his inability to avail from the protection of his own country. This reasoning aligns with the premises of the 1951 Geneva Convention and the ECHR, attributing high importance to the risks derived from the whole played by non-State actors in producing persecution when assessing the risk of *refoulement*[237].

It is important to take into account that, despite the Directive does not preclude Member States to maintain their own national standards of protection to refugees and persons entitled of subsidiary protection, such standards must be compatible with the purposes of the Directive, as defined under Article 3. This premise is confirmed in *Bundesrepublik Deutschland v. B. and D.*[238], where the *Bundesverwaltungsgericht* (Federal Administrative Court) requested the view of the Court of Justice in the application of the exclusion clause, referred under Article 12(2) of Directive 2004/83/EC. The German Court pointed out that if deported, the applicants had chances to suffer persecution in their country of origin, which in other words meant they fulfilled the minimum criteria to be considered as refugees. Instead, if applied the referred provision, the applicants would no longer be entitled to obtain the status recognised. In this sense, it was to be clarified whether it would be compatible with the

[235] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.297.
[236] Ibid., p.309, See also Battjes, H., *European Asylum Law and International Law*, Leiden, Boston, 2006, p.243; Cherubini, F., *L'asilo della Convenzione di Ginevra al diritto dell´Unione europea*, 2012, cit., pp.201-202; K. Hailbronner, K., Alt, S., Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, in *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives*, Oxford, 2010, p.1047 ff.
[237] Ibid., p.310.
[238] CJEU [GC], *Bundesrepublik Deutschland v. B and D*, Joined Cases Application Nos.C-57/09 and C-101/09, Judgment 09 November 2010, para.64-67.

purposes of Article 3 of the Directive if a Member State recognised that a person excluded from refugee status pursuant to Article 12(2) of the Directive had a right of asylum under its constitutional law. The Court of Justice justified that "*in so far national rules under a right of asylum is granted to persons excluded from refugee status within the meaning of the Directive 2004/83 permit clear distinction to be drawn between national protection and protection under the Directive, they do not infringe the system established by that Directive. In the light of those considerations, Article 3 of the Directive 2004/83 must be interpreted as meaning that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status, provided that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive*"[239].

A second issue to consider is the modality of assessment of applications for international protection, ruled under Article 4 of the 2004/83/EC. The Court of Justice defined two distinct phases within this process, being the first one the establishment of factual circumstances that can possibly constitute elements of proof to sustain the application, and the second one the juridical assessment of such elements that must be carried out on an individual basis, consisting in deciding whether or not, in light of the presented facts, the substantive conditions laid down by Article 9, 10 and 15, relating to the acts and reasons of persecution, of the Directive for granting any the forms of international protection are met[240]. In this sense, para.1 of the Article attributes responsibility to the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection, and to the Member State to assess the relevant factors. This clause was interpreted in distinct ways among Member States as France, Portugal and Spain settled a fixed term until when the asylum-seeker could present his application from the date of his entry into domestic shores, and some others as Bulgaria, Austria, Ireland and Sweden detained that the application was to be done immediately after the asylum-seeker's entry, deeming that, in case such condition will be disregarded, the request might be considered unfounded[241].

[239] Ibid., paras.120-121.
[240] CJEU, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland*, Application No.C-277/11, Judgment 22 November 2012, para.64, see also Del Guercio, A. *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016), p.298.
[241] See again Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.299.

Despite para.2 of the Article imposes crucial responsibility on the asylum-seeker to provide all documents required in order to substantiating his application, para.5 determines certain flexibility from Member States where aspects of the applicant's statements are not supported by documentary or other evidence. The clause provides that such aspects shall not need confirmation if "*the applicant has made genuine efforts to substantiate his application*", "*all relevant elements… have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given*", "*the applicant´s statements are found to be coherent and plausible*", "*the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so*", and "*the general credibility of the applicant has been established*". Further, when the elements provided for by the applicant are not sufficient, relevant or up to date, the Court of Justice pointed out in the sentence of *M.M. v. Minister for Justice, Equality and Law Reform, Ireland* that the Member State shall cooperate actively with the applicant in order to obtain valid information to substantiate the application[242]. In these terms, it is the duty of the Member State to verify, having regard to the individual situation of the applicant, all relevant facts relating to his country of origin, including the State's relevant laws and regulations, and his individual position and personal circumstance; that will hence be essential for determining the consistence and probability of suffering persecution he might have if returned, as refers para.3. The Court of Justice reinforced this idea in the sentence of *Aydin Salahadin Abdulla and Others v. Bundesrepublik Deutschland*[243], where it inferred that the competent authorities to the assessment of the claim must verify whether actors of protection like institutions, authorities and security forces of the third-country in question disposes of efficient measures in order to prevent persecution, ensuring "*an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection*", obtaining this way consistent evidences on whether the applicant could avail himself from the protection of his country of origin or not.

A third point to be addressed concerns procedural guarantees in the assessment of asylum claims, of which further indications are provided for by the Directive

[242] *M.M. v. Minister for Justice, Equality and Law Reform, Ireland,* Application No.C-277/11, para.66.
[243] CJEU [GC], *Aydin Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, Joined Cases Application Nos.C-175/08, C-176/08, C-178/08 and C-179/08, Judgment 2 March 2010, paras.70 and 71.

2013/32/EU[244] on common procedures for granting and withdrawing international protection, denominated 'Procedures Directive'. A first element to highlight is contained under Article 4(1) of the latter that determines Member States are entitled to designate a competent authority that must therefore carry out all the procedures, and ensure such authority is provided for with appropriate means and sufficient personnel in order to operate with effectiveness and efficiency. This means the authority in charge must be able to register and income applications respecting a settled limit of time, thus providing an effective possibility for the asylum-seeker to proceed with his claim as soon as possible, as defined under Article 6 of this Directive. Second, Member States shall guarantee that third-country nationals or stateless persons held in detention facilities or present at border crossing points also have access to proper counselling and information regarding asylum procedures as refers Article 8(1). Although derogation of this clause is allowed under circumstances in which it is made necessary for reasons of security, public order or administrative management of such areas, as foresees para.2, such limitation seems to be rather problematic as the places in question are those in which this kind of assistance is most required in order to turn effective the access to international protection procedures[245]. Third, as determined by Article 10(1), Member States shall secure applications for international protection are neither rejected nor excluded from examination for the sole motif of not being submitted within the established dead-line.

One of the most relevant developments brought by the Directive 2013/32/EU is contained under Article 34 settling a maximum period for the assessment of the asylum claims that, in accordance with para.3, shall be concluded within six months of the lodging of the application. This time limit, if subject to the procedures laid down under the premises of Dublin Regulation[246], shall start to count from the moment the Member State responsible for its examination is determined and the applicant is found on the territory of that Member State, being allowed a delay of more nine months when it is presented cases of high legal and contextual complexity, the competent authority had

[244] *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)*, Official Journal of the European Union, 29 June 2013.
[245] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, pp.302-303.
[246] *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)*, Official Journal of the European Union, L 180/31, 29 June 2013.

received large amount of applications at the same time, and if the delay is attributed to lack of collaboration by the applicant. All the same, as establishes Article 33 of the Directive, the application can also be considered inadmissible when the applicant has been granted international protection within another Member State, a country which is not Member State is considered as a safe third-country for the applicant, and when a dependant of the applicant lodges an application on his behalf, but there are no facts related to the dependant´s situation justifying a separate application.

Followed the application submission, Article 9(1) of the 'Procedures Directive' also defines the right of the applicant to remain within the territory of the Member State for the sole purpose of the procedure until a first instance decision has been taken. Member States can derogate from this clause only when applicable one the conditions listed in para.2, relating to cases of subsequent application as provided for in Article 41(1), and surrender or extradition order of a person to another Member State, to a third-country, or to international criminal courts or tribunals, in reason of one of the obligations derived from the European arrest warrant foreseen within the 2002/584/JHA[247]. In this way, it is essential to remark that such procedures must be carried out with due respect for the principle of *non-refoulement*, accordingly requiring from the competent authorities to verify and ensure such obligation will not be violated in case the provision is applied, as establishes para.3.

Beyond that, it is necessary to stress that under Article 46 applicants are likewise entitled of resorting to effective remedy in case their applications are found amidst one of the conditions listed in para.1. Therefore para.5 determines that, under such circumstances, "*Member States have the duty to allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such right has been exercised within the time limit, pending the outcome of the remedy*". It is however necessary to point out that, as established under para.6, the applicant might be denied the right to remain within domestic territory if his claim is manifestly unfounded, inadmissible, or withdrawn, and if he comes from an EU safe 'third-country' or, in the sense of Article 39, from a country that ratified the 1951 Geneva Convention or the ECHR. Such reservation might not be applied only when the procedure is operated in the border crossing areas and the applicant did not have access

[247] *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, Official Journal L 190, 18 July 2002, p.1.

to proper legal assistance in a language he could understand, in a way he could be enabled to prepare and present relevant arguments to sustain his application[248].

This complex formulation brings some concerns in what regards rendering effective the guarantees of the Directive 2013/32/EU, as it seems to be more appropriate if the EU legislator adopted the same jurisprudence of the Court of Strasbourg, extending without any sort of reservation the right to remain within national shores during the entire duration of the procedure, until the final decision has been taken, than imposing all the conditions listed under Article 46 of the Directive[249]. This reasoning is reinforced by the ECtHR in the sentence of *A.C. and Others v. Spain*[250], in which the applicants, thirty individuals of Saharawi origin, after having their applications for international protection refused, resorted to judicial review of the decisions, seeking also for a stay of execution of the orders for their deportation. After the *Audiencia Nacional* (National Court) rejected the stay of execution, the applicants requested for interim measures under the Rule 39, claiming for do not be removed during the whole course of their proceedings. In this sense, the ECtHR was recalled in order to judge whether or not, in light of Article 13 of the Convention providing for the right of everyone to effective remedy, appropriate safeguards were in place to protect the applicants from arbitrary removal, given their appeals on the merit were still pending before the domestic courts. In this context, the Court of Strasbourg pointed out that the availability of domestic remedies to asylum-seekers have to be practical and accessible in order to avoid violations of procedural guarantees that could lead to further breaches on the applicant's fundamental rights such as those encompassed by the principle of *non-refoulement*[251]; rationale used particularly in this case and in *M.S.S. v. Belgium and Greece*[252], among others. The Court further added that where an individual arguably claims that his removal would expose him to treatment contrary to Article 3 of the Convention, remedies without a suspensive effect cannot be regarded as effective within the meaning of Article 31(1) of the Convention[253].

[248] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.304.
[249] Ibid., p.304.
[250] ECtHR, *A.C. and Others v. Spain*, Application No.6528/11, Judgment 24 April 2014.
[251] Ibid., paras.86 and 94.
[252] *M.S.S. v. Belgium and Greece*, Application No.30696/09, para.318.
[253] *A.C. and Others v. Spain*, Application No.6528/11, para.94.

2.2. The Status of Refugee under the Qualification Directives

The criteria established in order to determine the first type of international protection cited within the EU normative, that of refugee status, presented in Article 2(d) of the 'Qualification Directives', is based on similar grounds as the definition brought by Article 1(A)(2) of the 1951 Geneva Convention, inferring that a refugee is a third-country national or stateless person who "*owing to well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group*", is found "*outside the country of nationality*" or "*the country of former habitual residence*", and is "*unable or, owing to such fear, unwilling to avail himself of the protection of that country*". Not only the texts of both provisions are similar, but further the EU Law recognizes the Convention as the cornerstone regulating the protection of refugees, referred through the primary sources of EU Law in Article 78 TFEU, and also in recital 3 of the 2011/95/EU, stating the Council's decision to establish the CEAS, based on the full and inclusive application of the 1951 Geneva Convention and its related Protocol. Moreover, recital 22 of the same Directive also encourages Member States to look for the guidance of the UNHCR when determining refugee status; mechanism that, according to the CJEU, shall be respected when dealing with issues related to the asylum system in the Member State[254], however not interfering in matters of the EU Law on asylum[255].

It is on the other way necessary to highlight that there is a distinction between both jurisdictions that relates to the criteria applied for recognizing refugee status. While the definition provided for by the 1951 Geneva Convention detains that a person is a refugee as soon as he fulfils the requirements defined under Article 1(A), implying the recognition of such status is entailed of a declaratory effect and not a constitutive one[256], the formulation of the 'Qualification Directive' separates the criteria for being

[254] CJEU, *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet*, Application No.C-528/11, Judgment 30 May 2013, para.44; see also CJEU [Grand Chamber], *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Joined Cases Application Nos.C-411/10 and C-493/10, Judgment 21 December 2011, para.75; CJEU [Grand Chamber], *Mostafa Abed El Karem El Kott, Chadi Amin A Radi, Hazem Kamel Ismail v. Bevándorlási és Állampolgársági Hivatal*, Application No.C-364/11, Judgment 19 December 2012, para.43; CJEU [GC], *Aydin Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, Joined Cases Application Nos.C-175/08, C-176/08, C-178/08 and C-179/08, Judgment 2 March 2010, para.53; CJEU [GC], *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal*, Application No.C-31/09, Judgment 17 June 2010, para.38.

[255] Case Application No.C-528/11, para.47.

[256] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, para.28.

recognized as a 'refugee' from the criteria for being granted 'refugee status'. This allows hence Member States to exceptionally decide not to grant refugee status, and revoke or refuse to renew it in case it has already been granted, when applicable Article 14(4)(5) of the 2011/95/EU which corresponds to Article 33(2) of the 1951 Geneva Convention[257]. In these terms, insofar the 1951 Geneva Convention acknowledges large importance to definition of the term, the EU legislator seems to attribute higher relevance on the procedures for determining a formalized 'refugee status'. Such procedures are defined under Article 4 of the 2011/95/EU which lists not only all elements to be taken into account when assessing an application for international protection, but also the manner in which the examination shall be conducted[258].

Although within the EU Law no proper definition of the term 'persecution' is provided, the EU regime acknowledges such notion as being a threat to life and/or liberty of a person or any other form of severe violation of human rights, which therefore goes aligned with the interpretation present within the international refugee protection system[259]. Moreover, the EU jurisdiction entertains through the 'Qualification Directive" some indications on its forms and causes, which accordingly contribute to evaluate whether or not an individual is entitled of protection.

Firstly, it is defined under Article 9(1) of the 2011/95/EU that, in order to be considered as an 'act of persecution', an act must be "*sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the ECHR*". This reference on Article 15(2) of the ECHR refers to violations on the right to life (Article2), prohibition of torture or inhuman or degrading treatment or punishment (Article 3), prohibition of slavery and forced labour (Article 4), and prohibition of punishment without law (Article 7). It is however important to stress that the term 'particular', present in the text of Article 9(1), is to be read as a non-limiting element when formulating and interpreting the provision. This flexibility can be seen through the

[257] UNHCR, *European Regional Courts: The Court of Justice of the European Union and the European Court of Human Rights – Refugees, asylum-seekers, and stateless persons*, 1st edition, June 2015, cit., p.45.
[258] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo,* 2016, p.320.
[259] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 2011, para.51; see also G. Goodwin-Gill, G., McAdam, J., *The refugee in International Law*, Oxford, 2007, cit., p.91.

reasoning of the Court of Justice in the sentence of *Bundesrepublik Deutschland v. Y. and Z.*[260].

In the referred case, the applicants were two Pakistani citizens that applied for asylum in Germany, claiming suffering past incidents of persecution in reason of their membership to the Muslin Ahmadi community. This fact was verified through objective elements as the Pakistani Criminal Code provides that members of the Ahmadi community may face imprisonment of up to three years or may be punished by death or life imprisonment or a fine. The *Bundensamt* (Federal Bureau) refused their claims and both appealed to the Courts in Germany, which hence decided to stay the proceedings and submit a preliminary reference to the CJEU. The issue was to define if within the meaning of Article 9(1) of the Qualification Directive', the core area of religious freedom limited to the profession and practice of faith in the areas of the home and neighbourhood, or if it could be considered an act of persecution given that under the presented circumstances it posed risk to life, physical integrity or freedom of the applicant[261]. The Court of Justice expressed its view by affirming that "*freedom of religion is one of the foundations of a democratic society and is a basic human right. Interference with the right to religious freedom may be so serious as to be treated in the same way as the cases referred in Article 15(2) of the ECHR, to which Article 9(1) of the Directive refers, by way of guidance, for the purpose of determining which acts must in particular be regarded as constituting persecution*". The Court continued, safeguarding that not "*any interference with the right to religious freedom… constitutes an act of persecution… on the contrary, it is apparent from the wording of Article 9(1) of the Directive that there must be a 'severe violation' of religious freedom having a significant effect on the person concerned*"[262].

Secondly, Article 9(2) of the 'Qualification Directive' provides a non-exhausting list of acts that can be considered as concrete forms of persecution, such as acts of physical or mental violence; legal, administrative, police, and/or judicial measures which are themselves discriminatory; prosecution or punishment which is disproportionate or discriminatory; denial of judicial redress resulting in a disproportionate or discriminatory punishment; prosecution or punishment for refusal to perform military

[260] CJEU [Grand Chamber], *Bundesrepublik Deutschland v. Y. and Z.*, Joined Cases Application Nos.C-71/11 and C-99/11, Judgment 5 September 2012.
[261] Ibid., para.45.
[262] Ibid., paras.57-59.

service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion; and acts of gender-specific or child-specific nature. This provision is not exhaustive: it can include other acts not encompassed within the definition that can anyhow assume the form of persecution in case it provokes the violations described in Article 9(1). This has shown that, although in recital No.10 of the Directive is determined the aim "*to achieve higher level of approximation to the rules on the recognition and content of international protection on the basis of higher standards*", the formulation chosen by the legislator still leaves to the State authority large discretion in order to apply the rules for qualifying a refugee within the EU Law[263].

Third, Article 10 of the Directive provides a list of elements that shall be taken into account when assessing the reasons of persecution which, in the sense of Article 2(d), comes through well-founded fear bounded by a justification based on race, religion, nationality and/or membership of a particular social or political group. Those are definitions foreseen under both versions of the 'Qualification Directive', that of the 2004/83/EC and that of the 2011/95/EU, factor that differs from the 1951 Geneva Convention that does not provide any formulation on the matter[264]. Accordingly, it is relevant to mention para. 2 of the provision which highlights that, "*when assessing if an applicant has well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution*". This means that what is actually to be taken into account in the examination process is how the applicant is classified through the eyes of the persecutor, not necessarily requiring the applicant to be part of the persecuted group.

2.3. The Subsidiary Protection under the Qualification Directives

The second type of international protection foreseen under the EU Law, determined within the concept of subsidiary protection, was created in light of the negotiations of Tampere, envisaging to provide an alternative solution to include asylum-seekers not fulfilling all the requirements to be recognised as a refugee, but that were likewise found in situations of imminent risk of suffering irreparable harm in case returned to his

[263] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.323
[264] Ibid., p.326.

country of nationality or habitual residence, as referred in Article 15[265]. Indeed, it is a form of protection of complementary and subsidiary nature that must be considered by State authorities only after firstly verifying whether or not the applicant fulfils all the requirements to obtain the refugee status[266]. This prevalence of the refugee status over the subsidiary protection is also reinforced by the CJEU, as illustrated in *H.N. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*[267].

The Court of Justice explained that, in light of Article 2(e) of the Directive 2004/83/EC, a person eligible for subsidiary protection is a third-country national or stateless person who cannot be qualified as a refugee. From this, it is possible to conclude that such form of protection is complementary and additional to the protection of refugees enshrined in the 1951 Geneva Convention, which accordingly should be applied only after the competent authority has reached the conclusion that the person seeking international protection is not entitled to the refugee status[268]. The Court also acknowledged that "*given that a person seeking international protection is not necessarily in a position to ascertain the kind of protection applicable to their application and that refugee status offers greater protection than that conferred by subsidiary protection, it is, in principle, for the competent authorities to determine the status that is most appropriate to the applicant's situation*"[269].

As pointed out within the proposal for the Council Directive of 2001[270], subsidiary protection was to be implemented in such a manner they did not undermine, but instead complemented the existing refugee protection regime[271]. Accordingly, this form of

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[265] *Directive 2011/95/EU* (2011), Article 15 defines that "*serious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict*".

[266] *Directive 2013/32/EU*, Article 10(2); UNHCR, *UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence*, January 2008, Available at: http://www.unhcr.org/protection/operations/479df9532/unhcr-statement-subsidiary-protection-under-ec-qualification-directive.html [Accessed 05 April 2018], p.4.

[267] CJEU, *H.N. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, Application No.C-604/12, Judgment 8 May 2014.

[268] Ibid., paras.30-31 and 35.

[269] Ibid., para.34.

[270] *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM(2001) 510 Final*, Commission of the European Communities, Brussels, 12 September 2001, Available at: http://ec.europa.eu/transparency/regdoc/rep/1/2001/EN/1-2001-510-EN-F1-1.Pdf [Accessed 05 April 2018], p.5.

[271] McAdam, J., *The European Union qualification directive: the creation of a subsidiary protection regime*, IJRL, 2005, p.461-463; Gilbert, G., *Is Europe Living Up to its Obligation to Refugees?*, EJIL, 2004, p.980.

protection should be based on pertinent instruments of international human rights law, like Article 3 of the ECHR, Article 3 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment, and Article 7 of the ICCPR, meaning its scope of application should restrain to cases in which there was a present risk of exposure to torture, inhuman and degrading treatment, death penalty, or any other form of serious and indiscriminate violation of human rights connected to warlike situations. This definition is further delimitated by Article 15 of the 2004/83/EC, which thus excludes from this context persons that cannot be removed in reason of other international obligations[272].

This distinction is clearly restated through the CJEU case law in *Mohamed M'Bodj v. État belge*[273] where it was put in check the scope of protection available under the EU law to third country nationals suffering from serious illness whose removal would amount to inhuman or degrading treatment. The Court of Justice ruled that, notwithstanding under exceptional conditions that could lead the applicant to be exposed to inhuman or degrading conditions, the 'Qualification Directive' is to be interpreted as not requiring Member States to grant social welfare and health care benefits to a third country national who has been granted leave to reside in the territory of that Member State under national legislation. The Court justified it affirming that "*Article 6 of the Directive 2004/83/EC sets out a list of those deemed responsible for inflicting serious harm, which supports the view that such harm must take the form of conduct on the part of a third party and that it cannot therefore simply be the result of general shortcomings in the health system of the country of origin*". It further reasoned that "*the risk of deterioration in the health of a third country national suffering from serious illness as a result of the absence of appropriate treatment in his country of origin is not sufficient, unless that third country national is intentionally deprived of health care, to warrant that person being granted subsidiary protection*"[274].

Despite the UNHCR has recalled for the essentiality of looking beyond the international and regional human rights law, taking hence into account also the jurisprudence of the Court of Strasbourg and the interpretation by treaty supervisory

[272] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo,* 2016, p.350.
[273] CJEU [GC], *Mohamed M'Bodj v. État belge,* Application No.C-542/13, Judgment 18 December 2014.
[274] Ibid., paras.34-35 and 47.

bodies in the definition of the scope of the Directive's provisions[275], it is to be stressed that the EU legislator and the Court of Strasbourg detain quite distinct views on the definition of the scope of the risk of torture, inhuman or degrading treatment to the obtainment of subsidiary protection. While the first one recognises that a person can only be entitled of subsidiary protection if he runs the risk of suffering such treatments when removed to his country of origin, the second one acknowledges that either the place, either the causes that exposed the person to such treatments are relevant, deeming the removal condemnable anyhow by the mere substantiation of the risk[276]. In this sense, the EU legislator seems to have adopted a more restrictive approach than that determined under the ECtHR case law.

Such rationale is further complemented by Article 6 of the 'Qualification Directive' that foresees the harm in this case must be necessarily caused by the State, parties or organisations controlling the State, and/or even non-State actors, when none of the first two cited, neither international agencies, are being able or willing to provide protection to the applicant. This consequently created a bound between the individual and his country of origin, meaning the mere existence of a general situation exposing the local population to inhuman or degrading treatment is not enough to ground the risk, being crucial the presence of an actor of persecution, independently of the general circumstances present therein[277]. In the preparatory works that led to the adoption of the 'Qualification Directive', it was enlightened that such formulation had been chosen by the EU legislator with the aim of limiting the concession of international protection under compassionate grounds, which accordingly included situations in which a person is unable to accede proper medical treatment for his pathologies in reason of a poor health care system in his own country, as illustrated in *M'Bodj*, and those in which there exists a possibility for the individual to be resettled in a safe region in his country of origin[278].

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[275] UNHCR, *UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence*, January 2008, p.5.

[276] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.352; See relevant ECtHR case law; *Sufi and Elmi v. United Kingdom*, Applications Nos.8319/07 and 11449/07, paras.217-218; ECtHR, *N.A. v. the United Kingdom*, Application No.25904/07, Judgment 17 July 2008, paras.115-116.

[277] Ibid., p.353; *Mohamed M'Bodj v. État belge*, Case Application No.C-542/13, paras.34-35.

[278] *Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum*, Doc. 12148/02 ASILE 43, Brussels, 20 September 2002, Available at: http://data.consilium.europa.eu/doc/document/ST-12148-2002-INIT/en/pdf [Accessed 05 April 2018, p.6; this rationale is further shared by the UNHCR in UNHCR´s Executive Committee, *Conclusion on the Provision on International Protection Including*

In what regards Article 15(c) of the 'Qualification Directive', referring to the victims of serious harm by reason of 'indiscriminate violence in situations of international or internal armed conflict', it is important to remark that its initial text referred to 'systemic and generalised violations of human rights', formulation that according to some EU Member States amplified excessively the scope of application of the norm[279], and hence, had to be substituted by 'serious and individualized threat'. The UNHCR regarded this change as inconsistent with the premises that endow complementary forms of protection, as their actual purpose aimed to address individuals facing risks derived from situations of a generalised nature. The UN Refugee Agency also recalled this definition could give rise to controversial interpretations of the clause, which hence could lead to impairment on the level of international protection offered within the EU, and on the process of harmonisation of Member States' practice on the matter. In this way, it affirmed that "*an interpretation which would not extend protection to persons in danger simply because they form part of a larger segment of the population affected by the same risks, would conflict with the wording as well the spirit of the provision. Such interpretation would result in an unacceptable protection gap, and be at variance with international refugee and human rights law*"[280]. Accordingly, the clause was to "*be understood as covering risks different from those addressed by the 1951 Convention*", and "*subsidiary protection should not be resorted to, where the threat is target at an individual and he or she would qualify for refugee status*"[281]. In short, this means the interpretation given to Article 15(c) should not focus on human rights' violations occasioned by perpetrators on a discriminatory basis, as that would already fall within the scope of the 'refugee status', but instead, it should encompass risks derived from events of a general and indiscriminate nature. After all, the added value of the clause is

Through Complementary Forms of Protection No.103(LVI), 07 October 2005, para. J, Available at: http://www.unhcr.org/excom/exconc/43576e292/conclusion-provision-international-protection-including-complementary-forms.html [Accessed 10 April 2018].

[279] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.354.

[280] UNHCR, *UNHCR Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence*, January 2008, p.6, See also UK Asylum and Immigration Tribunal, *Lukman Hameed Mohamed v. The Secretary of State for the Home Department*, AA/14710/2006, 13 September 2007 (unreported case), judgment of Judge JFW Phillips who held: "*It would be ridiculous to suggest that if there were a real risk of serious harm to members of the civilian population in general by reason of indiscriminate violence that an individual Appellant would have to show a risk to himself over and above that general risk*"; See also Hathaway, J., Foster, M., *The Law of Refugee Status*, Cambridge, 1991, p. 97.

[281] Ibid.; p.5; see also UNHCR's Executive Committee, *Conclusion No.103(LVI)*, para.k; *Directive 2004/83/EC*, Recital 24.

precisely its ability to provide protection against serious harms which are situational, rather than individually targeted.

In this sense, the UNHCR reinforced that the term 'individualization' should be then evoked when making reference to the procedural guarantees enshrined to the assessment of the claim, whereas the core elements of eligibility for the obtainment of subsidiary protection should maintain its general dimension, covering situations of indiscriminate violence, where there is real and immediate risk of being exposed to such events[282]. Notwithstanding the Court of Luxembourg has shared the same view, it found necessary to establish some limitations on its scope of application, reinforcing that the meaning of 'general and indiscriminate violence' must derive from an "armed conflict", as foreseen under the text provision, and reach certain level of severity in order to configure the need for concession of subsidiary protection[283].

This view is grounded by the CJEU in the sentence of *Elgafaji v. Staatssecretaris van Justitie*[284], through which the Court recognised that, although the meaning of 'indiscriminate' implied that a threat inherent in a general situation "*may extend to people irrespective of their personal circumstances*", the word 'individual' "*must be understood as covering harm to civilians… where the degree of indiscriminate violence characterising the armed conflict taking place reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face real risk of being subject to the serious threat referred in Article 15(c) of the Directive*"[285]. This rationale is also read within the Qualification Directives that, through Recitals 26 of the 2004/83/EC and 35 of the 2011/95/EU, expressed that "*risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm*", being hence required the verification of an exceptional situation, presenting a considerable degree of risk, forming substantial grounds for believing the persons under concern would be subject to the referred treatments. The UNHCR consented with this reasoning, and acknowledged that the

[282] Ibid., pp.4-5.
[283] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, pp.356-358.
[284] CJEU [GC], *Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie*, Application No.C-465/07, Judgment 17 February 2009.
[285] Ibid., paras.34-37.

notion of 'individual threat' in this context was to regarded as an instrument to remove from the scope of the provision "*persons from whom the alleged risk is merely a remote possibility, for example because the violence is limited to a specific region, or because the risk they face is below the relevant "real risk" threshold*"[286].

As the level of 'generalised and indiscriminate violence' plays a crucial role in defining who qualifies or not for subsidiary protection, it is necessary to establish some concepts that enable its assessment. Firstly, it is important to determine which forms of indiscriminate violence enter the criteria. According to the European Asylum Support Office (EASO), some examples that fulfil this condition are massive targeted bombings, aerial bombardments, guerrilla attacks, collateral damage in direct or random attacks in city districts, siege, scorched earth, snipers, death squads, attacks in public places, lootings, use of explosive devices, and so forth[287]. Secondly, it is relevant to explain how the assessment of subjective and objective elements is conducted in order to determine the severity of the risks. In this case, another reference to *Elgafaji* is required, as therein the CJEU referred to the need of taking into account the concept of "sliding-scale", which ascertained in this regard that, "*the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection*"[288].

It is however important to stress that, although the over mentioned definitions help in the interpretation of Article 15 of the 'Qualification Directive', there still lacks a more accurate formulation provided for by the EU Law, in particular in what regards the level of generalised violence required in order to obtain the recognition of subsidiary protection. Such ambiguity therefore leaves great discretional power to the competent authorities of EU Member States, which hence jeopardize the purposes and the scope of an institute that has been developed to amplify the meaning of international protection

[286] UNHCR, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551*, 21 October 2009), 29 July 2010, p.17, Available at: http://www.refworld.org/docid/4c503db52.html [Accessed 11 April 2018].

[287] EASO, *Article 15(c) Qualification Directive (2011/95/EU)*, 2014, Available at: https://www.easo.europa.eu/sites/default/files/public/Article-15c-Qualification-Directive-201195EU-A-judicial-analysis.pdf [Accessed 10 April 2018], p.17.

[288] *Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie*, Case Application No.C-465/07, para.39.

and harmonise such standard through the geographic area in which its prerogatives are enforced[289].

2.4. The concept of Temporary Protection within the EU Law

The third type of international protection foreseen under the EU Law is the 'temporary protection'. Created with the aim of attending situations of massive inflow of migrants, inspired by the events that succeeded the dissolution of the Yugoslavian territory, in particular the case of Kosovo[290], this status is determined under Article 78(2)(c) TFEU, and its premises are regulated through the Directive 2001/55/EC[291]. The purposes of the Directive are twofold as defines Article 1. The first one is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries that are unable to return to their country of origin, and the second one is to promote a balance of efforts between Member States in receiving and bearing the consequences of receiving such persons. As defined under Recital 2 and contextualized under Article 2, this is form of protection that shall be set up under exceptional schemes in order to offer immediate and transitory relief. This means the objective herein is not to substitute other forms of protection, but instead to complement them, guaranteeing this way that fundamental principles of human rights are being respected, in this case, ensuring full compliance with the principle of *non-refoulement*[292]. It is to be highlighted that, since the Directive has not been applied so far, as settled under Article 31, the European Council has neither presented any

[289] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.359.
[290] *Directive 2001/55/EC*, Recital 6.
[291] *Council Directive 2001/55/EC*.
[292] Del Guercio, A., *La Protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016, p.386, cit.: Great part of doctrine acknowledges that the application of the principle of *non-refoulement* cannot be excluded from cases of massive influx. See Durieux, J-F., Hurwitz, A., *How Many Is Too Many? African and European Legal Responses to Mass Influxes of Refugees*, in German Yearbook of International Law, 2004, p.105; Durieux, J-F., McAdam, J., *Non-refoulement through time: the case for a derogation clause to the refugee Convention in mass influx emergencies*, in International Journal of Refugee Law, 2004, p.13; Goodwin-Gill, G., McAdam, J., *The Refugee in International Law*, Oxford, 2007, p.335; Lauterpacht, E., Bethlehem, D., *The Scope and the content of the principle of non-refoulement: Opinion*, in Feller, E., Türk, V., Nicholson, F. (eds.), *Refugee protection in International Law. UNHCR's Global Consultations on International Protection*, Cambridge 2001, p.104; see also UNHCR, *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, 2001; EXCom, *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, Conclusion No.22 (XXXII), 1981; EXCom, *General Conclusion on International Protection*, Conclusion No.74 (XLV), 1994, sections (r)-(u); EXCom, *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection*, Conclusion No.103 (LVI), 2005, section (l).

amendment proposal in order to advance and add improvements to the scope of the rules framing this form of protection[293].

An important remark shall be done in the definition the Directive attributes to 'massive influx'. The term, which possesses a key role in framing the temporary protection regime and in distinguishing it from the ordinary asylum system, is described under Article 2(d) as a "*large scale number of displaced persons, who come from a specific country or geographical area*". The lack of specification regarding the minimum number of displaced persons necessary to form a massive influx in the text provision, not only leaves the concept too vague, hindering the conduction of a more accurate interpretation of the term, but it also gives large discretionary power to the Council that, in the sense of Article 5, detains exclusive competence to determine under a qualified majority decision the existence of massive influx in the context analysed. As a consequence, such decisions are more politically motivated than conducted in accordance with a legal justification, factor that leads the application of the Directive not necessarily aligned with the logic envisaged during its development, that of maximizing the protection of fundamental rights of the displaced population.

An evidence of that is the fact that, although there have been many occasions in which the Directive 2001/55/EC could have been applied, it has not been evoked so far[294]. A first example could be the arrival of 48,000 persons in European shores from January to July 2011, with the uprisings of the Arab Spring. In that moment, delegates from Italy and Malta requested the Council to propose the activation of temporary protection[295], demand that was refused with the following justification: "*At this point we cannot see a mass influx of migrants to Europe even though some of our Member States are under severe pressure. The temporary mechanism is one tool that could be used in the future, if necessary, but we have not yet reached that situation*"[296]. Similar situation occurred with the arrival of the Syrian citizens between 2014 and 2015 that, despite being composed by a large number of persons coming from the same region, in reason of an armed conflict where systemic violations of human rights perpetrated, characterising hence an immediate and temporary need for protection, did not obtain

[293] Ibid., pp.294 and 384.
[294] Ibid, pp.294 and 398.
[295] Ibid., p.398, cit., Nascimbene, B., Di Pasquale, A., *The 'Arab Spring' and the extraordinary Influx of People who arrived in North Italy from North Africa*, in EJML, 2011, p.346.
[296] Ibid., p.399.

approval of the Council for activation of the Directive. In this case, the Council decided to intervene through the base of Article 78(3) TFEU, that enable the adoption of provisional measures defined by the Commission for the benefit of Member States most affected by the migration influx. That seemed to be more a choice of an emergency character, in the sense of providing support to Member States suffering excessive pressure in their asylum system as a result of a massive influx, based on a principle of burden sharing[297] and resettlement programmes, as envisaged within the European Agenda on Migration of 13 May 2015[298], than an acknowledgement of the temporary protection under the premises of Article 2(d) within the EU.

Scholars raised two hypotheses on the possible reasons for the impediment on the activation of the Directive 2001/55/EC. The first one is justified through concerns that such recognition would serve as a pull factor to persons that remained in their country of origin to come and seek protection within European shores[299]. The second one is based on a procedural factor, enshrined to the Council decision-making system, involving qualified majority voting[300]. The directly dependency on Member States' vote in order to obtain such approval might prove to be rather difficult, especially when the decision in question regards the activation of a third form of protection that might enlarge the scope of international protection within the EU, in a period of economic crisis and austerity policies.

The scope of application of the temporary protection seems to be broader than that of the 'Qualification Directive', encompassing herein all displaced persons, falling within

[297] Burden sharing is described in Article 1 of 2001/55/EC as a main purpose of the Directive, referring to the "*balance of effort between Member States in receiving and bearing the consequences of receiving such persons*". It is applied by means of financial solidarity, realized through the European Refugee Fund (ERF) (Article 24) and support with reception measures like accommodation arrangements, coverage of medical expenses, social assistance, and so forth; practical solidarity, involving the Member State´s full participation in the reception scheme, by indicating their reception capacity which hence will be inserted in the Council decision, through a normative act of binding force (Article 25); and through solidarity among Member States that works through the transfer of part of beneficiaries of temporary protection from one Member State to the other, subject to the consent of the persons concerned (Article 26).

[298] European Commission, *A European Agenda on Migration*, COM (2015) 240 final, Brussels, 13 May 2015, p.4 Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf [Accessed 16 April 2018].

[299] Ibid., p.400, cit., Klug, A., *Regional Developments: Europe*, in Zimmermann, A. (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Oxford, 2011, p.133.

[300] Ibid., p.400, cit., Ineli-Ciger, M., *Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean*, in Bauloz, C., Ineli-Ciger, M., Singer, S., Stoyanova, V. (eds.), *Seeking Asylum in the European Union*, Leiden/Boston, 2015, p.233.

the description of Article 2(c), which hence refers to third country nationals or stateless persons who "*had to leave their country or region of origin, or have been evacuated,… and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection*". This means that, if in one side the criteria to obtain temporary protection might overlap with that provided for by the 'Qualification Directive', referring to those exposed to immediate and serious risk of suffering systemic and generalised violations of human rights that, for this reason, cannot return to their country of origin; in the other side, it also recognizes that among the beneficiaries of temporary protection there might be persons falling within the scope of refugee status, hence acknowledging them the possibility of applying for protection under an individual basis.

In this way, it is important to highlight that during the formulation phase of the Directive 2001/55/EC, in reason of concerns arisen from the risk that, once adopted, Member State authorities could preclude the possibility of the applicant to apply for refugee status[301], the drafters found necessary to insert provisions that guaranteed the right of the applicant to apply for other status offering a higher level of protection than the temporary protection[302]. Accordingly, Article 3(1) determines that "*temporary protection does preclude recognition of refugee status under the Geneva Convention*", and Article 17(1) foresees that "*persons enjoying temporary protection must be able to lodge an application for asylum at any time*". Additionally, Article 19(2) defines that, "*where, after and asylum application has been examined, refugee status… is not granted…, the Member States shall… provide for that person to enjoy or to continue to enjoy temporary protection for the remainder of the period of protection*". These guarantees not only ensure the individual's possibility to obtain a higher status of protection without putting in risk the one he already possesses, but they also align the Directive with the International Refugee Protection System.

[301] Ibid., p.395, cit.: As the Directive 2001/55/EC was adopted before the Directive 2004/83/EC (QD), the text therein does not mention the possibility of applying for subsidiary protection, hence referring only to the refugee status, based on the 1951 Geneva Convention.
[302] ECRE, *Observations of the European Council on Refugees and Exiles on the European Commission´s draft directive on temporary protection and responsibility sharing*, 2001, p.3.

3. The Dublin System

The "Dublin System", formed in the light of the CEAS with the purposes of settling common procedures for the assessment of asylum claims within the EU, and developed with the ordinary purpose of ensuring that every third-country national (TCN) had equal chances of obtaining access to status determination within the EU Member States, is in operation since 1995 and is currently based on the Dublin III Regulation (DRIII)[303]. The implementation of the Regulation is facilitated by EURODAC, which is a fingerprint database of asylum seekers and irregular migrants, established under Regulation (EU) 603/2013[304]. The system, that has been governing responsibility allocation among 32 States, including the 28 EU Member States and the four European Free Trade Association (EFTA) "associate" States, passed through several developments in its legal foundations and geographical scope along time and its current formulation is framed in three major features[305]. The first one is the principle that an asylum seeker has only one opportunity to lodge and asylum claim within the Dublin area and, if the decision is negative, that rejection is recognised by all Member States, as settled under Article 3(1) DRIII. The second one is the settlement of rules in order to determine which Member State will be responsible for assessing the claim and receiving the applicant during the whole duration of the procedure, based on a hierarchy of "objective criteria", as determined by recital 5 and Article 7(1). Such method criteria is grounded on family ties under Articles 8-11, issuance of residence permits or visa under Article 12, irregular entry of stay under Article 13, and visa waived entry under Article 14. When none of these criterions are applicable, the country where the first application has been lodged becomes the responsible, referred through Article 3(2) of the Regulation. And the last one is the fact that an asylum seeker may be deported to the Member State in which he

[303] *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)*, Official Journal of the European Union L180, 29 June 2013.

[304] *Regulation (EU) No.603/2013 of the European Parliament and of the Council of 26 June 2013 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 third-country national or stateless person and on requests for the comparison with EURODAC data by Member State´s law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No.1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast)*, Official Journal of the European Union L 180/1, 29 June 2013.

[305] EU, Policy Department C - Citizens' Rights and Constitutional Affairs, *The Reform of the Dublin III Regulation*, 2016, p.11-12, Available at: http://www.europarl.europa.eu/supporting-analyses [Accessed 19 Oct. 2017].

was firstly allocated under a coercive basis, in case he tries to move to another Member State[306].

Although there are quite extensive critics related to the functioning of the Dublin System, justified through assumptions that it has achieved very little at very high costs both for asylum-seekers and for the functioning of the CEAS[307], the report issued by the European Commission in 2015 on the evaluation of the Dublin III Regulation[308] emphasised some relevant aspects of its structure which make it an essential tool within the context of the EU Asylum Protection System. To start with, the report stressed that the establishment of a method for determining the Member State responsible for

[306] EU, Policy Department C: Citizens' Rights and Constitutional Affairs, *Enhancing the Common European Asylum System and alternatives to Dublin*, Brussels 2015, p.15-16, Available at: http://www.europarl.europa.eu/supporting-analysis [Accessed 10 Oct. 2017].

[307] EU, Policy Department C - Citizens' Rights and Constitutional Affairs, *The Reform of the Dublin III Regulation*, 2016, p.12, footnote 11: "*The enumeration of the main problems of the system has remained consistent since the first evaluations*". See European Commission, *Staff Working Document: Revisiting the Dublin Convention*, SEC (2000) 522, 21 March 2000, para. 53; European Commission, *Staff Working Document: Evaluation of the Dublin Convention*, SEC (2001) 756, 13 June 2001, especially at p.18; European Commission, *Commission Staff Working Document accompanying the 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), Impact assessment*, COM(2008) 820 final, SEC(2008) 2963, Brussels 3 December 2008, especially at p.9 and 23, Available at: http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2008/sec_2008_2962_en.pdf; European Commission, *A European Agenda on Migration*, 2015, p.13; European Commission, *Dublin IV Proposal (footnote 5)*, 2016, especially at p.10 f; See also European Parliament, *Setting Up a Common European Asylum System (footnote 6)*, 2010, p.157 f; European Parliament (2014), *New Approaches (footnote 6)*, p.50 f; Fratzke, S (2015), *Not Adding Up – The Fading Promise of Europe's Dublin System*, *MPI Europe*, March 2015, Available at: http://www.migrationpolicy.org/research/not-adding-fading-promise-europes-dublinsystem; Goodwin-Gill, G. S., *The Mediterranean Papers – Athens, Naples and Istanbul*, September 2015, p.9 f, Available at: http://www.blackstonechambers.com/news/publications/the_mediterranean.html; Hruschka, C., *Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission*, EU Immigration and Asylum Law and Policy Blog, 17 May 2016, Available at: http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-europeancommission/; Maiani, F., *The Dublin III Regulation: a New Legal Framework for a More Humane System?*, in: Chetail, V., De Bruycker, Ph., Maiani, F. (eds), *Reforming the Common European Asylum System: The New European Refugee Law*, *Brill*, 2016, p.101-142, at p.105 f; Den Heijer, M., Rijpma, J., Spijkerboer, T., *Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System*, CMLR, vol. 53, 2016, pp.607-642, p.611; European Parliament, *Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI))*, 2016, para.34, Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-20160102+0+DOC+XML+V0//EN; On the favourable evaluation by the Commission in 2007 European Commission, *Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin System*, COM (2007) 299 final, 6 June 2007, p.6, Available at: http://eur-lex.europa.eu/legalcontent/EN/TXT/?qid=1465407679741&uri=CELEX:52007DC0299, see ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, Brussels, March 2008, p.9 f, Available at: http://www.refworld.org/docid/47f1edc92.html; Maiani, F., Vevstad, V., *Reflection note on the Evaluation of the Dublin System and on the Dublin III Proposal, Briefing Note Prepared for the European Parliament*, March 2009, Available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-LIBE_NT(2009)410690.

[308] European Commission, *Evaluation of the Dublin III Regulation (Final Report)*, 2015.

examining an application for international protection was necessary from both practical and legal perspective. It not only clarified to which Member State an asylum-seeker shall turn to for the examination of his claim, accordingly ensuring him an effective access to asylum procedure; but it also provided practical guidance to Member States in order to identify under which grounds they hold responsibility towards an asylum-seeker within the Dublin area, and when they can reject or shift responsibility to a different Member State. Further, by defining through objective criteria the 'responsible State', it tended to discourage multiple applications, consequently reducing human and financial resources related to asylum procedures[309].

Moreover, it was reinforced that the codification of such mechanism in a legislative instrument was crucial in order to guarantee legal certainty and legal redress for both applicants and Member States. This idea was justified through the fact that, notwithstanding the EU had been working towards the harmonisation of asylum procedures within the EU within the scope of the CEAS since 1999, in reality, there were still present large disparities in practices and standards among Member States. This therefore contributed for applicants to select few countries within the Dublin area in order to apply for international protection, unbalancing the burden sharing along the EU. In other words, the rationale was that, at the same time asylum-seekers were not indifferent towards which EU Country they wished to lodge their application, Member States were being affected according to the number of applications they received, receiving direct impact on their financial, administrative, social and political costs. In short, the Dublin System turned to be a necessary tool in order to determine and share responsibility, this way guaranteeing asylum-seekers' access to asylum procedures, whilst dividing reception and protection burdens among Member States[310].

3.1. Deficiencies in the implementation of the Dublin Regulation in light of the European Refugee Crisis

It is though necessary to remark that, despite the establishment of the Dublin System has brought substantial developments to the management of the EU Asylum Protection System, quite problematic issues have arisen from its applicability. The first one relates to the challenges faced by Member States in applying the Dublin Regulation during periods of massive influxes. In such circumstances, ensuring the deliverance of an

[309] Ibid., p.2.
[310] Ibid., p.3.

efficient flow of applicants throughout the procedure proved to be an obstacle, which consequently resulted in response delays and insufficient internal capacity to carry out such a large amount of claims in a timely manner. In addition, the fact that Regulation rules for defining the 'responsible State' do not account for Member States' capacity to process claims, combined with the likelihood that some Member States tend to receive more asylum-seekers than others – whether for offering higher standards of protection, whether for their geographical location on the external borders of the EU – contributed to create disproportional distribution of applications for international protection within the Dublin area. As a consequence, that which was in principle to be a system of burden sharing within the EU turned mostly into a system of burden allocation.

This occurred in the context of the Mediterranean refugee crisis. As the main access routes during this period were those by land, from Turkey to the Bulgaria, and by Sea through the Mediterranean crossing[311], from Turkey to Greece and from North Africa to Italy and Malta, the number of irregular entries in the Dublin area boosted, which, as a consequence, led to the application of Article 13 of the DRIII, inferring that "*an applicant that has irregularly crossed the border into a Member State…, the Member State thus entered shall be responsible for examining the application for international protection*". This has contributed to high percentage of cases being assessed under the criteria related to documentation and first country of entry[312], overburdening States like Greece, Italy and the Balkan States[313].

The situation motivated Member States, serving as major EU entry doors, to turn a blind eye towards registering newcomers arriving through those paths, factor that represented an opportunity for asylum-seekers to refuse proceeding with their asylum applications or to comply with identification obligations in the Member State they first arrive, and then to move freely within the European Union to apply for asylum in

[311] OHCHR, *In search of Dignity – Report on the human rights of migrants at Europe´s borders*, 2017, p.10.

[312] COM (2016) 270 final, p.9; European Commission, *Evaluation of the Dublin III Regulation (Final Report)*, 2015, p.4, Gilbert, G., *Is Europe Living Up To Its Obligations to Refugees?*, EJIL, 2004, pp.963-987, pp.970-971; EU, Policy Department C – Citizens' Rights and Constitutional Affairs, *The Reform of the Dublin III Regulation*, 2016, p.14, Footnote: "*The first State where an application is lodged may be responsible for a variety of reasons: because no other criterion is applicable; because a higher-ranking criterion makes that State responsible; because the State in question decides to apply the "sovereignty clause" of Article 17(1) DRIII; or because it subsequently becomes responsible, e.g. for missing the deadlines set out by Art. 29 DRIII for the implementation of transfers*"; *Setting Up a Common European Asylum System* (footnote 6), p.158 f; European Parliament, *New Approaches* (footnote 6), 2014, p.9.

[313] Munari, F., *The perfect storm on EU Asylum Law: The need to Rethink the Dublin Regime*, DUDI, 2016, p.526.

another Member State[314]. Moreover, because in the hierarchy of criteria applied under the Dublin Regulation the interests and needs of applicants are not prioritised, and there still persist consistent differences within asylum procedures, reception conditions and integration capacity along the Dublin area; the feeling of uncertainty and fear of falling within the scope of the Dublin rule on the first country of arrival, or of being denied international protection in the designated State, if rates of negative reply there are high, increased a lot. This led asylum seekers to remain in anonymity, enhancing the level of irregular staying within the EU, and motivate secondary movements within the region, and the lodging of multiple applications among different Member States[315].

One alternative in order to afford relief to Member States subject to particular pressure was the development of relocation schemes. The pilot project was EUREMA[316], funded by the EU and assisted by EASO. During its execution, very few people were relocated because in on one hand relocation States offered very few places and settled extensive lists of conditions, on the other hand difficulties and delays in the agreements between Member States for each relocation process, matched with the unwillingness of beneficiaries of protection to relocate in some Member States, turned each process endless with no consensus achievement[317]. This endowed the scheme with

[314] Policy Department C - Citizens' Rights and Constitutional Affairs, *The Reform of the Dublin III Regulation*, 2016, p.15 (footnote 32): See in particular 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, Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0197&from=en [Accessed 23 April 2018], p.4; See also European Commission, *Dublin II Evaluation* (footnote 11), 2007, p.9: "*The Commission has launched infringement proceedings against i.a. Italy and Greece for their alleged failure to systematically fingerprint irregular arrivals*"; see European Commission, *Managing the refugee crisis: State of play of the implementation of the priority actions under the European Agenda on Migration*, COM (2015) 510, 14 October 2015, p.11 and Annex 6, Available from: http://www.refworld.org/docid/563201fc4.html [Accessed 23 April 2018]; See also Di Stasio, C., "*La crisi del "Sistema Europeo Comune di Asilo" (SECA) fra inefficienze del Sistema Dublino e vacuità del principio di solidarità*", dUE, G. Giappichelli Editore – Torino, 2/2017, p.212.

[315] European Commission, *Evaluation of the Dublin III Regulation (Final Report)*, 2015, p.5.

[316] European Resettlement Network: "*In order to initiate relocation programmes, the EU Pilot Project on Intra-EU Relocation from Malta (EUREMA) was implemented under ERF Community Actions in 2010 and 2011. EUREMA was the first multilateral intra-EU relocation initiative, and was led by the Maltese authorities and implemented by IOM with the participation of ten Member States - France, Germany, Hungary, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia and the UK - with the active involvement of UNHCR. The results were modest - a total of 255 relocation places were pledged by the ten participating Member States, of which 227 persons were eventually relocated to six of the pledging states (France, Germany, Luxembourg, Portugal, Slovenia and the UK).*" Available at: http://resettlement.eu/page/intra-eu-relocation [Accessed 26 April 2018].

[317] Policy Department C - Citizens' Rights and Constitutional Affairs (2016), *The Reform of the Dublin III Regulation*, 2016, p.17; See also EASO, *Fact-Finding Report on intra-EU Relocation Activities from Malta*, July 2012, especially at p.9 and 13, Available at: http://www.refworld.org/pdfid/52aef8094.pdf [Accessed 26 April 2018]; European Parliament, *New Approaches* (footnote 6), 2014, p.56.

a more symbolic significance than an effective mechanism for burden sharing within the EU.

The current relocation scheme, an initiative in favour of Greece and Italy, was established as an emergency measure under Article 78(3) TFEU, constituting derogation from the Dublin rules. It provided that until September 2017, the responsibility for a number of applicants was to be transferred from Greece and Italy to other Member States. The programme defined that applicants were to be relocated only after applying for international protection, being fingerprinted, and then undergoing a Dublin procedure establishing the responsibility of Italy or Greece, as defines Articles 3(1) and 5(5) of the Council Decision (EU) 2015/1601[318], this way guaranteeing that only applicants in clear need of international protection would beneficiate from that. This scheme differed from the first one as it forecasted that relocation States should not unilaterally impose conditions, being entitled to reject relocated individuals exclusively for reasons of national security or public order, as defines Articles 4(5) and 5(7) of the relocation Decisions. As for the results, it also proved to be inefficient as it failed to comply with the expected results. From a target of relocating 105,900 persons during the two-year duration of the programme, after nine months from its start, it had relocated only 2,280 persons in total[319].

One of the major deficiencies in the application of relocation schemes was the reluctant will of Member States to fulfil their duties under the scheme, not only in terms of restricting the available places to very few numbers and imposing unilateral conditions of acceptance, but also in terms of violating relocation decisions, as well as taking too long time for delivering reply. A second element hindering the schemes was the fact that applicants were not able to choose their destination, which resulted in lots of withdrawals after beneficiaries got acquainted of their relocation destination. A last concern was on the procedural limitations of the scheme itself. If the scheme determines that States, in order to be beneficiaries, might be confronted with a number of arrivals exceeding their ability to process applications, and individuals, in order to be eligible,

[318] *Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, Official Journal of the European Union, 24 September 2015.

[319] Policy Department C - Citizens' Rights and Constitutional Affairs, *The Reform of the Dublin III Regulation*, 2016, p.18 (footnote 53): European Commission, *Fourth report on relocation and resettlement*, COM (2016) 416 final, 15 June 2016, p. 2, Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160615/4th_report_on_relocation_and_resettlement_en.pdf [Accessed 27 April 2018].

must be duly registered and passed through the Dublin System, then the beneficiary State still holds the burden of handling with massive arrivals, unfounded cases and return obligations[320].

A second issue influencing the effectiveness of the Dublin System regards the difficulties of transferring applicants to Member States with systemic flaws in critical aspects of their asylum procedures or reception conditions[321]. This is illustrated not only through the suspension of Dublin transfers to Greece since 2011, given the critical situation in which the country was found in reason of the large amount of migrants arriving there, but also through judicial decisions in which it was expressed concerns that reception conditions in some Member States were not respecting minimum standards, therefore classifying them as not necessarily 'safe-countries'. As shown in the sentence of *Tarakhel v. Switzerland*[322], the ECtHR reinforced that it was responsibility of Swiss authorities to obtain guarantees from Italy that, if removing the applicants towards Italy under the Dublin Regulation, the applicants would be treated in accordance with minimum standards, not exposing them to any treatment prohibited under Article 3. The same occurred in *M.S.S. v. Belgium and Greece*[323], in which the Court condemned Belgium that, in application of the Dublin Regulation, removed the applicants towards Greece, regardless the numerous recalls from the UNHCR on the systemic flaws in the Greek asylum system.

Additionally, in the report issued by the OHCHR in 2017 on the human rights of migrants at Europe's borders the High Commissioner exposed protection gaps present in some Member States where they carried out missions in 2016 in order to assess border governance measures. The visits were done in Italy, Bulgaria, the Former Yugoslav Republic of Macedonia and France, where it was found that irregular entry and stay were punishable with penalties imposed on migrants amounting to imprisonment and/or a fine. The teams appointed that such criminalization increased detention, which might place individuals at higher risk of suffering abuse and exploitation, benefits the business of smugglers, and deprive migrants from accessing services and justice for crimes and human rights violations committed against them.

[320] Ibid., p.19.
[321] 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*, 2016, p.4.
[322] *Tarakhel v. Switzerland*, Application No.29217/12.
[323] *M.S.S. v. Belgium and Greece*, Application No.30696/09.

They emphasised that the fear of being deported, imprisoned and/or being subject to police authorities violence led migrants to refrain from reporting their situation, which precluded their access to legal aid, information and access to services. The teams also reinforced that criminalization led to a security-focused approach, prioritising over-securitization of borders than protection measures[324]. These factors proved that EU Member States are not always complying with minimum standards of protection, in these cases preventing individuals from being involved in decisions affecting them, fact that hence require that mutual monitoring among Member States be done, imposing responsibility on States when applying removal within the Dublin System.

These protection gaps proved to be inconsistent with the prerogatives of the 'Dublin format' that envisaged the allocation of responsibility on the basis that all EU Member States were safe-countries, which in turn was justified through the assumption that all were party of the 1951 Geneva Convention and the ECHR, which hence made them holders of the same obligations enshrined to the duty to provide international protection, based on the EU Law, the ECHR and the International Refugee Law. Thereafter, this incurred in the application of the principle of mutual recognition to the quality and efficiency of any Member State into the scheme, implying that Dublin transfers should occur without the concern of examining firstly potential risks that asylum seekers might face in the Member State to where he is being removed[325]. This is illustrated in the sentence of *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*[326]. The CJEU in this case clarified that the principle of mutual trust, in which all States participating to the CEAS shall observe fundamental rights of refugees, can prevent a Member State from transferring an asylum seekers to the 'Member State responsible' within the meaning of the Dublin Regulation, where they cannot ignore the presence of systemic deficiencies in the asylum procedure and in the reception conditions in that Member State, amounting to substantial grounds for believing that the referred asylum seeker would be face real risk of being subject to inhuman or degrading

[324] OHCHR, *In search of Dignity – Report on the human rights of migrants at Europe's borders*, 2017, pp.8 and 13.
[325] Munari, F., *The perfect storm on EU Asylum Law: The need to Rethink the Dublin Regime*, 2016, pp.522-523; Di Stasio, C., *La crisi del "Sistema Europeo Comune di Asilo" (SECA) fra inefficienze del Sistema Dublino e vacuità del principio di solidarità*, 2017, p.213.
[326] *N.S. v. Secretary for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Joined Cases Application Nos.C-411/10 and C-493/10.

treatment, as defined under Article 4 of the Charter [327]. In this case, if anyway the transfer occurs, any infringement of fundamental rights by the responsible Member State might incur in the obligations of other Member States to bend to the mutual confidence and the presumption of compliance[328].

A third factor to be stressed is the clarity in the hierarchy of criteria for determining the responsible State. Although majority of Member States (11 out of 19 consulted by the EC) found the criteria to be enough clear, some stated that the Regulation text left too much room for interpretation[329]. This is shown through the index of refusals in the requests for outgoing take-back and take-charge by receiving Member States. In 2014, from a total of 84,586 requests, it achieved 33 percent of refusals, proving that reaching a consensus among Member States on the responsible State was rather hard, thus confirming Member States were indeed interpreting and applying the criteria differently[330]. In one side this can be in reason of difficulties arisen to obtain and agree on evidences. Member States reported that, despite EURODAC[331] and Visa Information System (VIS)[332] data were effective instruments to find evidences on the applicant's situation, finding proof of family connections was not easy, neither agreed upon[333]. In the other side, it occurred that the current migration crisis has increased pressure on Member States' asylum and border control authorities, at times resulting in incomplete

[327] Ibid., para.94; See also Munari, F., *The perfect storm on EU Asylum Law: The need to Rethink the Dublin Regime*, 2016, pp.527-52.
[328] Munari, F., *The perfect storm on EU Asylum Law: The need to Rethink the Dublin Regime*, 2016, p.528.
[329] European Commission, *Evaluation of the Dublin III Regulation (Final Report)*, 2015, p.7.
[330] Ibid., p.6.
[331] European Commission, Migration and Home Affairs, definition of EURODAC: "*Establishes an EU asylum fingerprint database. When someone applies for asylum, no matter where they are in the EU, their fingerprints are transmitted to the EURODAC central system. Since it was established in 2003, EURODAC has proved to be a very important tool providing fingerprint comparison evidence to assist with determining the Member State responsible for examining an asylum application made in the EU. Its primary objective is to serve the implementation of Regulation (EU) No. 604/20133 (the 'Dublin Regulation') and together these two instruments make up what is commonly referred to as the 'Dublin system'.*" Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/identification-of-applicants_en [Accessed 24 April 2018].
[332] European Commission, Migration and Home Affairs, definition of Visa Information System (VIS): "*The Visa Information System (VIS) allows Schengen States to exchange visa data. It consists of a central IT system and of a communication infrastructure that links this central system to national systems. VIS connects consulates in non-EU countries and all external border crossing points of Schengen States. It processes data and decisions relating to applications for short-stay visas to visit, or to transit through, the Schengen Area. The system can perform biometric matching, primarily of fingerprints, for identification and verification purposes.*" Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system_en [Accessed 24 April 2018].
[333] European Commission, *Evaluation of the Dublin III Regulation (Final Report)*, 2015, p.7.

requests, fact that might also have impacted in the assessment of Dublin requests, justifying the growth in the number of rejections and disputes.

This sort of dispute is demonstrated in *Khadija Jafari, Zainab Jafari v. Bundesamt für Fremdenwesen und Asyl*[334]. The facts of the case originated in a preliminary reference lodged by the Austrian Upper Administrative Court regarding two sisters from Afghanistan and their children, who left their country of origin towards Europe in 2015 and passed through a number of Member States before applying for international protection in Austria. They entered Europe from Greece, where they were fingerprinted and registered through the EURODAC system, and then moved direction to Croatia. In Croatia, the local authorities organised their transportation towards Slovenia, where the local authorities issued them with police documents stating their travel destination was Austria. Austrian authorities contested Slovenia on that, which in turn replied they never registered the family, making the Dublin Regulation hence inapplicable to them, indicating the applicants have come from Croatia. Having acknowledged that, the Austrian authorities considered Croatia the responsible State, and then requested it to take charge of the applicants. Lack of response led to the application of Article 22(7) DRIII, which entailed an obligation in the questioned Member State to take-charge, if it did not reply within a due period of time. In reference to this provision, the asylum applications in Austria were considered inadmissible and a removal order was issued.

The Jafari family passed through the territory of three distinct Member States under the consent of their competent authorities, before applying for asylum in Austria. This proves that not only practices of *laisser passer* are being applied within the EU, but also that lack of solidarity among Member States, in face of situations of massive influx of migrants, is present within the context of the Dublin Regulation, hindering the application of the criteria to determine the responsible State[335]. This raised sensitive questions around the meaning attached to the responsibility allocation in the assessment of asylum claims in the Union. If considering the criteria set out in Articles 12, 13 and 14 of the DRIII, relating to issuance of residence documents or visas, irregular entry or stay and visa-waived respectively, it is possible to interpret the conception of responsibility as a corollary of authorisation. This can be understood in the sense that,

[334] CJEU [GC], *Khadija Jafari, Zainab Jafari v. Bundesamt für Fremdenwesen und Asyl*, Application No.C-646/16, Judgment 26 July 2017.
[335] Michel, V., *De La Délicate Interprétation Du Système Dublin*, European Papers, 25 February 2018, (Footnote 11), Conclusions of Advocate General Shaprson, *Jafari*, cit., para.5.

the more a country opens its doors to a third-country national, the more responsibility it undertakes for that third-country national's potential engagement in the EU asylum process[336]. In other words, the Dublin criteria seems to attribute a degree of fault to the Member State that permitted the individual to enter EU shores, thus entailing this State to the duty of processing the application of this individual.

Besides, if that is the actual rationale of the System, by issuing residence permit or visa to a third-country national, a Member State might be almost automatically bound to exclusive responsibility for any future asylum claim made by this third-country national. This way, Member States might be incentivised to adopt non-entry policies between Member States and to assess applications for admission with much greater caution[337], therefore maintaining their visa requirements and other restrictive visa policies, precluding legal avenues for regular entry into the EU. The link between irregular border crossing and responsibility allocation within the Dublin System, urges Member States to act as border guards, protecting their borders to avoid the burden of any prospective claim made by an applicant under irregular situation.

This led to a fourth question related to the concept of irregular entry into the EU. In this way, it is necessary to comprehend whether or not the entry in the EU territory, tolerated by a Member State without satisfying the conditions of entry, constitutes an irregular entry in the sense of Article 13 DRIII. According to the CJEU, there is a difference between issuing a visa, that is an act of formal admission to national territory, and merely tolerating the entry of asylum seekers into domestic territory[338]. However, the Court still detains that if "*a third-country national admitted into the territory of one Member State, without fulfilling the entry conditions generally imposed in that Member State, for the purpose of transit to another Member State in order to lodge an application for international protection there, must be regarded as having 'irregularly crossed' the border of that first Member State within the meaning of Article 13(1) of the*

[336] Mouzourakis, M., *We Need to Talk about Dublin: Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union*, Refugee Studies Centre, Oxford Department of International Development, December 2014, p.10; See also Hurwitz, A., *The 1990 Dublin Convention: A Comprehensive Assessment*, IJRL, 1999, p.648; Noll, G., *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, The Hague, 2000, p.189.
[337] Ibid., p.11; See also Thielemann, E., Williams, R., and Boswell, C., *What System of Burden-Sharing between Member States for the Reception of Asylum Seekers?*, European Parliament, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, PE 419.620, 22, Brussels, January 2010.
[338] Michel, V., *De La Délicate Interprétation Du Système Dublin*, 2018, p.6.

Dublin III Regulation, irrespective of whether that crossing was tolerated or authorised in breach of the applicable rules or whether it was authorised on humanitarian grounds by way of derogation from the entry conditions generally imposed on third-country nationals"[339]. The Court defended in this way that, under such circumstances, general rules of interpretation should be applied, meaning it should be attributed the usual definition of the term, considering 'irregular entry' as "*crossing of a border without fulfilling the conditions imposed by the legislation applicable in the Member State in question*"[340].

In the opinion of General Advocate Sharpston instead, a different interpretation was given, where it was stressed that, when there is a human flood of desperate people, it is not possible to avoid the entry of these individuals as otherwise that would lead somehow to the formation of improvised camps, which would consequently attract international assistance from bodies as the UNHCR, the Red Cross and the Médicins Sans Frontières, reaching in the end an humanitarian crisis on the European Union's doorstep. Beyond that, "*all EU Member States have international obligations under the Geneva Convention*". So, "*for humanitarian reasons, they should early admit these suffering fellow human beings into their territory*". In this sense, it seems to be right to frame the application of the EU Asylum Protection System in accordance with Article 78(1) TFEU, referring to Articles 31 and 33 of the 1951 Geneva Convention as the starting point in interpreting Article 31(1) of the DRIII[341]. Despite the Advocate General continues the text by reinforcing that, in the other hand, "*if they do so, those Member States will not be able to guarantee suitable reception conditions for everyone…, nor examine everyone's application for international protection swiftly if their administrations are overwhelmed by the sheer number of claims to process*"[342], the closure of borders would necessarily put those States in breach with their international obligations. In conclusion, the General Advocate affirmed that "*it is evident that the border crossings that took place in the present cases were not 'regular'*". However,

[339] *Khadija Jafafi, Zainab Jafari v. Bundesamt für Fremdenwesen und Asyl,* Application No.C-646/16, para.92.
[340] Ibid., para.74.
[341] *Opinion of Advocate General Sharpston delivered on 8 June 2017*, Case C-490/16 *A.S. v. Republic of Slovenia*, Case C-646/16 *Khadija Jafafi, Zainab Jafari v. Bundesamt für Fremdenwesen und Asyl*, para.173.
[342] Ibid., paras.182-183.

they could neither be properly "*classified as 'irregular' within the meaning of Article 13(1) od the Dublin III Regulation*"[343].

After all, the Dublin System showed to be endowed of deflective capacity, leaving its application under an ambiguous position, permitting both higher and lower standards of protection within the EU. The struggles to shift responsibility over asylum claims among Member States, especially in periods of massive influx, disagreement on the interpretation of the hierarchy of criteria, and lack of solidarity towards the most affected countries are some of the deficiencies of the Dublin System, which is hindering the orderly management of asylum and the access to status determination for everyone seeking asylum within the EU. This left room for an active participation of the Courts, ranging from national courts' ruling against transfers of asylum seekers, to the most powerful sentences on Dublin returns pronounced by the Court of Strasbourg and the Court of Luxembourg, illustrating hence multi-level governance in processing responsibility within the region, such as in the cases *Tarakhel v. Switzerland*[344], *Khadija Jafari, Zainab Jafari v. Bundesamt für Fremdenwesen und Asyl*[345], *M.S.S. v. Belgium and Greece*[346], among others.

4. An assessment of the EU Asylum Protection System: A multilevel governance

The ongoing refugee crisis, that overtook the reception capacities of some EU Member States, led European countries to adopt a more repressive approach towards migrants, reinforcing removal measures and border control policies, at times resulting in the closure of their borders. This, in combination with the enforcement of the Dublin System that ultimately unbalanced responsibility allocation within the EU, not only discouraged Member States to duly pursue their responsibilities in accordance with the EU normative, but also affected major aspects of the EU Asylum Protection System – regarding the development of a CEAS offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*, as defines Article 78(1) TFEU, at the same time of conducting such policies based on the principle of solidarity and responsibility sharing within the EU, as foresees Article 80 TFEU.

[343] Ibid., para.186.
[344] *Tarakhel v. Switzerland*, Application No.29217/12.
[345] *Khadija Jafafi, Zainab Jafari v. Bundesamt für Fremdenwesen und Asyl*, Application No.C-646/16.
[346] *M.S.S. v. Belgium and Greece*, Application No.30696/09.

In this sense, it is essential to acknowledge the existence of a multilevel governance leading decisions within the scope of the EU Asylum Protection System, occurring through the involvement of the EU institutional bodies in framing asylum policies at regional level, EU Member States by applying it at domestic level, the CJEU by ensuring Member States compliance with the EU Law and keeping EU institutions in check[347] and the ECtHR through interference in cases in which applicants exhausted domestic remedies in order to render effective their access to minimum human rights guarantees[348]. This is a system that, if in one side seeks to comply with international obligations derived from International Refugee Law and International Human Rights Law, in the other side needs to deal with different interpretations of those objectives that very often results in settlement of disputes, and in different standards of protection along the EU. Hence, for the purposes of stressing some of the main issues arisen from this amalgam of objectives and governing forces influencing asylum management within the EU, I chose therefore to firstly deal with existing incompatibilities between the reasoning of the Court of Strasbourg and that of the Court of Luxembourg in assessing the application of Dublin transfers, and secondly with the odds of this multilevel governance that in the context of the Dublin has been hindering the achievement of solidarity and responsibility sharing on asylum management in the EU.

4.1. The ECtHR and the CJEU case law on Dublin transfers

Recital 3 of the DRIII, by affirming the CEAS was developed in full alignment with the 1951 Geneva Convention, thus ensuring no one is exposed to *refoulement*, implied that all Member States were safe countries, meaning transfers among them could occur without compromising, neither the responsibility criteria laid down in the Dublin Regulation, neither the compliance with international obligations arisen from the minimum content of International Refugee Law. This passage is very relevant as it acknowledges the importance relied upon the principle of mutual trust and mutual recognition for the accomplishment of the aims envisaged within the CEAS[349]. This is stressed by the Court of Justice in *Gözütok and Brügge*[350], where it is pointed out the necessity for Member States to "*have mutual trust in their criminal justice systems and*

[347] Costello, C., *The human rights of migrants and refugees in European law*, 2016, p.53.
[348] Ibid., p.51.
[349] Di Stasio, C., *La crisi del "Sistema Europeo Comune di Asilo" (SECA) fra inefficienze del Sistema Dublino e vacuità del principio di solidarità*, 2017, p.213.
[350] CJEU, *Hüseyin Gözütok and Klaus Brügge*, Joined Cases Application Nos.C-187/01 and C-385/01, Judgment 11 February 2003, para.33.

that each of them recognizes the criminal law in force in other Member States even when the outcome would be different if its own national law were applied", for the purposes of eliminating obstacles to integration within the EU, of which asylum matters are part.

It is however necessary to point out that, in many occasions, in reason of the high levels of disparities among Member States' domestic asylum systems, even more pronounced by the outcomes of the refugee crisis, the effectiveness of this mode of co-operation was put in check[351]. Although its credibility relied upon the advances brought by the CEAS in harmonising asylum norms, yet, their implementation was not uniformed within the whole region, turning the rationale of allocating responsibility in a single 'responsible State' not a secure method[352]. The Court of Strasbourg was the first to denounce a number of violations committed by the automatic application of the Dublin rules that resulted in transfers to Member States presenting severe deficiencies in their asylum systems, exposing applicants to violations of some of the core rights protected within the ECHR. Those were condemnations found in *M.S.S. v. Belgium and Greece*[353], *Tarakhel v. Switzerland*[354], *Sharifi and Others v. Italy and Greece*[355], among others, in which the Court reinforced the relativity in applying the principle of mutual trust under such circumstances.

In *M.S.S.* for instance, when referring to the removal of the applicant from Belgium to Greece, in application of the Dublin Regulation, the Court highlighted that "*it was in fact up to the Belgian authorities, faced with the situation described…, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3*"[356]. With this text, the Court not only affirmed Greece violated the Convention since it did not possess an efficient domestic asylum system, hence exposing applicants to degrading situations, contrary to Article 3, but also condemns Belgium for transferring an individual to a non-

[351] Di Stasio, C., *La crisi del "Sistema Europeo Comune di Asilo" (SECA) fra inefficienze del Sistema Dublino e vacuità del principio di solidarità*, 2017, p.214.
[352] Ibid., pp.217-218.
[353] *M.S.S. v. Belgium and Greece*, Application No.30696/09.
[354] *Tarakhel v. Switzerland*, Application No.29217/12.
[355] *Sharifi and Others v. Italy and Greece*, Application No.16643/09.
[356] *M.S.S. v. Belgium and Greece*, Application No.30696/09, para.359.

safe country, consequently breaching with the principle of *non-refoulement*. In other words, the Court of Strasbourg confirms that in this case Member States continue to be responsible for violations within the scope of the ECHR, even when such violation occurred in application of EU rules, as the case of transfers within the Dublin area[357]. This decision hence represents a resizing on the principle of mutual trust within the Dublin System, fact that accordingly affects the already challenging application of the Dublin Regulation. Indeed, as long as States continue to violate rights contained within the ECHR, some of which appertain to minimum guarantees on asylum procedures, the Court is entitled to interfere[358].

This distanced the Court of Strasbourg from the view of the Court of Luxembourg, pending their respective approaches towards their specific competences, being the first a judicial body specialised in the protection of human rights, and the second a judicial body pursuing the objectives set out within the scope of the EU. Such distinction can be seen through the comparison between the decisions adopted in *M.S.S.* and in *N.S. and Others v. SSHD*[359]. In this last, in an attempt to mitigate the effects brought by the ECtHR's sentence in *M.S.S.* and at the same time safeguard European rules, the Court of Justice highlighted the necessity of separating single provisions of the European system directives from particular situations, as the case of systemic flaws in the domestic asylum system of a given Member State, configuring violations in Article 4 of the Charter and 3 of the ECHR. The Court remarked that the principle of *non-refoulement* was central within the prerogatives of the EU Asylum Protection System and that the presumption of security, tied to the principle of mutual trust within the context of the Dublin System, was in accordance with it by the moment Member States were bound to secure minimum human right's guarantees within their asylum systems. So, the principle of mutual trust was not to be interpreted as absolute. Instead, Dublin transfers should not occur to the Member State responsible if it presented systemic deficiencies in its asylum procedures and reception conditions, amounting to substantial grounds for believing that the asylum-seeker in that Member State would face real risk

[357] Di Stasio, C., *La crisi del "Sistema Europeo Comune di Asilo" (SECA) fra inefficienze del Sistema Dublino e vacuità del principio di solidarità*, 2017, p.219.
[358] Ibid., 220.
[359] *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Joined Cases Application Nos.C-411/10 and C-493/10.

of being subject to inhuman or degrading treatment[360]. However, if the situation did not achieve a level of severity to be considered a 'systemic flaw', then the principle of mutual trust was applicable. Furthermore, the Court also stresses that, in case it is made necessary to impede a Dublin transfer in order to secure fundamental human rights of the applicant, Member States can always evoke the 'sovereignty clause' and take assume responsibility over the applicant or, continue to examine the criteria in order to establish whether another Member State can be designated as responsible, as refers Article 3(2) DRIII[361].

Another similar case brought before the Court of Justice was *Shiraz Baig Mirza v. Bevándorlási és Állampolgársági Hivatal*[362]. The facts herein pertain to a national from Pakistan who having passed through Serbia applied asylum in Hungary. While his process was still in course, he left to Czech Republic where a 'take-back' request pursuant to Article 18(1)(c) DRIII was made. Upon return to Hungary the applicant lodged a second asylum application, defined as inadmissible by Hungarian authorities on the ground that Serbia was a safe third-country. Hungary, in application of Article 3(3) DRIII, decides then to transfer the applicant towards Serbia, decision that was contested by the applicant and resulted in a preliminary ruling by the CJEU. The Court of Justice reasoned in favour of Hungary, authorising the transfer under the justification of 'presumption of security' within the Dublin System. The Court in this case did not adopt the same precautions contemplated by the ECtHR in *M.S.S.* and *Tarakhel* in terms of requesting the State in charge to obtain concrete guarantees from the State towards where the applicant was being removed that, once there, he would not be subject to any treatment prohibited under Article 4 of the Charter and Article 3 ECHR. This created a higher risk of exposing the applicant to such treatments, especially if taking into account reports issued by NGOs condemning reception conditions present in the domestic asylum system of Serbia, characterised by abuse from police authorities, inadequate asylum procedures, delay in replies and very low percentage of requests processed[363]. Furthermore, this rationale contradicted guarantees foreseen under Article

[360] Ibid., para.106.
[361] Ibid., para.107.
[362] CJEU, *Shiraz Baig Mirza v. Bevándorlási és Állampolgársági Hivatal*, Application No.C-695/15 PPU, Judgment 17 March 2016.
[363] Human Rights Watch, *World Report 2016 – Serbia*, 27 January 2016, Available at: http://www.refworld.org/docid/56bd992115.html [Accessed 02 May 2018].

38 of the Procedures Directive[364] regarding individual assessment of risk, which hence neglected the subjective element present during the examination of asylum claims, enhancing the applicant's chances of being prevented from the access to asylum guarantees[365].

Although the 'Procedures Directive' recast provides a complete definition on how to classify a safe third-country, problems on its effectiveness might be affecting removal processes, resulting in violations of applicants' fundamental rights, as shown in the cases above. Annex I of the Directive determines that, "*a country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict*"; assessed through consideration of the relevant laws and regulations of the country and their respective application; observance of the rights and freedoms laid down in the ECHR and/or the ICCR and/or the CAT, in particular the rights from which derogation cannot be made; respect for the principle *non-refoulement* in accordance with the 1951 Geneva Convention; existence of a system of effective remedies against violations of those rights and freedoms. However, evidences on great disparities among the asylum systems of countries considered 'safe' demonstrated the politicization of the term. As shown in the Asylum Information Database (AIDA) Annual Report 2014/2015[366], while certain nationalities were in some form deemed as manifestly unfounded by some States, the same did not hold true for some other States, turning some countries safe for these nationalities and some others not[367]. The same occurred for gender, referring to countries that can be considered safe for man applicants, but not for women[368]. This means that, although the criteria for designating a 'safe third-country' attribute great relevance to the actual state of human rights in the country in question, this mode of assessment does not determine the outcomes itself,

[364] *Directive 2013/32/EU*.
[365] Di Stasio, C., *La crisi del "Sistema Europeo Comune di Asilo" (SECA) fra inefficienze del Sistema Dublino e vacuità del principio di solidarità*, 2017, pp.231-232.
[366] AIDA, *Common asylum system at a turning point: Refugees caught in Europe´s solidarity crisis – Annual Report 2014/2015*, Available at: http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annualreport_2014-2015_0.pdf [Accessed 03 May 2018].
[367] Ibid., p.78.
[368] Ibid., p.80.

framing it within a more institutional context than a practical one[369]. For this reason, if the CJEU seeks to align the purposes of Article 78(1) TFEU with the prerogatives of the Dublin System, the approach given by the ECtHR in *M.S.S.* should be regarded as a reference.

4.2. The facultative nature of the principle of solidarity and responsibility sharing within the EU Asylum Protection System

The principle of solidarity is not only present in the EU Law as found under Article 80 TFEU, but it is also a core element settled since the creation of the European Community, as read in the lines of the Schuman Declaration in 1950, affirming that "*Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity*"[370]. This makes the actual dysfunctions of the Dublin System a controversial point within the core objectives of the EU. If considering the circumstances of the actual European refugee crisis, the application of the criteria to define the responsible State unbalanced distribution of asylum claims along the region, burdening Member States of first arrival, turning this mechanism more an obstacle than a bridge towards the achievement of solidarity and responsibility sharing within the EU Asylum Protection System.

These factors proved that such principle so inherent to the EU is not that effective when it comes to asylum management under situations of emergency. Despite Article 67(2) TFEU represents an institutional advance to the framing of a common policy on asylum, immigration and external border control, based on solidarity between Member States, in practice, solidarity under these terms has not obtained significant results yet. This can be demonstrated through the reading of the provision's text together with Article 80 TFEU, when it affirms the necessity for the Union acts to contain appropriate measures to give effects to this principle. An interpretation that the second is in fact as a direct consequence of the application of the first could easily emerge, putting both provisions as constituent parts of a single process[371]. This places solidarity under a subsidiary condition, allowing it to be evoked exclusively in situations of emergency, in

[369] Costello, C., *Safe Country? Says Who?*, IJRL, 2016, p.610.
[370] *The Schuman Declaration*, 9 May 1950, Available at: https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en [Accessed 03 May 2018].
[371] Di Stasio, C., *La crisi del "Sistema Europeo Comune di Asilo" (SECA) fra inefficienze del Sistema Dublino e vacuità del principio di solidarità*, 2017, p.239; See also Morgese, G., *Solidarietà e ripartizione degli oneri in materia di asilo nell'Unione europea*, in Caggiano, G., *Percorsi giuridici per l'integrazione, Migranti e titolari di protezione internazionale tra diritto dell'Unione e ordinamento italiano*, Torino, 2014, p.373.

which interference of the EU in order to co-ordinate responsibility sharing is made necessary. It means that, as long Member States are still capable of assuming and managing their own asylum duties in an efficient manner, the EU might not act. As a consequence, the undefined nature of the term "necessity" results in conferring to the principle of solidarity a facultative character, by the moment its application depends in a considerable extent from the discretionary will of the European Union Institutions[372].

This confers a key role for the EU that, as determined under Article 33(4) DRIII, shall "*throughout the entire process, discuss and provide guidance on any solidarity measures as they deem appropriate*". This in other words it means that no automatic or binding measure is envisaged when a Member State is facing pressure in its asylum system and burden sharing is demanded, being necessary firstly a decision agreed upon the European Council and European Parliament on the actions to be taken. The only settled procedure in this domain is foreseen under Article 33(2) DRIII determining that affected Member States prepare and implement action plans under the supervision of the EASO, the Union institutions and other Member States[373]. In this regard, it is essential to demonstrate through which ways those actions have been operating and how far they have gone towards achieving responsibility sharing goals in the referred context.

One of the main channels through which solidarity has been working so far is through the establishment of financial programmes, aimed at funding Member States. In parallel with the recast of the Dublin regime, a package of measures has been adopted for the period between 2014 to 2020, devoting financial resources to asylum and, as well policies aimed at securing border controls and police co-operation. These resources were divided in different ways, addressing the Internal Security Fund (ISF), encompassing the ISF-Borders Fund, concerning security borders control[374], and the ISF-Police Fund, financing police co-operation, preventing and combating crime, and crisis management[375]; and the AMIF (Asylum, Migration and Integration Fund)[376],

[372] Ibid., p.239.
[373] Munari, F., *The perfect storm on EU Asylum Law: The need to Rethink the Dublin Regime*, 2016, p.531.
[374] *Regulation (EU) No.515/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision No.574/2007/EC*, Official Journal of the European Union, 20 May 2014.
[375] *Regulation (EU) No.513/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for police*

financing national programmes focused on reception and asylum systems, integration of non EU-nationals and voluntary returns, including also the payment of an amount of EUR 6,000 per each Member State for every beneficiary of international protection transferred from another Member State[377]. Both were implemented through a horizontal regulation, in which is established the general provisions on the EU home affairs funds for the referred period[378]. This is the exclusive mechanism so far accomplishing solidarity in the meaning of Article 80 TFEU[379].

Another form of burden sharing was the development of relocation schemes. However, as seen along the implementation of the September 2015 decisions establishing mandatory quota allocation of migrants entering Italy and Greece[380], it proved to be largely inefficient. This is illustrated through the outcomes of this programme that departed from a target of relocating 105,900 persons in a period of two years, and after nine months from its start had achieved relocation for only 2,280 persons[381]. In addition, two Member States opposed the principle of relocation, even under temporary terms, taking such decisions to be reassessed at the CJEU level[382]. After these failures, together with the present political weakness of the European Commission, relocation schemes disappeared from the political agenda of the EU[383].

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cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA, Official Journal of the European Union, 20 May 2014.

[376] *Regulation (EU) No.516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No.573/2007/EC and No.575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC*, Official Journal of the European Union, 20 May 2014.

[377] Article 18 of Regulation No.516/2014.

[378] *Regulation (EU) No.514/2014 of the European Parliament and of the Council of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management*, Official Journal of the European Union, 20 May 2014.

[379] Munari, F., *The perfect storm on EU Asylum Law: The need to Rethink the Dublin Regime*, 2016, p.532.

[380] *Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, Official Journal of European Union, 15 September 2015; *Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection of the benefit of Italy and Greece*, Official Journal of the European Union, 24 September 2015.

[381] Policy Department C – Citizens' Rights and Constitutional Affairs, *The Reform of the Dublin III Regulation*, 2016, p.18 (footnote 53): European Commission, *Fourth report on relocation and resettlement*, COM (2016) 416 final, 2016, p.2.

[382] CJEU [GC], *Slovak Republic, Hungary v. Council of the European Union*, Joined Cases Application Nos.C-643/14 and C-647/15, Judgment 6 September 2017.

[383] Munari, F., *The perfect storm on EU Asylum Law: The need to Rethink the Dublin Regime*, 2016, p.536.

4.3. The multilevel governance in the management of the EU Asylum Protection System

The whole refugee crisis has been managed by the EU at an intergovernmental level, having policies within the scope of CEAS in the competent areas foreseen in Article 78(2) TFEU, under the control of the Council, the European Council and Member States. This led to a more horizontal approach in the institutional relations within the EU, resulting in fragmentation and unilateral actions, motivated by short-term individual interests of Member States.

For instance, in the present EU asylum framework, instead of reacting in solidarity with first arrival countries as Italy and Greece, 'second line' Member States have firstly decided to temporary re-establish border controls with the purposes of pushing-back irregular migrants, availing of relevant provisions from the Schengen Border Code[384]. Some other countries have consented with temporary relocation schemes as long as safeguard clauses were allowed[385]. In the other hand, States like Germany have adopted the *Halaf* Doctrine[386], permitting Member States to examine asylum requests, independently of the criteria of the responsible State, unilaterally declaring an open gate. This decision if in one side was positive for humanitarian purposes, in the other side contributed to enhance pressure in 'front line' States, encouraging the migrants to come to Europe[387]. In this sense, the rule of law seems to be losing space, being

[384] *Regulation (EC) No.562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, Official Journal of the European Union, 13 April 2006; See Fijnaut, C., *The Refugee Crisis – The End of Schengen*, in EJCCLCJ, 2015, p.313; Atak, I., *La Crise de l´Espace Schengen Pendant le Printemps Arabe: Impact sur les Droits Humains des Migrants et des Demandeurs d´Asile*, in RQDI, 2012, p.123.

[385] Munari, F., *The perfect storm on EU Asylum Law: The need to Rethink the Dublin Regime*, 2016, p.537.

[386] Reference to Article 17 DRIII, allowing derogation from Article 3(1), determining each Member State may decide to examine an application for international protection lodged with it by third-country national or stateless person, even if such examination is not responsibility under the criteria laid down in this Regulation. Ibid., p.530, It is denominated *Halaf* Doctrine as such principle has been recalled in the CJEU, *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerkia Savet*, Application No.C-528/11, Judgment 30 May 2013, where the Court highlights in para. 39: "*Article 3(2) of the Regulation must be interpreted as permitting a Member State, which is not indicated as responsible by the criteria in Chapter III of the Regulation, to examine an application for asylum even though no circumstance exist which establish the applicability of the humanitarian clause in Article 15 of the Regulation. That possibility is not conditional on the Member State responsible under those criteria having failed to respond to a request to take back the asylum seeker concerned*".

[387] Munari, F., *The perfect storm on EU Asylum Law: The need to Rethink the Dublin Regime*, 2016, p.537 ff.

substituted by longstanding negotiations that in the end are not implemented and counter-measures unilaterally decided[388].

The EU is a transformative political space, taking decisions out of the exclusive domain of the State, destabilizing the assumption of statist migration control. This gives rise to a decision-making system rooted in justificatory grounds, requiring both Member States and EU institutional bodies to articulate their reasons. In this way, it is important to consider that when the EU constrain national discretion by determining which admission-seekers may lawfully reside in the EU and how responsibility allocation might be processed within the Dublin System, national cleavages are reinforced, putting Member States against each other and resulting in zero-sum engagement[389]. In the other side, it is to be clarified that the EU is to be regarded as a distinctive *chora* containing Member States, but not constraining their inclusive capacities, leaving them competent to offer asylum beyond the EU measures[390].

This puts the EU Law as a framer of minimum standards, which likewise shall not prevent Member States from maintaining or introducing in the areas concerned national provisions which are compatible with the EU and other international agreements[391]. In the opinion of Advocate General Kokott in *European Parliament v. Council of the European Union* the legal base of this measure is assessed[392]. The analysis disagreed with the view of the German government that this could leave Member States completely free to set their own standards[393], but instead, reinforced the idea that such measure was to be read as not "*limiting the legal effect of legislation*" but rather as "*enjoying the Community legislature… to leave Member States an appropriate degree of latitude*"[394].

[388] Ibid., p.538.
[389] Costello, C., *The human rights of migrants and refugees in European law*, 2016, pp.24-25.
[390] Ibid., p.27.
[391] Ibid., p.30.
[392] *European Parliament v. Council of the European Union*, Application No.C-540/03.
[393] Ibid., Opinion of Advocate General Kokott, 8 September 2005, para.35.
[394] Ibid. para.41.

CHAPTER III:
THE APPLICATION OF THE EUROPEAN ASYLUM PROTECTION SYSTEM IN THE ITALIAN CASE LAW

The main purpose of this chapter is to provide an overview on how Italy has been implementing international obligations arisen from the minimum content of International Refugee Law and the EU Asylum Protection System, especially in what concerns the respect for the principle of *non-refoulement* and for the rules of the Dublin System. For that, the idea is to initially demonstrate how this country has been managing asylum at a domestic level faced to the current refugee crisis that overcrowded its southern ports and exceeded its reception capacities, then making an individual assessment of cases brought in front of the ECtHR against Italy, giving evidences on how this scenario contributes to the way in which competent authorities address and apply such prerogatives, at times constraining the fundamental rights of asylum-seekers. In this sense, not only a comparison approaching the differences and commonalities in the reasoning of the Court of Strasbourg on similar cases is developed, but also the decisions of other courts and monitoring bodies on the matter are brought to the analysis.

1. The position of Italy within the European Refugee Crisis

In 2017, 119,369 refugees and migrants arrived in Italy by sea, 91 percent of this total departed from Libya, majorly nationals from Nigeria, Guinea, Bangladesh, Ivory Coast, Mali, Eritrea, Tunisia, Senegal and Morocco. This represents a 34 percent decrease compared to the previous year when the overall amounted in 181,436[395]; outcome of an Action Plan announced by the European Commission in July 2017 to prevent irregular crossing towards Italy, combined with activities undertaken by Italian authorities in order to fight human trafficking businesses in Libya[396]. If otherwise these

[395] UNHCR, *Italy Operational Update – December 2017*, 11 January 2018, p.1, Available at: https://data2.unhcr.org/en/documents/download/61549 [Accessed 07 May 2018].

[396] The measures included additional support for the Libyan Coast Guard and other Libyan authorities. See for example, European Commission, *Central Mediterranean Route: Commission proposes Action Plan to support Italy, reduce pressure and increase solidarity*, Strasbourg 4 July 2017, Available at: http://europa.eu/rapid/press-release_IP-17-1882_en.htm [Accessed 07 May 2017]; Reuters, *Italy begins naval mission to help Libya curb migrant flows*, 2 August 2017, Available at: https://www.reuters.com/article/us-europe-migrants-italy-libya/italy-begins-naval-mission-to-help-libya-curb-migrant-flows-idUSKBN1AI1JC [Accessed 07 May 2018]; The Guardian, *Italian minister defends methods that led to 87% drop in migrants from Libya*, 7 September 2017, Available at:

measures had not been put in practice, numbers were expected to have been even higher than in 2016. The quantity of arrivals in the second semester of 2017 dropped drastically, going from a sum of 22,300 in May and 22,200 in June of that year, to an average of 4,800 each month between August and December[397]. In the first three months of 2018, the numbers have achieved 74 percent reduction in relation to the same period in the 2017, proving those measures were effective[398].

Insofar the data has shown that general number of arrivals has considerably fallen, the results achieved so far were not positive. Firstly, the rate of deaths in the Libya-Italy crossing has doubly increased, recording one death for every 14 persons concluding successfully the crossing in the first three months of 2018, while in the same period in 2017 the proportion was of one for each 29 persons[399]. Secondly, by supporting the enhancement of Libyan authorities' capacities in joint rescue operations[400] increased the level of interceptions by Libyan Coast Guard at the Mediterranean Sea[401]. This consequently brought concerns that subsequent disembarkation of the migrants on board in Libyan territory would lead to automatic transfers of persons in possible need of international protection to detention facilities. From there, as already approached in

https://www.theguardian.com/world/2017/sep/07/italian-minister-migrants-libya-marco-minniti [Accessed 07 May 2018].

[397] UNHCR, *Desperate Journeys – January 2017 to March 2018*, 10 April 2018, p.7.

[398] Ibid., p.4.

[399] Ibid., p.4.

[400] "*On 3 April 2012, Italy entered into a new "Processo Verbale" with Libya to combat the unauthorized departures of migrants from Libya. This bilateral framework for Italian – Libyan cooperation contains limited concrete safeguards aimed at strengthening Libya´s normative and institutional capacities for the protection of human rights of third country nationals*". UNHCR, *The UNHCR Recommendations on Important Aspects of Refugee Protection in Italy*, 2013, p.3 Available at: http://www.unhcr.org/500950b29.pdf [Accessed 23 May 2018]; See also Human Rights Council, *Report by the Special Rapporteur on the human rights of migrants, François Crépeau, on his mission to Italy*, A/HRC/23/46, 24 April 2013, paras.46-47 Available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46_en.pdf [Accessed 23 May 218].

[401] While from 206 to 2017 there was a 34 percent decrease in the number of arrivals through the Mediterranean sea in Italian shores, in the same period there was an increase in the number of intercepted persons by Libyan authorities that went from 14,332 in the first year to 15,358 in the second year analyzed, ESI Core Facts, *The Italian Magnet – Deaths, arrivals and returns in the Central Mediterranean*, p.10, 13 March 2018, Available at: https://www.esiweb.org/pdf/ESI%20core%20facts%20-%20The%20Italian%20Magnet%20-%2013%20March%202018.pdf [Accessed 16 May 2018]; UNHCR, Libya: Activities at Disembarkation, November 2017, *UNHCR, Libya: Activities at Disembarkation*, Monthly update – January 2018, 1 February 2018, Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/61781.pdf [Accessed 18 May 2018].

Hirsi[402], they risked to be exposed to inhuman and degrading treatments, likewise not having access to status determination[403].

In addition, the improvement on registrations upon arrival and on border controls in the north of the country aiming at avoiding further internal movements within the EU[404], have contributed for majority of refugees arriving from the sea routes to lodge their applications in Italy. This factor, notwithstanding the general fall in the number of arrivals, led to a considerable growth in the quantity of applications received by Italy that went from 123,600 in 2016 to 130,119 in 2017[405], enhancing even more the pressures over the Italian asylum system, exceeding its reception capacities and lowering its reception conditions. The administrative and human costs of identifying and registering the massive arrivals coming from the Mediterranean paths, combined with the financial and social burdens of hosting such large number of applicants, reflection of the enforcement of the Dublin criteria in order to define responsibility allocation, strongly impacted in the conduct of Italian authorities, provoking deficiencies in the Italian immigration policy. These flaws were intensified by "*the lack of long-term rational strategy and occasional endorsement of xenophobic pressures at the political level, with symbolic legislative amendments mainly aimed at gaining easy political and electoral consensus and at reassuring the public opinion*"; also by "*issues of judicial inactivity, self-restraint and workload, administrative negligence unlawful practices*"[406]. This scenario led to frequent violations of asylum-seekers' fundamental

[402] *Hirsi Jamaa and Others v. Italy*, Application No.27765/09.
[403] Ibid., p.9, 12; See UNHCR, *Libya: Activities at disembarkation, monthly update – December 2017*, 08 January 2018, Available at: https://data2.unhcr.org/en/documents/download/61535 [Accessed 07 May 2018].
[404] Regardless of these measures, there were still attempts of internal movements of individuals crossing from Italian borders to other Member States. These internal movements also posed danger to the lives of asylum-seekers, as demonstrated through the death of 16 individuals trying to go from Italy to France, in the route between Ventimiglia and Nice, from September 2016 to the end of 2017. Most of deaths were caused by accidents in which the individuals were hit by vehicles or trains, or even through electrocution while doing the crossing hiding on a train. As a result of the difficulties arisen within this path, some refugees and migrants started attempting an even more dangerous route through the Alps from near Bardonecchia. See UNHCR, *Desperate Journeys – January 2017 to March 2018*, 2018, p.11 (footnote 11): Reuters, *Migrants risk death crossing Alps to reach France*, 12 January 2018, Available at: https://widerimage.reuters.com/story/migrants-risk-death-crossing-alps-to-reach-france [Accessed 07 May 2018]; News Deeply, *Dodging death along the Alpine migrant passage*, 25 January 2018, Available at: https://www.newsdeeply.com/refugees/articles/2018/01/25/dodging-death-along-the-alpine-migrant-passage [Accessed 07 May 2018].
[405] Ministero Dell'Interno, *I numeri dell'asilo 2017*, Available at: http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/documentazione/statistica/i-numeri-dellasilo [Accessed 07 May 2018].
[406] Nicosia, E., *Massive immigration flows management in Italy between the fight against illegal immigration and human rights protection*, QIL, Zoom-in 5, 2014, p.25ff., p.39.

human rights as illustrated in *Khlaifia*[407], in which the Court of Strasbourg condemned Italy for precluding the right to freedom of the applicants (Article 5 ECHR), kept under inhuman conditions within reception centres equitable to detention centres, subsequently proceeding with their collective expulsion (Article 4 Protocol No.4 ECHR), precluding their individual right to status determination.

In this regard, it is necessary to conduct an assessment on the measures Italy has taken or/and in conjunction with the EU, in order to manage the ultimate waves of arrivals. These were actions framed within the context of the European Agenda on Migration of 2015[408] in which *hotspots* were introduced in several points along the Italian southern region[409] for the purposes of co-ordinating arrivals through pre-identification and registration of newcomers; next incoming them to reception centres according to three distinct categories, settled through a *Roadmap* plan developed by the Italian Ministry of Interior[410]. Individuals identified as applicants for international protection were transferred to a Centre of Identification and Assistance for Asylum Seekers (Centri di Accoglienza per Richiedenti Asilo – CARA), individuals entering the procedure for relocation schemes were sent to dedicated regional hubs, and those under irregular situation that did not intend to apply for international protection, or asylum seekers that have been issued an expulsion or rejection order were conducted to Centres for Identification and Expulsion (CIE)[411], where they remained detained while waiting for removal[412].

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[407] *Khlaifia v. Italy*, Application No.16483/12.
[408] European Commission, *European Agenda on Migration*, 2015.
[409] European Commission, "*In Italy, the regional headquarters in Catania (Sicily) is coordinating the work in four ports which have been identified as Hotspots, namely Pozzallo, Porto Empedocle and Trapani in Sicily and Lampedusa. In each of these Hotspots, first reception facilities are in place with a capacity for receiving approximately 1 500 persons for the purpose of identification, registration and fingerprinting*", Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf [Accessed 08 May 2017].
[410] Ministero Dell'Interno, *Roadmap Italiana*, 28 September 2015, Available at: http://www.meltingpot.org/IMG/pdf/roadmap-2015.pdf [Accessed 09 May 2018].
[411] CIE – Centri di Identificazione ed Espulsione (Centres for Identification and Expulsion): Established in 1998 by the Turco-Napolitano Immigration Law (Article 12 of the Law 40/1998), the Temporary Permanence Centers, later called CIE (Centers for Identification and Expulsion) by the Bossi-Fini Law (L 189/2002), and finally renamed CPR (Repatriation Centers for Repatriation) by the Minniti-Orlando Law (L 46/2017), they are custodial structures where foreign citizens without a regular residence permit are detained. According to article 14 of the T.U. 286/1998, as subsequently amended by the Bossi-Fini law (L 189/2002), the Safety Package (L 94/2009) and the decree implementing the Returns Directive (L 129/2011), the detention in the Centers was arranged for a time period of 30 days, extendable for a maximum total of 18 months when it was not possible to immediately execute the removal. In October 2014, an amendment to the 2013bis European Law by Senators Manconi and Lo Giudice consented at the

A first issue derived from this structure relates to the circumstances in which pre-identification and registration procedures occurred within the Italian *hotspots*. During a visit to the Lampedusa unit by the extraordinary Commission for the protection and promotion of human rights of the Italian Senate it was remarked that migrants were being held there for a too long period, exceeding the maximum term of thirty days[413]. This was happening because if in one hand many of them were refusing to be identified through the EURODAC fingerprinting system as they intended to move to another Member State, in the other hand they could neither be removed until the conclusion of their identification process. *Hotspots* then passed to operate through a closed regime, not allowing individuals to leave and/or to apply for asylum or for relocation schemes before passing through first procedural steps, factor that contributed to overcrowd their physical structures which remained even more compromised as they were not prepared for welcoming long hosting periods[414]. Thus, from their original functions that were limited to the identification of the individual and his subsequent transfer to reception centres, they became a sort of reception centres themselves, working in a very similar mode as the CIEs[415].

According to this, the European Commission issued a Communication where it was reinforced that Italy in a short-term should enhance its efforts, even at a legislative level, "*in order to provide a more solid legal framework to perform hotspot activities and in particular to allow the use of force for fingerprinting and to include provisions*

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reduction of the maximum detention term within the CIEs to ninety days. This maximum term has once more undergone a change in September 2015. With the approval of the legislative decree No.142, in implementation of the Directive 2013/33/EU on the rules regarding the reception of applicants for international protection, in some circumstances the detention of up to twelve months was foreseen for the asylum seeker who constitutes a danger to the public security and order and for which there was a risk of escaping. Finally, from the conversion into law of the Minniti-Orlando Decree of 17 February 2017, No.13, the maximum detention of 30 days (Article 14(5) of T.U. 286/1998) can be extended by more 15 days, after judicial approval, in cases of particular complexity regarding the procedures for identification and organization of repatriation. Available at: http://www.meltingpot.org/Cosa-sono-i-C-I-E-Centri-di-Identificazione-ed-Espulsione.html#.WvGhs4iFPIU [Accessed 08 May 2017].

[412] Gornati, B., *Le nuove forme di trattenimento dello straniero irregolare in Italia: dall'evoluzione' dei CIE all´introduzione dei c.d. hotspot*, DUDI, Vol.10, No.2, 2016, p.476; Bianchini, K., *Legal Aid for Asylum Seekers: Progress and Challenges in Italy*, JRS, Vol.24, No.2, OUP, 2011, p.393.

[413] *Rapporto sui Centri di Identificazione ed Espulsione in Italia*, Commissione Straordinaria per la Tutela e la Promozione dei Diritti Umani, Senato della Repubblica – XVII Legislatura, 11 February 2016, Available et: http://www.meltingpot.org/IMG/pdf/cie_rapporto_aggiornato_11_febbraio_2016.pdf [Accessed 08 May 2018].

[414] Gornati, B., *Le nuove forme di trattenimento dello straniero irregolare in Italia: dall'evoluzione' dei CIE all´introduzione dei c.d. hotspot*, 2016, p.477.

[415] Ibid., p.472.

on long term retention for those migrants that resist fingerprinting"[416]. Although this passage majorly targeted the speeding up on identification procedures, from a human rights point of view, it was worthy of criticism. The proposed methods not only affected the right to personal freedom of the individuals in question, protected under Article 13 of the Italian Constitution and Article 5 ECHR, but also contradicted Article 349 (2*bis) Codice di procedura penale* (Italian Code of criminal procedure) that determined the only hypothesis of coercive action by the police forces was the compulsory collection of hair or saliva against a person subjected to preliminary investigations, and always with due respect for the personal dignity and prior authorization of the Public Prosecutor.

Furthermore, there were other concerns that information was not being effectively delivered to newcomers by their arrival. Migrants during the pre-identification process were only required to complete a form with their personal data, indicating through a multiple choice questionnaire the reason of their displacement to Italy. Given linguistic limitations that at times were not overcome even with the support of language mediators, combined with the state of vulnerability in which most of these individuals arrived, the comprehension of the text and of the consequences that a wrong compilation of the form could bring to their applications got compromised, therefore enhancing the chances of mistakes along this step. It means that, in case this procedure were to be interpreted as a determinant passage to the future condition of the individual, then it could likewise configure an obstacle to the full enjoyment of his right to status determination in accordance with the prerogatives of the 1951 Geneva Convention, and breach of Article 8 Directive 2013/32/EU, which determines that "*where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so*"[417].

A second point addressed by the same report related to the conditions within the CIEs in Italy to where, not only asylum-seekers that did not present application by their arrival were transferred, but also ex-minors who were no longer entitled of renewing

[416] European Commission, *Communication from the Commission to the European Parliament and the Council, Progress Report on the Implementation of the hotspots in Italy*, COM(2015) 679 final, Strasbourg, 15 December 2015.
[417] Gornati, B., *Le nuove forme di trattenimento dello straniero irregolare in Italia: dall´'evoluzione' dei CIE all´introduzione dei c.d. hotspot*, 2016, pp.478-479.

their residence permit after completing eighteen years old, stateless persons pending their status recognition and migrants under irregular situation were sent[418]. The critics herein departed from the inexistence of an effective possibility of internal access to the centres, precluding individuals from receiving visits of familiars and/or legal advocates. This, combined with the impossibility of the press and independent organisations to accede areas where migrants were held, in reason of insecurity occasioned by high tensions among internals[419], created a complete isolated world at the inside of the CIEs.

Moreover, the inhuman conditions in which those individuals remained, added to the long periods in which they were held there – in particular asylum-seekers that in the sense of Article 6 of the legislative decree No.142 of 18 August 2015 adopted in application of the Directive 2013/33/EU could be detained for a period of up to twelve months in case they represented a threat to the public security and order – compromised even more their already vulnerable situations. This is a problematic approached even within the jurisprudence of the Court of Strasbourg, not only in cases related to Italy as shown in *Khlaifia and Others v. Italy*[420], but also in similar cases involving other EU Member States such as *M.S.S v. Belgium and Greece*[421], *Dougoz v. Greece*[422], and so forth. The criticisms fell over the lack of information to migrants concerning their own rights and duties within the centres, lack of space destined for recreational activities, inadequate sanitary infrastructure, and the existence of a significant number of individuals possessing different vulnerabilities not receiving proper support on their particular needs[423].

Another element affecting reception conditions within the CIEs in Italy concerns asylum seekers' access to legal aid and counselling from their inside. Since in many cases they are unaware of the requirements to meet and of the documents to provide

[418] Ibid., p.474.
[419] The limited access to the centres were reported by the *Medici per i diritti umani* (MEDU) in *Arcipelogo CIE. Indagine sui centri di identificazione ed espulsione italiani*, 13 May 2013, Available at: http://www.mediciperidirittiumani.org/arcipelago-cie-indagine-sui-centri-di-identificazione-ed-espulsione-italiani-2/ [Accessed 10 May 2018]; and by the Campaign *LasciateCIEntrare* in *Accogliere: la vera emergenza*, Roma, 25 February 2016, Available at: http://www.lasciatecientrare.it/j25/italia/news-italia/193-scaricabile-il-rapporto-di-lasciatecientrare-accogliere-la-vera-emergenza [Accessed 10 May 2018].
[420] *Khlaifia v. Italy*, Application No.16483/12.
[421] *M.S.S. v. Belgium and Greece*, Application No.30696/09.
[422] ECtHR, *Dougoz v. Greece*, Application No.40907/98, Judgment 06 March 2001.
[423] Gornati, B., *Le nuove forme di trattenimento dello straniero irregolare in Italia: dall''evoluzione' dei CIE all'introduzione dei c.d. hotspot*, 2016, p.475; see also UNHCR, *UNHCR Recommendations on Important Aspects of Refugee Protection in Italy*, 2013, p.6.

along their application for international protection, most of times being also unable to give a coherent testimony of their fear of persecution, those became essential forms of assistance in order to guarantee a fairer status determination, overcoming misunderstandings on the immigration laws and preventing the issuance of undue expulsion orders, by supporting and interceding in the assessment of the merit of the cases[424].

The Italian Constitution determines under Article 4 that everyone is entitled to legal aid at every stage and instance of the legal proceedings in order to protect his/her rights under civil and administrative law, right that was extended to asylum seekers through the Legislative Decree 25/2008[425]. Although legal aid under these terms remained limited to representation in court, yet, a minimum legal counselling not necessarily provided for by lawyers is foreseen under non-contentious matters[426]. The service is available in three distinct categories attending individuals willing to proceed with asylum request at the border entry points[427], persons detained inside reception centres as part of a range of obligatory services instituted by the agency responsible for the management of the centre or by other NGOs[428], and individuals along the areas of arrival outside the official entry points[429].

It is important to highlight that legal aid in civil and administrative court cases are usually obtained through formal request to a Bar Association (*Consiglio dell'Ordine degli Avvocati*) of the competent court, either in person or by intermediation of an NGO or a lawyer, in which it must be submitted the application form along with the applicant's income certitude or declaration (Article 79, Presidential Decree 115/2002; *Consiglio dell'Ordine degli Avvocati di Catania*, communication 2009), a copy of his/her identity card, tax code number (*Codice Fiscale*), and any available evidence in its support[430]. Notwithstanding asylum seekers held in CIEs are entitled of making this application directly to the judge through an *ex lege* procedure – as determined under

[424] Bianchini, K., *Legal Aid for Asylum Seekers: Progress and Challenges in Italy*, 2011, pp.390-392.
[425] Vassallo Paleologo of 8 September 2008.
[426] Ibid., p.396.
[427] Article 11(6), Legislative Decree 286/98.
[428] Article 32, Law 189/2002; Ministero dell´Interno 2009: 43.
[429] Bianchini, K., *Legal Aid for Asylum Seekers: Progress and Challenges in Italy*, 2011, p.396: Reference to the 'Presidium' Project, run by UNHCR, International Organization for Migration (IOM), Italian Red Cross and Save the Children, co-financed between the European Commission and the Ministry of Interior. Initially implemented only in Lampedusa, the project has later been enlarged to cover the whole Sicilian coast and other areas in the South of Italy.
[430] Ibid., 398.

Article 13(8) *Testo Unico* No.286/1998, as amended; Article 142(L) Presidential Decree –, linguistic and communication barriers, lack of adequate translation of documents, lack of economic resources and outside support still represent consistent obstacles to the exercise of this right. Moreover, lawyers in charge before detention started are discouraged from continuing to represent individuals after transference to another place as travel expenses outside the area of their court are not covered, and also, contact with the lawyer becomes seriously problematic within the 48 hours of the hearing that reviews the expulsion order. In the end, this recourse remained incomplete and ineffective, leaving a gap on legal aid support to asylum seekers, which is being hence substituted by legal counselling and information services offered by initiative of NGOs and churches[431].

On the same grounds, it is also valid to highlight the lack of procedural safeguards within rejections at the border, which in many cases, resulted in violations to the right of asylum[432]. This occurs because at this stage, no provisions for legal aid, neither revision of individual cases by a judge are foreseen, being at disposal only legal information and translation support. Likewise, there have been evidences that since 2011 many Egyptians and Tunisian nationals that had arrived in Lampedusa in an irregular manner by sea were being only admitted to the asylum procedures if followed by interventions of *Praesidium* partners, NGOs or lawyers. These groups of individuals have been regularly transferred to CIEs rather than Reception Centres for Asylum seekers (CARA) by their arrival, even when presented the intention to seek asylum[433]. These factors not only deprived individuals from the access to a proper status determination, but also, in many cases, led them to removal without respecting all procedural guarantees[434], ending up in *refoulement*.

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[431] Ibid., 399.

[432] Ibid., 400; See also The Guardian, *A cruel End for Italy's Asylum Seekers*, 16 May 2009, Available at: https://www.theguardian.com/commentisfree/2009/may/16/italy-asylum-seekers-berlusconi [Accessed 18 May 2018]; Progetto Melting Pot Europa, *Morto al Porto Venezia – Comunicato delle Associazioni*, 25 June 2008, Available at: http://www.meltingpot.org/Morte-al-porto-di-Venezia-Comunicato-delle-Associazioni.html#.WvxQPIiFPIU [Accessed 16 May 2018]; Progetto Melting Pot Europa, *Le Frontiere della Morte. Cosa Accade al Porto di Venezia?*, 23 June 2008, Available at: http://www.meltingpot.org/Le-frontiere-della-morte-Cosa-accade-al-porto-di-Venezia.html#.WvxQzYiFPIU [Accessed 18 May 2018].

[433] UNHCR, *UNHCR Recommendations on Important Aspects of Refugee Protection in Italy*, 2013, p.6.

[434] Eurostat Statistics Explained, *Statistics on enforcement of immigration legislation*, May 2017, "*Italy and the United Kingdom reported the highest numbers of refusals at sea borders (3 725 and 3 470 respectively) for 2016; none of the other EU Member States for which data are available recorded in excess of a thousand refusals at sea borders*", Available at: http://ec.europa.eu/eurostat/statistics-

2. The assessment of the international courts and monitoring bodies to the Italian case law

In this part of the work I will approach different cases brought before the ECtHR regarding the way Italy has been implementing international obligations derived from International Refugee Law and the EU Asylum Protection System, highlighting some of the aspects influencing asylum procedures and compromising the applicants' access to human rights. I firstly address the case *Khlaifia v. Italy* in order to show how the Court interpreted the identification procedures and the conditions of detention of the applicants by their arrival in Italy, and in which ways these factors violated the human rights of these individuals. Next, it will be discussed how in *Mohammed Hussein v. The Netherlands and Italy* and in *Tarakhel v Switzerland* the reception conditions in the country influenced the way in which the Court reasoned on the returns conducted under the Dublin System. Finally, there will be an assessment of the case *Hirsi Jamaa v. Italy*, focusing on the responsibility attributed to Italy within interceptions occurred in the sea in order to avoid irregular boats to disembark within European ports. This analysis will give an overview on which areas Italy has been failing to comply with the referred obligations, and how the international monitoring bodies have been assessing that.

2.1. Procedural guarantees of asylum-seekers in Italy: the case *Khlaifia v. Italy*

The *Khlaifia* case[435] was approached in different parts of this work[436] and discusses the manner in which Italy conducted the repatriation of three Tunisian nationals in 2011, disrespecting procedural guarantees that resulted in violation of fundamental rights protected under the ECHR. The first point to consider in this context was the arbitrary detention of the applicants that occurred without any formal judicial order, neither legal support of a lawyer, violating Article 5 ECHR on the right to freedom. The second was the poor conditions in which the applicants were detained in the Centre for Rescue and initial Reception (*Centro di soccorso e prima accoglienza* - CSPA) on Lampedusa, exposing them to inhuman and degrading treatment, prohibited under Article 3 ECHR. The third was the expulsion of the applicants towards Tunisia merely on the basis of their nationality, not taking into account their individual situations neither proceeding with an individual assessment of case, breaching Article 4 Protocol 4

explained/index.php/Statistics_on_enforcement_of_immigration_legislation#Entry_refusals_by_border_type [Accessed 16 May].

[435] *Khlaifia and Others v. Italy*, Application No.16483/12.

[436] See supra, Chapter I, para.1.3 and Chapter 3.

ECHR on the prohibition of collective expulsion of aliens and Article 13 ECHR on the right to effective remedy.

As dealt in the first chapter[437], according to customary international law, each State is free to exercise territorial sovereignty, to protect its own borders, to decide who to admit into its own territory and whether or not to detain and/or remove migrants[438]. It is however necessary to remark that these powers must be implemented in accordance with obligations under international human rights law, among which the most important is the respect for the principle of *non-refoulement*, representing a threshold to the discretionary power of the State on immigration control[439]. This means that nobody shall be removed without an individual assessment of his/her case, necessary step in order to ensure the person in view of removal will not be victim of ill-treatment and persecution once returned. The fact is that police and border control still exercise a key role in the enforcement of immigration law as they detain discretionary power in order to determine who enters or not, exceeding its mere role of border patrolling, acting more as borders' performers[440]. They possess an inclusion capacity through this discretionary power, being able to make a choice among possible courses of action or inaction, resulting in a permissive and vague application of these laws[441]. This can lead to different patterns of treatment at border control and during identification process, turning such procedures unpredictable and unequal, at times also leading to arbitrary detention of asylum-seekers, in many cases precluding their access to asylum procedures[442].

Indeed, one of the most controversial aspects of the Italian immigration policy, which is also an important point addressed in *Khlaifia*, is the frequent recourse by national authorities to the administrative detention of migrants in view of their removal.

[437] See supra, Chapter I, para.1.
[438] Mauro, M.R., *Detention and Expulsion of Migrants: The Khlaifia v. Italy case*, The Italian Yearbook of International Law, Vol.25, 2015, p.91; See also ECtHR, *T.I. v. The United Kingdom*, Application No.43844/98, Judgment 07 March 2000; Pisillo Mazzeschi, R., *Sui rapporti fra i diritti umani ed i diritti degli stranieri e dei migranti nel diritto internazionale*, Pisillo Mazzeschi, R., Pustorino, P., Viviani, A., (eds.), *Diritti umani degli immigrati: tutela della famiglia e dei minori*, Editoriale Scientifica, Napoli, 2010, p.7 ff., pp.10-11.
[439] See supra, Chapter I, para.1.2.
[440] Fabini, G., *Managing illegality at the internal border: Governing through 'differential inclusion' in Italy*, EJC, Vol.14(I) 46-62, 2017, p.49; See also Wonders, N.A., *Global flows, semi-permeable borders and new channels of inequality*, in Pickering, S. and Weber, L., (eds) Borders, Mobility and Technologies of Control. Dordrecht: Springer, 2006, pp. 63–86.
[441] Ibid., p.50; see also Davis K.C., *Discretionary Justice: A Preliminary Inquiry*, Baton Rouge: Louisiana State University Press, 1969.
[442] See supra, Chapter III, para.1.

In this sense, it is important to take into account that detention of migrants is unlawful if conducted in an arbitrary manner or in violation of human rights norms[443]. Detention shall therefore always be conducted based on an adequate motivation and justification, informing the individual the reasons for his detention, providing him the possibility of appealing to a judicial organ in order to verify the lawfulness of his detention and the right to compensation in case of unlawful detention, as well as not occurring for an unreasonable period of time, neither impeding the access to international protection procedures. This signifies that detention must have a precise and foreseeable basis. Moreover, the ECHR case law has shown that detention is only lawful while removal procedure is pending, otherwise being no longer justified[444]. Such guarantees however are not always provided, especially within the Italian CIEs[445] where very often, either the principle of equality either the principle of inviolability of personal freedom foreseen in the Italian Constitution, are respected. This normally happens due to the lack of a transparent and detailed legal regulation, causing arbitrariness, uncertainties and significant differences in treatment from one CIE to another. Furthermore, inadequate living conditions of migrants detained in CIEs and CSPAs, illustrated by overcrowding, improper hygiene and health care, bad quality of food, and generally degrading treatment constitute themselves violations of one's fundamental rights[446].

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[443] ECtHR, *Guzzardi v. Italy*, Application No.7367/76, judgment 6 November 1980, para.92: "*No one should be dispossessed of this liberty in an arbitrary fashion. In order to determine whether someone has been deprived of his liberty within the meaning of Article 5 (art. 5), the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question*"; ECtHR, *Amuur v. France*, Application No.19776/92, judgment 25 June 1996, para.21: "*holding an alien in the transit zone does nevertheless, through the combined effect of the degree of restriction of movement it entails and its duration, impinge on the personal liberty of the person concerned within the meaning of Article 66 of the Constitution. Although the power to order an alien to be held may be conferred by law on the administrative authorities, the legislature must make appropriate provision for the courts to intervene, so that they may carry out their responsibilities and exercise the supervisory power conferred on them.*"; ECtHR, *Abdolkhani and Karimnia v. Turkey*, Application No.30471/08, judgment 22 September 2009, para.127: "*the applicants have not been free to leave the Hasköy police headquarters or the Kırklareli Foreigners' Admission and Accommodation Centre. Besides, they are only able to meet a lawyer if the latter can present to the authorities a notarised power of attorney. Furthermore, access by the UNHCR to the applicants is subject to the authorisation of the Ministry of the Interior. In the light of these elements, the Court cannot accept the definition of "detention" submitted by the Government, which in fact is the definition of pre-trial detention in the context of criminal proceedings. In the Court's view, the applicants' placement in the aforementioned facilities amounted to a "deprivation of liberty" given the restrictions imposed on them by the administrative authorities despite the nature of the classification under national law*".

[444] Mauro, M.R., *Detention and Expulsion of Migrants: The Khlaifia v. Italy case*, 2015, p.95-96.

[445] Ibid., p.93, According to Article 13 of the Italian Constitution "*CIEs are considered as places of detention, therefore migrants are guaranteed by all relevant constitutional safeguards, in particular judicial control within strict time limits*".

[446] Ibid.

In different terms, it means that, in order comply with Article 5 ECHR, administrative detention of migrants must be conducted in accordance with all the procedural guarantees stressed above, enabling detained migrants to challenge the legitimacy of their detention as provided for in Article 13 ECHR on the right to an effective remedy, and guaranteeing conformity with the prohibition of inhuman or degrading treatment, imposed by Article 3 ECHR[447]. Those are issues that have shown to be more of a formal than substantial nature along the CIEs in Italy. Detention is not always followed by judicial validation of the detention order by the Justice of Peace, and when it does, many times it comes with failures in respecting the strict terms, difficulties in communication arisen from language barriers, and inadequacy of the legal reasoning within judicial decisions[448]. In *Khlaifia*, the conditions in which the applicants were detained were not founded on a domestic legal basis, neither on a formal decision adopted. Thus, it represented a *de facto* detention and an unlawful deprivation of liberty, which proved to be incompatible with Article 5 ECHR[449]. As well, the reasons for detention were not clearly explained to the applicants and they had no means of challenging their detention, violating Article 5(2) and 13 ECHR respectively[450].

In what regards violation of Article 4 Protocol No.4 ECHR on the collective expulsion of aliens, it is firstly necessary to consider that according to Italian immigration law, migrants without valid documents for entry or the right to stay in the national territory may be expelled by the border police[451]. In this sense, expulsions may occur in three different ways: through an order issued by the *Prefetto* (the highest local affairs administrative authority) in case of irregular entry or residence or threat to public security[452]; judicial expulsion that constitutes a criminal law security measure and is decided by the judicial authority together with or alternatively to usual criminal sanctions, when aliens have committed a crime[453]; and push-backs and expulsions of migrants, following the legislative amendments adopted in 2008-2009, the so called "Pacchetto Sicurezza" (Security Packages)[454]. These practices have been strongly

[447] Ibid., p.95.
[448] Ibid., p.96; see also Di Martino, A., Bindi Dal Monte, F., Boiano, I., Raffaelli, R., *The criminalization of irregular immigration: law and practice in Italy*, Pisa 2013, p.58 ff.
[449] *Khlaifia and Others v. Italy*, Application No.16483/12, para.170.
[450] Mauro, M.R., *Detention and Expulsion of Migrants: The Khlaifia v. Italy case*, 2015, p.96.
[451] Article 10 T.U. Immigrazione.
[452] Article 13 T.U. Immigrazione.
[453] Article 235 and 312 of the Italian Criminal Code, as well as Articles 15 and 16 T.U. Immigrazione.
[454] *Pacchetto Sicurezza*, Law of 15th July 2009, No.94 regarding matters of public security (09G0096) (GU Serie Generale No.170 of 24th July 2009 - Suppl. Ordinario No.128), entry into force 8 August

criticised, not only because they impose limitations to personal freedom, giving a large margin of discretional evaluation, inclusive contradicting the Italian Constitution and at times violating international obligations[455], but also because they are considered excessively focused on the protection of public order and security instead of following a model of integration[456].

If in one way expulsion of aliens in itself does not constitute a breach of International Law as States have the right to expel aliens in case of illegal entry or residence, in the other way collective expulsion of aliens is absolutely prohibited. This prohibition is foreseen under both customary and treaty international law, as well as within the EU legal order, inferring such practice is incompatible with Article 78(1) TFEU according to which asylum policy has to respect the prerogatives of the 1951 Geneva Convention and other relevant treaties, and with Article 19 of the Charter. The concept of "collective expulsion of aliens" is understood as "*any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group*"[457]. This means that, in order to not breach with Article 4 Protocol No.4 ECHR, expulsion procedures shall evaluate the personal situation of each applicant individually. After all, the purpose of this clause is to prevent removals of a certain number of aliens without examining their personal circumstances, and therefore without enabling them to put forward their arguments against the measure taken by relevant authority[458], rationale also defended in *Hirsi Jamaa and Others*[459] and *Sharifi and*

2009, Available at: http://www.gazzettaufficiale.it/gunewsletter/dettaglio.jsp?service=1&datagu=2009-07-24&task=dettaglio&numgu=170&redaz=009G0096&tmstp=1248853260030 [Accessed 29 May 2018], Laws part of the "*Lotta all'immigrazione clandestina*" in order to counteract the presence of irregular and clandestine migration in Italy: Law 94/2009 - Possibility of detaining the irregular migrants within the CIE for up to 180 days, allowing his/her identification and subsequently removal; Law 7/2009, protocol 4 February 2009 – Ratified the agreement between Italy and Libya, and signed the related protocol for joint patrolling operations within Mediterranean waters; Law 125/2008 – Removal for persons condemned to a penalty exceeding the period of two years; Law 94/2009 – Measures to turn effective the removal of non-nationals that have already been issued a removal order.

[455] Di Martino, A., Bindi Dal Monte, F., Boiano, I., Raffaelli, R., *The criminalization of irregular immigration: law and practice in Italy*, 2013, p.21-23: "*This does not seem to comply with either the principle that "the legal status of foreigners is regulated by law" (Article 10(2) of Italian Constitution" nor the principle established by Article 13 of the Italian Constitution, according to which all limitations to personal freedom shall be established by law (so called riserva di legge) and be subjected to jurisdictional control (so called riserva di giurisdizione). In fact in many cases, push-back orders have been adopted some days after the immigrant had been identified*".

[456] Mauro, M.R., *Detention and Expulsion of Migrants: The Khlaifia v. Italy case*, 2015, p.97.

[457] *Conka v. Belgium*, Application No.51564/99, para.59; *Khlaifia and Others v. Italy*, Application No.16483/12, para.237; *Georgia v. Russia (I)*, Application No.13255/07, para.167; ECtHR, *Sultani v. France*, Application No.45223/05, Judgment 26 September 2007, para.81.

[458] *Khlaifia and Others v. Italy*, Application No.16483/12, para.238.

Others[460]. The Court in *Khlaifia* in its assessment to define whether or not there was a breach of Article 4 Protocol No.4 ECHR took into account the existence of deportation orders with equal terms; the presence or absence of individual interviews; existence of obstacles for aliens to obtain legal aid; and whether or not the expulsion order covered large number of individuals having the same nationality and receiving same treatment simultaneously[461].

Although Italy in this case had duly conducted identification and registration procedures of the applicants, the Court still reinforced that this was not sufficient to rule out the existence of a collective expulsion within the meaning of Article 4 Protocol No.4. The Court reinforced that the refusal of entry orders did not make any reference to the personal situations of the applicants neither the Government was capable of proving that individual interviews concerning the specific cases of each applicant was conducted. In addition, the fact that most individuals around the time of the events in issue were of the same origin and had been subjected to the same outcomes, probably result of the agreement between Italy and Tunisia in April 2011 foreseeing the return of unlawful migrants from Tunisia through simplified procedures, on the basis of mere identification by the Tunisian consular authorities of the person concerned, was enough to conclude that the applicants were victims of collective expulsion, therefore configuring a breach of Article 4 Protocol No.4[462].

The ECHR case law developed an extensive interpretation on the prohibition of collective expulsion of aliens, the reason why is still interesting to look through the dissenting opinion of Judges Sajó and Vucinic in *Khlaifia*[463] limiting such formulation through a more traditional approach. The judges addressed two circumstances necessary in order to qualify collective expulsion of aliens. The first relates to cases in which members of a group are targeted for expulsion from State's territory purely on the basis of their membership, and the second regards and entire group of people being "pushed-back" from a territory without consideration of their individual identities. They highlighted that in the present case the applicants were not expelled on the basis of membership of an ethnic, religious, or national group and that they were returned to a

[459] *Hirsi Jamaa and Others v. Italy*, Application No.27765/09, para.177.
[460] *Sharifi and Others v. Italy and Greece*, Application No.16643/09, para.210.
[461] Mauro, M.R., *Detention and Expulsion of Migrants: The Khlaifia v. Italy case*, 2015, p.102.
[462] *Khlaifia and Others v. Italy*, Application No.16483/12, para.213.
[463] Ibid., Second Section, Joint Partly Dissenting Opinion of Judges Sajó and Vucinic, Judgment 01 September 2015.

safe country and were not, in any event, asylum-seekers; thus posing no issue of *refoulement*[464]. In contrast, the ECHR case law still defends that an expulsion can be considered as collective even without being target oriented, in which personal characteristics are taken into account. The prohibition of collective expulsion anyhow impedes automatic decisions that may result in violation of human rights of the expellees[465].

2.2. The reception conditions in Italy: the case *Mohammed Hussein v. The Netherlands* and Italy and *Tarakhel v. Switzerland*

The first referred case, *Mohammed Hussein v. The Netherlands and Italy*[466], concerns the removal of a Somali asylum seeker and her two young children from the Netherlands towards Italy, under the Dublin Regulation. The applicant claimed that in case the transfer occurred, she and her kids would be subject to ill treatment as she would be forced to live on the streets and her kids would be separated from her as they would be sent to a children's home, resulting hence in violation of Articles 3 and 8 ECHR, on the right to respect for family and private life. The second approached case, *Tarakhel v. Switzerland*[467], regards another Dublin removal involving an Afghan couple and their six children in course of being transferred from Switzerland to Italy. They similarly attested fear of suffering ill-treatment in the referred Member State, grounding their risk on allegations that Italy lacked of individual guarantees as how they would be taken charge of, in the view of systemic deficiencies in the reception arrangements for asylum seekers, from the identification and asylum procedures to the living conditions within the reception centres. Notwithstanding the existence of these commonalities, the decisions taken in each of the cases were rather different.

In order to understand how both returns would amount in violations of Article 3, it is firstly necessary to consider the reception conditions in Italy. For that, an assessment on the way Italy has been applying the provisions laid down in the Council Directive No.2003/9/EC[468] is required, demonstrating whether or not asylum seekers and persons already granted with an international protection status are having access to a minimally

[464] Ibid., paras.12-18.
[465] Mauro, M.R., *Detention and Expulsion of Migrants: The Khlaifia v. Italy case*, 2015, p.103.
[466] ECtHR, *Samsam Mohammed Hussein and Others v. the Netherlands and Italy*, Application No.27725/10, Judgment 2 April 2013.
[467] *Tarakhel v. Switzerland*, Application No.29217/12.
[468] *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, Official Journal L 031, 06 February 2003.

dignified standard of living. Although refugees, beneficiaries of subsidiary protection and those granted with residence permit for compelling humanitarian reasons are all entitled of at least the right to work and access to health care, the first two categories having also the right to family reunion, social assistance, social housing and education under Italian domestic law, in practice, the conditions in which those rights are achieved, if achieved, are not yet accordingly to the standards of the Directive or in compliance with fundamental rights foreseen under the ECHR. The same applies for applicants that, despite of being entitled to access facilities where they stay while awaiting a hearing or while they attempt to integrate into Italian life, not always have access to such structures, or when they do, in many cases are under really precarious conditions[469].

This inadequacy in the Italian reception conditions[470] has already been questioned by other Member States like Germany that, in a number of judgements by different administrative courts, have suspended Dublin transfers, notably owing to the risk of homelessness and life below minimum subsistence standards[471]. Also Belgium positioned itself during the ruling No.74623 given on the 3 February 2012, suspending the transfer of an Afghan asylum seeker from Belgium to Italy, fearing that would breach the latter's rights under Article 3 of the Convention[472]. On the same grounds, many asylum seekers have already used the Court of Strasbourg as a recourse in order to block their transfers back to Italy[473], as demonstrated in the herein study cases[474].

In *Mohammed Hussein* the Court determined that, "*while the general situation and living conditions in Italy of asylum seekers, accepted refugees and aliens who have been granted a residence permit for international protection of humanitarian purposes may*

[469] Rubin, A.T., *Shifting Standards: The Dublin Regulation and Italy*, CICLJ, Vol.7, Issue 1, 2016, pp.142-143.
[470] Ibid., p.144; see also Asylum Information Database (AIDA), *Conditions in detention facilities*, 2018, Available at: http://www.asylumineurope.org/reports/country/italy/detention-asylum-seekers/detention-conditions/conditions-detention-facilities [Accessed 23 May 2018]; UNHCR, *UNHCR Recommendations on Important Aspects of Refugee Protection in Italy*, 2013, p.9; European Commission, *Asylum seekers and migrants in Italy: are the new migration rules consistent with integration programmes?*, ESPN Flash Report 2017/16, Filippo Strati, European Social Policy Network, 2017, p.2.
[471] *Samsam Mohammed Hussein and Others v. the Netherlands and Italy*, Application No.27725/10, para.51.
[472] Ibid., para.52.
[473] *Tarakhel v. Switzerland*, Application No.29217/12; *Samsam Mohammed Hussein and Others v. the Netherlands and Italy*, Application No.27725/10, ECtHR, *A.M.E v. the Netherlands*, Application No.51428/10, Judgment 13 January 2015, ECtHR, *A.S. v. Switzerland*, Application No.39350/13, Judgment 30 June 2015.
[474] See supra, Chapter III, para.2.2.

disclose some shortcomings, it has not been shown to disclose a systemic failure to provide support or facilities catering for asylum seekers as members of a particularly vulnerable group of people"[475], declaring hence the case inadmissible. The Court further reiterated that "*the mere fact of return to a country where one´s economic position will be worse than in the expelling Contracting State is not sufficient to meet the threshold of ill-treatment proscribed by Article 3*"[476].

In *Tarakhel* this reasoning changed. The applicants highlighted that reception arrangements for asylum seekers in Italy were beset by systemic deficiencies related to difficulties in gaining access to reception facilities owing to the slowness of the identification procedure, insufficient accommodation capacity of those facilities and inadequate living conditions in the available facilities[477]. The Court in this regard acknowledged the concrete possibility that a significant number of asylum seekers removed to Italy could be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions. Unlike the first case, it was therefore emphasized that Swiss authorities should obtain assurances from their Italian counterparts that on their arrival in Italy the applicants would be received in facilities with minimum living standards, and that the family would be kept together[478]. In this sense, the Court referred to considerations taken in *Bosphorus Hava Yollari Turizm ve Ticaret Anomim Sirketi v. Ireland*[479] in which it was pointed out that, although "*the Convention did not prohibit Contracting Parties from transferring sovereign power to an international organisation in order to pursue cooperation in certain fields of activity*", "*States…*[still] *remain responsible under the Convention for all actions and omissions of their bodies under their domestic*

[475] *Samsam Mohammed Hussein and Others v. the Netherlands and Italy*, Application No.27725/10, para.78.
[476] Ibid., para.70.
[477] *Tarakhel v. Switzerland*, Application No.29217/12, para.57; Information also based on findings of the following organisations: The Swiss Refugee Council (SFH-OSAR), *Reception conditions in Italy: Report on the current situation of asylum seekers and beneficiaries of protection, in particular Dublin returnees*, Berne, October 2013 ("the SFH-OSAR report"); PRO ASYL, Maria Bethke, Dominik Bender, *Zur Situation von Flüchtlingen in Italien*, 28 February 2011, www.proasyl.de ("the PRO ASYL report"); Jesuit Refugee Service-Europe (JRS), *Dublin II info country sheets. Country: Italy*, November 2011 ("the JRS report"); Office of the United Nations High Commissioner for Refugees, UNHCR Recommendations on important aspects of refugee protection in Italy, July 2012 ("the 2012 UNHCR Recommendations"); report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, published on 18 September 2012 following his visit to Italy from 3 to 6 July 2012 ("the Human Rights Commissioner's 2012 report); and the European network for technical cooperation on the application of the Dublin II regulation, *Dublin II Regulation National Report on Italy*, 19 December 2012 ("the Dublin II network 2012 report").
[478] Ibid., para.120.
[479] *Bosphorus Hava Yollari Turizm ve Ticaret Anomim Sirketi v. Ireland*, Application No.45036/98.

law or under their international legal obligations"[480]. The reference to "international obligations" in this case related to the respect for the principle of *non-refoulement*, implying Contracting States shall not remove any individual towards a territory where he would be exposed to ill-treatment, including transfers occurred within the Dublin area.

Since in both cases the applicants failed to demonstrate they had been actually subjected to any inhuman or degrading treatment, there is the possibility that the differences between the two decisions were grounded on a press briefing note on the status of Italy's asylum system provided by the IOM on the 28th January 2014, cited by the Court of Strasbourg in *Tarakhel*. In this press note it was reinforced that Italy could no longer handle the number of asylum seekers because of the large increase in the amount of people arriving through the Mediterranean sea routes, overcrowding and exceeding the capacities of its reception centres[481]. That sufficed to prove Italy was not guaranteeing minimum conditions along its reception facilities, precluding the automatic application of the Dublin transfers based on the premise that all Member States were safe[482].

Hence, the decision in *Tarakhel* represents a development to the way in which the ECtHR so far had been positioning itself towards European Union matters. It disrupted European norms and procedures for processing asylum seekers, creating a disjointed policy, which Dublin countries may be pressed to implement and act upon from this moment on. By requiring individual guarantees that the applicants would not be exposed to ill-treatment once removed to Italy, the Court constrained one of the major goals of the Dublin Regulation, that of a Common policy on asylum[483]. This way the Court throw an entire system into turmoil and created an atmosphere of non-

[480] *Tarakhel v. Switzerland*, Application No.29217/12, para.88.
[481] Ibid., para.50: "*Over 45,000 migrants risked their lives in the Mediterranean to reach Italy and Malta in 2013. Of those who arrived in Italy, over 5,400 were women and 8,300 were minors – some 5,200 of them unaccompanied. Most of the landings took place in Lampedusa (14,700) and along the coast around Syracuse in Sicily (14,300). This year (2013) migration towards Italy's southern shores tells that there has been an increase in the number of people escaping from war and oppressive regimes. Landings are continuing in January 2014. On 24 January, 204 migrants were rescued by the Italian navy in the Straits of Sicily and landed in Augusta, close to Syracuse. The real emergency in the Mediterranean is represented by those migrants who continue to lose their lives at sea. Over 20,000 people have died in the past twenty years trying to reach the Italian coast. They include 2,300 in 2011 and around 700 in 2013*".
[482] *Tarakhel v. Switzerland*, Application No.29217/12, paras.90-91.
[483] Rubin, A.T., *Shifting Standards: The Dublin Regulation and Italy*, 2016, pp.148-149.

compliance, where countries began to look for ways around the standards, creating uncertainty on the way to comply with them and how they will be enforced[484].

This reasoning gained juridical space, in particular in reason of the massive increase in the number of arrivals that exceeded the reception capacities of southern EU Member States, being acknowledged also by the CJEU within the decisions of *N.S. v. Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*[485]. The Court in this case determined that, in order "*to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 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 within the meaning of Article 4 of the Charter*"[486]. This has been rendering the implementation of a CEAS, framed in application of the Dublin Regulation, more complicated, posing a counterpart to the free movement of persons within the Schengen area as internal borders control are inexistent, even to migrants under irregular situation[487].

2.3. The international obligations of Italy towards the interceptions at sea: the case *Hirsi Jamaa and Others v. Italy*

The *Hirsi* judgment became important not only for emphasizing the absolute character of the principle of *non-refoulement* and its manner of operation in a maritime context, but also for reinforcing the idea that any State activity encroaching on fundamental rights should be embedded in a clear framework of legal safeguards on procedural standards[488]. This judgment is already treated in this work[489] dealing with the

[484] Ibid., p.151.
[485] CJEU [GC], *N.S. v. Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Joined Cases Application Nos.C-411/10 and C-493/10, Judgment 21 December 2011.
[486] Ibid., para.94.
[487] Bossuyt, M., *Tarakhel c. Suisse: La Cour de Strasbourg rend encore plus difficile une Politique commune européenne en matière d´asile*, SRIEL, Vol.25, 3, 2015, p.5.
[488] Den Heijer, M., *Reflections on Refoulement and Collective Expulsion in the Hirsi Case*, IJRL, Vol.25 No.2, 2013, p.266.
[489] See supra, Chapter I, para.1.3.

extraterritorial application of the principle of *non-refoulement*, and herein it will approach how such practices were elaborated in accordance with the specific interests of the Italian authorities and how this affected Italy's international obligations towards International Refugee Law and the EU Asylum Protection System.

European Heads of State and Government had already acknowledged the importance of ensuring protection for those who travel in mixed flows at sea in Stockholm in 2010, where the European Council called for "*clear common operational procedures containing clear rules of engagement for joint operations at sea, with due regard to ensuring protection for those in need, in accordance with international law*"[490]. Furthermore, the European Council and the European Parliament also affirmed that the strengthening of border controls should not prevent persons entitled to international protection from gaining access to protection, therefore requiring the implementation of more sensitive border controls[491]. The Italian operations were thus considered an affront to such terms, as it did not respect the wide accepted opinion that a refugee, including those found at sea, should under no circumstance be returned to a territory where he can be submitted to ill-treatment[492].

Hirsi was one among many cases in which push-back operations envisaging the reduction in the number of mixed flows travelling through the sea occurred[493]. They

[490] *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, OJ 2010 C 115-01, Official Journal of the European Union, 4 May 2010, para.5.1.

[491] *Green Paper on the future Common European Asylum System*, COM (2007) 301 final, Brussels, 6 June 2007, para.5.3; *European Parliament resolution of 18 December 2008 on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR)*, (2008/2157(INI)), Strasbourg, 18 December 2008, recital p, pts.13,18 and 28.

[492] *Hirsi Jamaa and Others v. Italy*, Application No.27765/09, Concurring Opinion of Judge Pinto de Albuquerque, pp.68-69: "*The prohibition of refoulement is not limited to the territory of a State, but also applies to extra-territorial State action, including action occurring on the high seas. This is true under international refugee law, as interpreted by the Inter-American Commission on Human Rights, the United Nations High Commissioner for Refugees, the United Nations General Assembly, and the House of Lords, and under universal human rights law, as applied by the United Nations Committee Against Torture and the United Nations Human Rights Committee*".

[493] "*According to the Italian authorities, from 6 May to 6 November 2009, a total of nine operations were carried out, returning a total of 834 persons to Libya. The precise modalities of the operations have not been made public and were not otherwise fully disclosed to UNHCR. However, Italian officials have provided some information to the media and in the Italian Parliament. Furthermore, UNHCR collected information by interviewing a number of witnesses to these "push-back" incidents*", UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Italy (Application No.27765/09)*, March 2010, para.2.1.2, Available at: http://www.refworld.org/pdfid/4d92d2c22.pdf [Accessed 05 June 2018]; "*In April 2010, the Italian Interior Minister, Roberto Maroni, hailed the Libya deal, citing drop of 96 percent in migrant boat arrivals in Italy, with 28,000 fewer arrivals in the first months of 2010 compared to 2009*", Den Heijer, M., *Reflections on Refoulement and Collective Expulsion in the Hirsi Case*, IJRL, 2013, p.269 (footnote19): ANSA, *96% Drop in migrant arrivals after accord with Libya*, 16 April 2010; Blitz

were result of bilateral agreements concluded between Italy and Libya from 2007-2009, including the Treaty on Friendship, Partnership and Cooperation[494], that envisaged patrolling of irregular vessels, activities strongly criticised by the UNHCR and a number of NGOs[495]. The European Committee for the Prevention of Torture (CPT) had even conducted an ad hoc visit from 27 to 31 July 2009, in which they appointed that Italy's policy of intercepting migrants at sea was not only being conducted in a coercive manner, obliging migrants on board to return to Libya and other non-European countries, but was also violating the principle of *non-refoulement*, part of Italy's obligations under Article 3 of the ECHR[496].

This situation can be related to the recent case of 'Aquarius', a rescue vessel operated by the German NGO *SOS Méditerranée* that took 629 migrants from overcrowded boats traveling within the Central Mediterranean routes between the 9 and 10 June 2018, occurred under the initiative of search and rescue operations (SAR) carried out by NGOs and the Italian Navy. On the 10 June the Aquarius was on its way to Italy coordinated by the Maritime Rescue Coordination Centre (MRCC) and when they were around 35 nautical miles from the southern coast of Italy, Italian authorities ordered the Aquarius to stop, refusing the access to its ports and permission for disembarkation. This is a measure that, according to the Italian Minister of Interior, would be Italy´s new policy for any NGO vessel rescuing migrants in the Mediterranean Sea. Despite current

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Quotidiano, *Immigrazione, 170 clandestini in Italia nel primo quadrimestre del 2010: 96% meno del 2009*, 16 April 2010; Times of Malta, *Frontex patrols stopped as Malta quits. Italy, Libya patrols to be very effective*, 28 April 2010; "*The bilateral agreements were however suspended following the Libyan revolt in the first months of 2011 and,, in that year, a new record of around 55,000 boat arrivals – mainly from Tunisia – was recorded in Italy´s southernmost island Lampedusa up to September*", Den Heijer, M., *Reflections on Refoulement and Collective Expulsion in the Hirsi Case*, IJRL, 2013, p.270.

[494] *Il trattato Italia-Libia di amicizia, partenariato e cooperazione*, XVI legislatura, No.2041, 23 December 2008, Available at: http://www.camera.it/_dati/leg16/lavori/schedela/apritelecomando_wai.asp?codice=16pdl0017390 [Accessed 5 June 2018].

[495] UNHCR, *UNHCR deeply concerned over returns from Italy to Libya*, 7 May 2009, Available at: http://www.unhcr.org/news/press/2009/5/4a02d4546/unhcr-deeply-concerned-returns-italy-libya.html [Accessed 5 June 2018]; UNHCR, *UNHCR interviews asylum seekers pushed back to Libya*, 14 July 2009, Available at: http://www.unhcr.org/news/briefing/2009/7/4a5c638b6/unhcr-interviews-asylum-seekers-pushed-libya.html [Accessed 5 June 2018]; Human Rights Watch, *Pushed Back, Pushed Around – Italy´s Forced Return of Boat Migrants and Asylum Seekers, Libya´s Mistreatment of Migrants and Asylum Seekers*, New York, 2009, Available at: https://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf [Accessed 5 June 2018]; Amnesty International, *Libya: 'Libya of tomorrow': What hope for human rights*, 23 June 2010, Available at: https://www.amnesty.org/en/documents/MDE19/007/2010/en/ [Accessed 5 June 2018].

[496] Council of Europe, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) FROM 27 TO 31 July 2009*, CPT/inf (2010) 14, Strasbourg, 28 April 2010, Available at: https://rm.coe.int/1680697276 [Accessed 5 June 2018].

Maltese Prime Minister criticised Italian´s conduct, declaring this position was contrary to international rules, Malta itself refused the ship leaving it on stand-by for another day. Maltese and Italian vessels supplied the Aquarius ship with water and food, but none of them accepted the ship in their own territories. On the 11 June, Spain announced its availability to accept the disembarkation of the Aquarius ship in the port of Valencia and Italy offered its ships to facilitate safe passage.

In order to identify whether or not Italy and Malta have violated their international obligations in the referred events, it is essential to reinforce the limits of maritime law. According to the International Convention on Maritime Search and Rescue (the SAR Convention)[497] coastal States have the duty to establish search and rescue operations within their own Search and Rescue Regions (SRRs), subsequently coordinating the disembarkation of the rescued persons at a place of safety. This rule was amended in the Convention in 2004, just after the 'Tampa-incident' in which Australia prohibited the Norwegian vessel *Tampato* to enter the Australian territorial sea in order to disembark 433 migrants just rescued on the high seas. The amendment however did not specify how to predetermine the disembarkation port for each incident. This means that although the responsible State was bound to find safe havens for the individuals on board, it was not compelled to allow disembarkation in its own territory. The Aquarius case occurred in a part of the Mediterranean Sea where no State assumed *de jure* responsibility for the coordination of SAR. Libya which would be the nearest State has not officially established its SRR neither possess a MRCC; Malta always objected to the 2004 amendment, fact that exclude its obligations towards this rule; and Italy that in this case could be entitled the responsible State is only bound to coordinate the rescue operation and find a port for disembarkation, but does not have obligation to allow disembarkation on its own territory[498]. This is a shortcoming of the relevant treaty regime that, if read through the rationale of the principle of effectiveness, could be even regarded as a default obligation of disembarkation on the SAR responsible State[499].

[497] *International Convention on maritime search and rescue*, No.23489, Hamburg, 27 April 1979
[498] Fink, M., Gombeer, K., *The Aquarius incident: navigating the turbulent waters of international law*, EJIL, 14 June 2018, Available at: https://www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/ [Accessed 14 June 2018].
[499] Papastavridis, F., *The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?*, IJIL, 27 June 2018, Available at: https://www.ejiltalk.org/the-aquarius-incident-and-the-law-of-the-sea-is-italy-in-violation-of-the-relevant-rules/ [Accessed 27 June 2018].

Notwithstanding human rights law might oppose the prerogative that the SAR responsible State is not necessarily bound to accept disembarkation in its own territory, justifying that this could impose risks to the right to life of the individuals on board, it is important to remind that in the *Hirsi* judgment the Court of Strasbourg determined that States are responsible for acts contrary to Article 1 ECHR occurred in the high seas only when State officials exercise physical and effective control over the individuals subjected to the violations in question. By instructing the Aquarius to stand by, Italy undoubtedly exercised some control over the individuals on board, exposing them to risk of life. However, it is not clear whether or not such forms of control configured enough grounds to qualify the given circumstances as within the exercise of Italy´s jurisdiction[500].

The Court of Strasbourg in other occasions had already underlined that the high seas were not a human rights no man's land, meaning that maritime interdictions could indeed bring affected persons within the jurisdiction of the interdicting State[501]. This is a teleological interpretation based on the justification that, whenever a State chooses to engage in coercive activity at sea and brings migrants under its control, the only expected consequence was that its duties related to the application of the ECHR were engaged, rejecting Italy's argument that such operations had the mere purpose of rescuing, hence entertaining exclusively obligations under the UN Convention on the Law of the Sea[502]. This line of through is compatible with the ECtHR's case law on the concurrent applicability of other regimes of international law or treaties in which it is reinforced that such obligations do not reduce the scope of the ECHR, neither prevent the its application[503]. Notwithstanding this is a prospecting perspective in terms of the promotion of human rights, this mode of reasoning could display reluctance from States in conducting rescue operations for fear of becoming automatically bound by the obligations towards the migrants on board[504].

[500] Ibid.
[501] ECtHR [GC], *Medvedyev and Others v. France*, Application No.3394/03, Judgment 29 March 2010, para.81.
[502] UNCLOS, Article 98 on the duty to render assistance; See *Hirsi Jamaa and Others v Italy*, Application No.27765/09, para.95.
[503] Den Heijer, M., *Reflections on Refoulement and Collective Expulsion in the Hirsi Case*, IJRL, 2013, p.272; see ECtHR, *Soering v. the United Kingdom*, Application No.14038/88, Judgment 7 July 1989, para.86; ECtHR [GC], *Bosphorus Hava Yollari Turizm ve Ticaret Anomim Sirketi v. Ireland*, Application No.45036/98, Judgment 30 June 2005, para.153.
[504] Ibid., p.273.

The Court in *Hirsi* further considered that Italy exercised *de jure* and *de facto* control over the migrants on board, the first justified through the application of the principle of flag ship as determined under Article 92 UNCLOS and the second because they were actually under the factual power of the Italian authorities during the whole operation[505]. Besides, the conditions in which the interception occurred, with no information given to the migrants regarding their fate, no conduction of identification procedures and no availability of interpreters and legal advisors in order to enable them to comprehend the situation and the procedures they were being carried through, contributed for these individuals to do not declare their wish to apply for asylum[506]. This factor that is likewise affected by the conditions in which these individuals are often found – dehydrated, physically and mentally exhausted, having as unique concern at the time of rescue to be brought to safety –, usually discourages the lodging of asylum applications and hides the fact that the intercepted persons were actually in need of international protection[507].

In these terms, the Court considered Italy responsible for the conduction of the operation. Despite Italy declared that Libya was a safe-third country, based on the fact that Libya had ratified the ICCPR, the CAT and the African Union Refugee Convention, also being member of the International Organization for Migration IOM[508], the Court emphasized the importance of looking through the reports issued by the UNHCR and NGOs indicating that refugees enjoyed no special protection in Libya and were treated as any other clandestine migrants, facing real risk of being detained under inhuman circumstances or even being exposed to torture[509]. This is a situation that remains unchanged. According the Amnesty International, migrants, refugees and asylum seekers in Libya continue to be subjected to widespread violations of their human rights and abuses at the hands of detention centre officials, the Libyan Coast Guard, smugglers and armed groups. Between 2017 and 2018, it is estimated that an average of 20,000 people were arbitrarily held in Libyan detention centres run by the Directorate for Combating Illegal Migration (DCIM), under horrific conditions of extreme overcrowding, lacking access to medical care and adequate nutrition, and

[505] See supra, Chapter I, para.1.3.
[506] *Hirsi Jamaa and Others v Italy*, Application No.27765/09, paras.96, 202-204.
[507] Den Heijer, M., *Reflections on Refoulement and Collective Expulsion in the Hirsi Case*, IJRL, 2013, p.275.
[508] *Hirsi Jamaa and Others v Italy*, Application No.27765/09, para.97.
[509] Ibid., para.125.

systemically subjected to torture and ill-treatment, including sexual violence, severe beating and extortion. Libyan law continues to criminalize irregular entry, stay and exit of foreigners, and still lacks a legal framework for asylum[510].

It is important to highlight that international human rights law prohibits violations to the right to life, arbitrary detention, torture and enforced disappearance. These are prohibitions that Libya, as a State party to some of the core international human rights treaties such the ICCPR and the CAT should respect, being thus bound to protect and fulfil the therein rights to all persons within the territory in which it exercises jurisdiction. This means Libya should guarantee that no one is subjected to arbitrary detention as defined under Article 9 ICCPR, or is victim of deprivation of liberty after a manifestly unfair trial or without a legal basis and that every person has access to bring his/her claim in front of a judicial authority, being also entitled to challenge the legal and factual basis of his/her detention. Beyond, according to the HRC, the State is also responsible for ensuring that entities such as armed groups, empowered or authorized by it to carry out arrests and detention, act aligned with international human rights standards, turning Libya a still unsafe destination for returning migrants, asylum-seekers and refugees[511].

The Court further emphasised the risk of those returned in Libya to be subject to arbitrary repatriation based on the fact that Libya was not a ratifying State of the 1951 Geneva Convention, therefore not providing for refugee status determination neither an equivalent asylum procedure, the UNHCR possessed marginal role there and there were evidences that Libyan authorities had actually conducted forced returns of asylum-seekers and refugees[512]. It is important to highlight that also the Australian case law employed similar reasoning in August 2011, when the High Court of Australia blocked the exchange of 800 'offshore entry persons' from Christmas Island to Malaysia in exchange for 4,000 refugees recognised by UNHCR in Malaysia[513]. The Court concluded that because Malaysia was not ratifying State of the 1951 Geneva

[510] Amnesty International, *Libya 2017/2018*, Available at: https://www.amnesty.org/en/countries/middle-east-and-north-africa/libya/report-libya/ [Accessed 14 June 2018].
[511] OHCHR, *Abuse Behind Bars: Arbitrary and unlawful detention in Libya*, April 2018, pp.12-13, Available at: https://www.ohchr.org/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful_EN.pdf [Accessed 14 June 2018].
[512] Ibid., paras.153-155.
[513] Australia High Court, *Plaintiff M70/2011 v. Minister for Immigration and Citizenship; and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship*, HCA 32, Judgment 31 August 2011.

Convention, neither possessing procedures for determining refugee status or domestic laws guaranteeing protection against *refoulement*, then it was not considered a safe country[514].

A second issue tackled in *Hirsi* was the collective expulsion of aliens, regulated through Article 4 Protocol No.4 ECHR, also treated in others cases as "*Khlaifia and Others v. Italy*"[515], "*Conka v. Belgium*"[516], "*Georgia v. Russian Federation*"[517], and "*Sharif and Others v. Italy and Greece*"[518]. Although Italy has argued that *Hirsi* could not be considered a case of expulsion as for that it would be necessary that the applicants had entered Italian territory, the Court of Strasbourg adopted a teleological approach on the matter emphasising firstly that neither the text nor the drafting history of the Protocol No.4 give conclusive indications on the territorial scope of the provision[519]; secondly that it should always be taken into account the principle that the Convention is a living instrument that must be interpreted in light of the present-day conditions, fulfilling the purposes for which the provision was created for[520].

This built a wide scope of application to the prohibition on the collective expulsion of aliens encompassing it within the context of maritime interdictions as such activities could also be used by States as a tool to prevent migrants from reaching their borders[521]. This approach was justified by the Court based on the rationale that sea rescue operations also involved the enforcement of immigration laws, hence requiring that States respect all procedural guarantees against expulsion when conducting such activities, even when in exercise of their duties under Article 98 UNCLOS[522]. If in one side this inevitably discourages States to conduct rescue operations when the burden is too high[523], in the other side, the ECtHR's case law defended that prohibition of

[514] Ibid., para.135.
[515] *Khlaifia and Others v. Italy*, Application No.16483/12.
[516] *Conka v. Belgium*, Application No. 51564/99.
[517] *Georgia v. Russia*, Application No.13255/07
[518] *Sharifi and Others v. Italy and Greece*, Application No.16643/09.
[519] *Hirsi Jamaa and Others v Italy*, Application No.27765/09, para.173-174.
[520] Ibid., para.175; See also ECtHR, *Tyrer v. the United Kingdom*, Application No.5856/72, Judgment 25 April 1978, para.31.
[521] Ibid., para.180
[522] Ibid., para.185: According to the Court lacking procedural guarantees in this case were "*identification procedure by the Italian authorities, which restricted themselves to embarking all the intercepted migrants onto military ships and disembarking them on Libyan soil. Moreover, the Court notes that the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers*".
[523] Den Heijer, M., *Reflections on Refoulement and Collective Expulsion in the Hirsi Case*, IJRL, 2013, p.284.

collective expulsion of aliens shall be anyhow enforced to all kinds of removals, including those happening along interceptions at the sea. Although such activities are not necessarily prohibited, the Court stressed the essentiality of conducting them respecting procedural guarantees such as ensuring everyone an individual, reasonable and objective examination of case, implying each person concerned has been given the opportunity to put arguments against his expulsion[524].

Procedural guarantees are further available under Article 13 ECHR on the right to an effective remedy to all individuals whose rights and freedoms as set forth in the Convention are violated. This is recourse that enables the obtainment of relief at national level and must be effective in practice as well as in law, requiring from removing States to conduct an independent and rigorous scrutiny of the claim, leading inclusive to the suspension of the implementation of the measures impugned[525]. This means that, given the irreversibility of the consequences derived from the application of removal, Italy should have ensured that the migrants on board had obtained sufficient information regarding relevant procedures and how to substantiate their claims, and that hence they have been provided with proper legal assistance and interpretation services[526]. The Court reinforced that the special nature of the maritime environment, as justified by Italy for not conducting all procedural guarantees, could not be a reason for not covering individuals of minimum legal guarantees regarding the enjoyment of their human rights protected by the Convention[527].

Despite neither the EU nor its Frontex Agency were directly involved in any push-back operations, the EU agreed with the ECtHR's decision in *Hirsi*, insisting in the need for the EU to clarify the rules applicable to maritime controls based on common standards on asylum and border control, respecting the prerogatives of Article 78 TFEU[528]. At present, the application of such rules is directly shaped by three distinct elements: the Frontex rules, the asylum directives and regulations, and the Schengen Borders Code. Despite the scope of first cited is limited to facilitating cooperation on border control among Member States, thus leaving in the hands of State authorities

[524] *Hirsi Jamaa and Others v Italy*, Application No.27765/09, para.184-185; See also *Sultani v. France*, Application No.45223/05, para.81.
[525] Ibid., para.197-198.
[526] Ibid., para.204; *M.S.S. v. Belgium and Greece*, Application No.30696/09, para.185.
[527] Ibid, para.178.
[528] *Communication from the Commission to the European Parliament and the Council - An area of freedom, security and justice serving the citizen*, COM (2009) 262 final, Brussels 10 June 2009, para.4.2.3.1.

primary responsibility on surveillance and control[529], as an agency of the EU Frontex is bound to observe and ensure that activities conducted within its mandate be in accordance with full respect for the rights laid down in the Charter[530]. As for the second element referring to the asylum directives and regulations, regardless of their general inapplicability on interceptions at the high seas, they still are applicable in *Hirsi* in view of the Italian Navigation Code, considering vessels registered in Italy as Italian territory[531], therefore putting the migrants on board within the jurisdictional scope of the asylum directives. Finally, the third factor involving the Schengen Borders Code also applied to zones on the high seas, implying the push-back operation conducted in *Hirsi* indeed fell within the territorial scope of the Code[532]. The applicability of the Code within this case was rather important, firstly because in accordance with related developments in the CJEU case law EU law must be applied in strict compliance with human rights[533]; secondly as the Schengen Borders Code contains a number of procedural standards and individual safeguards to be respected when a Member State undertakes border control, including the obligation to establish identities, the rule that entry may only be refused by means of a substantiated decision, the right of every person to appeal against a refusal of entry[534].

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[529] *Council Regulation (EC) No.2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, Official Journal of the European Union, 25 November 2004, Article 1(2).

[530] Den Heijer, M., *Reflections on Refoulement and Collective Expulsion in the Hirsi Case*, IJRL, 2013, p.286 (footnote 113): On 6 March 2012, the European Ombudsman opened an inquiry into the implementation of fundamental rights obligations by Frontex. See, Press release No.4/2012, European Ombudsman, *Ombudsman investigates Frontex's fundamental rights implementation*, 13 March 2012; see also Human Rights Watch Report, *The EU´s Dirty Hands: Frontex involvement in III-Treatment of Migrant Detainees in Greece*, New York, September 2011; Papastavridis, E., *Fortress Europe and FRONTEX : Within or Without International Law?*, 79 NJIL, 2010, pp.75-111; Article 51(1) of the Charter determines the duty of Frontex to ensure the applicability of its activities in accordance with the rights foreseen in the Charter: "*The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers*".

[531] Article 4 of the Navigation Code of 30 March 1942, as amended in 2002 as follows: "*Italian vessels on the high seas and aircraft in airspace not subject to the soverengty of a State are considered to be Italian territory*".

[532] *Hirsi Jamaa and Others v Italy*, Application No.27765/09, para.34.

[533] *European Parliament v. Council*, Application No.C-540/03 para.38; CJEU, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, Application No.5/88, Judgment 13 July 1989, para.17; CJEU, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, Application No.C-260/89, Judgment 18 June 1991, paras.41-45.

[534] *Regulation (EC) No.562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, Official Journal of the European Union, 15 March 2006, Articles 3, 5(4)(c), 7 and 13.

The conclusion is hence that extraterritoriality does not preclude the application of the ECHR in the context of border surveillance and migration control operations. The interdiction of migrants on the high seas without individual procedural guarantees does configure a violation of Article 4 Protocol No.4 and Article 13 ECHR, including cases in which asylum has not been explicitly requested. This rationale follows the general rules of treaty interpretation adhered to by the Court, according to which contracting Parties must honour their obligations effectively and in good faith[535]. There is no impediment on extending this reasoning to other interception measures carried out beyond sovereign territory in the forms of visa or analogous pre-entry clearance operations as their impact is similar to maritime interdiction once their effect is to prevent migrants from reaching the State borders[536]. However, the potential repercussion of such legal progresses could lead to unrealistic consequences as it seems to be improbable that legal services, translators and appropriate reception and procedural facilities be provided in embassies, aboard ships, or at any other offshore locations[537]. Before, it is necessary to assess whether or not procedural guarantees can be legally implemented and enforced throughout meaningful strategies of extraterritorial migration governance[538].

[535] Moreno-Lax, V., *Hirsi Jamaa and Others v. Italy or the Strasbourg Court versus Extraterritorial Migration Control?*, HRLR, 2012, p.596.
[536] Ibid., p.597; *Hirsi Jamaa and Others v Italy*, Application No.27765/09, para.180.
[537] Ibid., p.598 (footnote 162): On the feasibility of Protected-Entry Procedures, see Noll, G., *Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones*, EJML, 2003, p.332; See also Moreno-Lax, V., *The External Dimension of the Common European Asylum System after Stockholm*, in Gortázar Rotaeche et al. (eds), *European Migration and Asylum Policies: Coherence or Contradiction?*, Brussels: Bruylant, 2012, p.103
[538] Ibid.; see also Giuffré, M., *Watered-down Rights on the High Seas: Hirsi Jamaa and Others v. Italy*, 2012, p.61; IACHR, *Haitian Centre for Human Rights and Others v. United States*, Application No.10.675, Report No.51/96, Judgement 13 March 1997.

CONCLUSION

This work provided a general overview on the international obligations derived from International Refugee Law and the EU Asylum Protection System, as well as how they have been implemented along the EU Member States, in particular the case of Italy that has been hardly affected by the current refugee crisis. The purpose was to show how the normative can produce different application standards within distinct Member States and international courts depending on the general circumstances, being strongly influenced by the number of arrivals and the socio-economic conditions of a country. Periods of massive arrivals can indeed lead governments to adopt non-entry policies and at times even to disregard procedural guarantees that can hinder the access to status determination, resulting in violation of asylum-seekers fundamental rights, some of them considered *jus cogens* under international law as the principle of *non-refoulement*[539].

The present situation has shown that, although there have been consistent developments within the ECtHR case-law, especially in *Hirsi*[540] in which it has been reinforced the need of considering extraterritorial interceptions within the context of *refoulement* when proved the exercise of power by State authorities[541], there are still present in the high seas State conduct preventing the arrival of new asylum-seekers, such as the recent decision of the Italian government in not allowing the disembarkation of the Aquarius ship, carrying more than 600 migrants on board, in national territory[542]. This does not necessarily configure a violation of international obligations under

[539] See supra, Introduction.
[540] *Hirsi Jamaa and Other v. Italy*, Application No. 27765/09.
[541] Ibid., para.74: "*Whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual*".
[542] BBC News, *Italy´s Matteo Salvini shuts ports to migrant rescue ship*, 11 June 2018, Available at: https://www.bbc.com/news/world-europe-44432056 [Accessed 11 June 2018]; Although French President Emmanuel Macron condemned the position of Italy on the case, Marie Le Pen, leader of the hard-right National Rally (former National Front), welcomed the decision, The Economist, *Italy´s Matteo Salvini refuses to let a boat full of migrants land*, Rome 12 June 2018, Available at: https://www.economist.com/europe/2018/06/12/italys-matteo-salvini-refuses-to-let-a-boat-full-of-migrants-land [Accessed 12 June 2018]; Le Monde, *Polémique autour du silence de la France sur la situation du bateau humanitaire 'Aquarius'*, 12 June, 2018, Available at: https://www.lemonde.fr/immigration-et-diversite/article/2018/06/12/polemique-autour-du-silence-de-la-france-sur-la-situation-du-bateau-humanitaire-aquarius_5313555_1654200.html [Accessed 12 June 2018].

international maritime law. Although States are bound to provide rescue within their search and rescue region (SRR) and to find a safe haven for their disembarkation, there is no specification that 'safe haven' shall necessarily be within their own territory. In the other way, this can certainly bring issues under international human rights law as such actions indeed exposed the migrants on board to risk of life, one of the most fundamental principles of human rights[543].

Furthermore, it has been demonstrated that situations of large scale arrivals have contributed to lowering the standards of procedural guarantees, at times resulting in inadequate identification procedures, not provided on an individual basis, neither with the support of legal advisors and interpreters to help the applicant to comprehend the information in a language he is familiarised with, constraining the whole process of status determination, culminating in *refoulement* as demonstrated in *Hirsi*[544], and also in other cases as *Khlaifia*[545], *Sharifi*[546], *Conka*[547], *Georgia v. Russia*[548], *N.D. and N.T. v. Spain*[549], among others. Those all are cases that brought issues under Article 4 Protocol No.4 ECHR on the prohibition of collective expulsion of aliens and consequently under Article 13 ECHR on the right to an effective remedy, recourse enabling the applicant to contest the expulsion decision. The prohibition of collective expulsion of aliens is foreseen under both customary and treaty international law, as well as within the EU legal order, inferring such practice is incompatible with Article 78(1) TFEU according to which asylum policy has to respect the prerogatives of the 1951 Geneva Convention and other relevant treaties, and with Article 19 of the Charter[550].

This overall situation contributed to emphasize even more the existing gaps along the Dublin System, created within the scope of the CEAS envisaging asylum management within the EU through responsibility allocation on asylum claims and mutual recognition of asylum decisions, in the sense that if asylum is denied by one Member State the decision is recognized by all[551]. If in one side States like Greece, Spain, Italy and the Balkan States have been overburdened by their geographic location along the

[543] See supra, Chapter III, para.2.3.
[544] *Hirsi Jamaa and Other v. Italy*, Application No. 27765/09.
[545] *Khlaifia and Others v. Italy*, Application No.16483/12.
[546] *Sharifi and others v. Italy and Greece*, Application No.16643/09.
[547] *Conka v. Belgium*, Application No.51564/99.
[548] *Georgia v. Russian Federation*, Application No.13255/07.
[549] *N.D. and N.T. v. Spain*, Application Nos.8675/15 and 8697/15.
[550] See supra, Chapter III, para.2.1.
[551] See supra, Chapter II, para.3.

external borders of Europe, receiving large majority of asylum-seekers arriving through the Mediterranean paths and from Turkey[552], in the other side renegotiation of the rules attributing to the first-country of arrival responsibility on the asylum claim seems to be rather improbable at the moment. A discussion within the JHA Council on a proposal that shall be presented in Brussels on the next 28 and 29 June in order to reform the rules of the Dublin System were criticized by many Member States such as the Visegrad group, Poland, Hungary, Czech Republic and Slovakia, Austria, the Netherlands, Germany and Belgium. The proposal based on the reform proposal of 2016[553], envisaging the implementation of an automatic relocation mechanism within the EU based on an equal division of asylum claims according to each State's capacity was promptly refused by them[554]. Despite relocation schemes have been put in practice, yet, Member States were acting reluctantly towards their duties under such schemes, disposing of very limited number of places available and imposing strict unilateral conditions for acceptance of the asylum-seekers. In addition, first arrival Member States still had to deal with the administrative burdens of identifying and registering the new arrived ones within the Dublin System, also dealing with unfounded cases and return obligations, making the schemes not effective[555].

Moreover, most migrants traveling through the Mediterranean Sea paths do not intend to remain in the country of first arrival, but to move to richer European Member States. This resulted in measures taken by countries like France and Austria of blocking their internal borders in order to avoid these individuals land access to their territories, not only affecting the functioning of the Schengen Borders Code, but also contributing for asylum-seekers to actually remain in their first country of arrival[556]. Accordingly, the ECtHR case law has shown in cases like *M.S.S.*[557] and *Tarakhel*[558] that Member States actually applied the returns under the Dublin System, even in situations in which it was impossible to be unaware of the reception deficiencies in the 'responsible country'. All this lack of solidarity, derived from the reluctance of renegotiating the Dublin system rules, facilitating the enforcement of relocation schemes and closure of

[552] Ibid., p.86.
[553] COM (2016) 270 final.
[554] Corriere della Sera, *Riforma del regolamento di Dublino – Dalla Germania all´Italia coro di no*, 5 June 2018, Available at: https://www.corriere.it/esteri/18_giugno_05/riforma-regolamento-dublino-1b566b84-68b5-11e8-8268-f285580d0dac.shtml [Accessed 12 June 2018].
[555] See supra, Chapter II, para.3.1.
[556] See supra, Chapter II, para.1.
[557] *M.S.S. v. Belgium and Greece*, Application No.30696/09.
[558] *Tarakhel v. Switzerland*, Application No.29217/12.

internal borders left countries like Italy, Greece and Spain alone in the management of arrivals and resulted in the consequences like that seen within the Aquarius case[559].

[559] BBC, *EU´s Mediterranean migrant crisis: Just a mess of cynical politics?*, 13 June 2018, Available at: https://www.bbc.com/news/world-europe-44466388 [Accessed 14 June 2018].

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