

THE TWOFOLD (INTERNAL AND EXTERNAL) DIMENSION OF EUROPEAN UNION'S MIGRATION AND ASYLUM POLICIES: RECENT CASES AND FUTURE SCENARIOS

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Abstract

European Union's policies on migration and asylum raise double-ditched problems. In the EU, the latter's Court stated that in these areas solidarity is a binding principle: consequently, EU Member States must comply with EU decisions assigning quotas of international protection seekers to each EU State. The paper inspects also agreements between, on one hand, EU Member States (or the EU as such) and, on the other, non-EU countries as origin or transit States of international protection seekers with the view of relocating such individuals to those latter countries. This practice raises doubts if latter countries were deemed non-safe states, e.g. in case they weren't part to 1951 Geneva Convention. These issues are relevant for the development of relations between EU and its member states as well as in the perspective that EU performs its international legal personality in full compliance to international law rules on migration and human rights protection.

Keywords: migration law, European Union law, asylum policy, solidarity, international agreements.

Introductory remarks

According to the report *Permessi di soggiorno per asilo politico e protezione umanitaria* ("Residence permits for political asylum and humanitarian protection", years 2015-2016) submitted by the end 2016 by the National Institute for statistics of Italy, in the two-years 2015/2016 the flows of people who have requested entry into Italy – and, consequently, into the European Union (EU) via Italy – for asylum or for other humanitarian reasons, assumed, even in absolute terms, dimensions that have never been reached in the last nine years, increasing from 9.971 units in 2007 to 67.271 units in 2016.

Between January 1st and October 31st 2016, 64.162 new permits for asylum and other forms of protection (provisional data) were issued to migrant adults: these figures in October of 2017 were close to the ones registered for the whole 2015 (64.515). At the beginning of 2016, 155.177 people were present in Italy with

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a permit for reasons linked to political asylum or humanitarian protection, equal to 4% on the total number of residence permits. Considering just expiring permits, those granted specifically for asylum and humanitarian protection reached in general only the 10% out of the total permits. In the whole EU, in 2015 the applications examined at first were 592.680: out of these, 71.345 applications were examined in Italy. The protection has been granted, in various forms, in 52.5% of cases¹.

Among the countries that had to manage at least 1.000 applications, Hungary is on the top of countries that rejected this kind of requests with only 15% of applications accepted. On the opposite, Denmark is a European Union country that has delivered a favourable opinion more frequently than average (81% of the cases examined). Italy (42%) has a lower recognition rate than average, considering that the percentage falls further if we consider decisions on the recognition of refugee status (5%) compared to 55% for Germany. Furthermore, non-EU citizens have accessed the latter country mainly for reasons of family reunification (32% in 2007 and 44% in 2015). However, the proportion of those same citizens accessing the Union specifically to obtain international protection rose from 3.2% in 2007 to 28.2% in 2015. It is worth noting that in Italy, until December 2017, out of a total of 7.937 applications for international protection, 3.552 of these applications have been rejected². Therefore, it must be assumed that in the mentioned time-frame (2015-2017) measures granting international protection did not rise comparably to the objective growth of related applications.

Above data prove that the general perception around the migratory phenomenon does not take sufficiently into account the “issue inside another issue” dealing with persons accessing European Union’s borders with the view of achieving protection according to relevant international law standards. It should also be taken into account that the procedures for assessing asylum or refuge applications seem eventually to be consistent with the aim of qualifying non-EU citizens demanding access at EU external borders mainly for humanitarian reasons. All in all, the pertinent question in legal terms is if the procedures for assessing these persons’ entitlement to get protection into the EU (and in the EU Member states) comply with relevant standards of international and EU law. However, these methodologies should be equally applied by all EU member states in accordance to requirements existing under both international and EU law. On the other hand, and more substantially, it cannot be forgotten that the protection of asylum seekers is not foreseen just by international legal sources, being generally regulated also in

¹ National Institute of Statistics (ISTAT) (2016) *Permessi di soggiorno per asilo politico e protezione umanitaria, 2015-2016, Italy*, 23 December 2016 (retrieved from: <https://www.istat.it/it/files/2016/12/Report-Permessi-Soggiorno2015-2016.pdf?title=Permessi+di+soggiorno+e+asilo+politico+-+23%2Fdic%2F2016+-+Testo+integrale+e+nota+metodologica.pdf>).

² Ministry of Interiors of Italy (2017), report, December 2017 (retrieved from: http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/dicembre_mensile_2017.pdf).

most national legal systems, in some cases under relevant Constitutional law rules (e.g. article 10 n. 3 Italian Constitution).

The following pages deal with some recent cases where all main topics of international and EU law on refugees and migrants have been tackled. This praxis is paradigmatic for future steps to be taken in this field. In the light of current negotiating rounds on United Nations (UN) Global compact *for safe, orderly and regular migration*, a more comprehensive approach is suggested, consistently with aims of interested individuals' socio-labour inclusion in the receiving countries. On the other hand, same goals are pursued in the EU in compliance to established standards of the International Labor Organization (ILO) inserted into the current UN agenda for mentioned draft Global compact.

1. Relocation of international protection (and asylum) seekers inside the EU

Asylum is a fundamental human right with a „procedural” character, entailing the right for an individual of „asking for” – and not necessarily getting – asylum in a State different from that of nationality.

Asylum is only theoretically different from international standards on protection of refugees: actually, these standards protect individuals against subjection to *refoulement* (refusal) from the country of welcome to the country of origin or towards a “transit” State, if such *refoulement* entails a risk for life or liberty of same individuals due to their race, religion, nationality, belonging to a social group or due to their political opinion (UN 1951, see article 33; Chetail, 2014, 32).

Same protection has been foreseen also by other international legal means such as the European Convention on Human rights and fundamental freedoms (ECHR, CoE 1950) through a broader reading (in French, “*par ricochet*”) offered by the European Court of Human Rights (ECtHR) on ECHR’s article 3, banning torture and inhuman or degrading treatments. In that Court’s view, under that provision relevant crimes are put in a reciprocal evolutionary relationship. Indeed, national authorities’ behaviours, including prison treatments, might easily be considered equivalent to real torture instead of being considered just as inhuman or degrading treatments, through a sort of „theoretical advancement” of the factual elements under scrutiny revealing the true legal character of the examined national practice (ECtHR July 28th, 1999, Appl. 25803/94, *Selmouni v. France* and Feb. 29th, 2008, Appl. 37201/06 *Saadi v. Italy*).

Briefly, according to legal standards relevant at European level, Article 3 of ECHR, literally prohibiting torture and inhuman or degrading treatments, encompasses also *non-refoulement* of third-country nationals. In fact, that provision covers all cases where the sending of international protection seekers from an ECHR’s Member State back to their origin or transit states, might entail the risk that in latter countries same individuals become victims of national authorities’ behaviours banned by article 3 ECHR.

The ECtHR, under art. 3 ECHR and article 4 of Protocol n. 4 ECHR, has recently associated the legal effects of *refoulement* of international protection



seekers perpetrated on the high seas to the effects of *refoulement* of similar individuals from the territory of one ECHR's Member State, to the extent that same *refoulement* occurs from one vessel flying the flag of one Member State of the ECHR, therefore equating that vessel to the territory of one of those states to which ECHR applies under its article 1 (judgments of Feb. 23rd, 2012, Appl. 27765/09, *Hirsi Jamaa and others v. Italy*, and of Sept., 2015, Appl.16483/12, *Khlaifia and others v. Italy*).

Thus, *non-refoulement* applies whenever international protection seekers are under the authority of one ECHR's member State, even if the latter's agents operate abroad or on the high seas.

Even more amply and substantially, if *refoulement* entails the risk for international protection seekers of being subjected to treatments prohibited by mandatory rules of international law (i.e. article 40 UN 2002, so called *ius cogens* rules including the prevention of torture or of enslavement), such practice is subjected to a general mandatory ban, even if the persons concerned might represent a "danger" for the security of the receiving State (Picone, 2015, p. 7, Rizzo, 2016, p. 183, Sciso, 2011, p. 1228).

In essence, *refoulement* of international protection seekers is subjected to an absolute ban if it entails that same individuals are exposed, in their country of origin or in a State of transit, to treatments prohibited by international *ius cogens* rules. This ban exists regardless if the staying of international protection seekers in the host country might entail a likely danger for the security of that same country or even if such a staying might represent a danger in broader and more substantial terms (e.g. under international standards on fighting terrorism, Nascimbene, 2011, p. 310, Lenzerini, 2012, p. 737, Rizzo and di Majo, 2014, p. 2604, Favilli, 2015, p. 702).

Above principles extend to the EU. Firstly, art. 18 of the Charter of fundamental rights of the EU (EU 2000) merges asylum and the defense of international protection seekers' rights with the view of ensuring to both standards of protection the most effective shield under EU law. On asylum, according to the Dublin regulation (EU 2013 b, named "Dublin III" Regulation) only one EU member State of „first entry" must assess the legal status of non-EU citizens accessing same EU's external borders. According to the Court of Justice of the European Union (CJEU), an EU Member State that is not competent to assess an asylum application, can't nonetheless send same applicant back to another EU country presumably competent for assessing such application under Dublin Regulation, if asylum assessment's procedures in this second EU member State suffer from systemic weaknesses such as to expose same applicant to the risk of being subjected to torture or inhuman or degrading treatments (CJEU Dec. 21st 2011, cases C-411/10 and C-493/10, *N.S.*).

Above rules are now enshrined into an amended version of article 3 n. 2 of Dublin Regulation: in addition, *refoulement* to an EU „first entry" country can be made exclusively after a strict assessment of the factual circumstances surrounding each individual case (Rizzo, 2015, p. 538, Imamovic and Muir, 2017, p. 8).



Current EU policies on migration and asylum are drawn from the transfer in the European Community Treaty („communitarization”) of subject-matters at first regulated through international agreements between European states, i.e. the 1990 Dublin agreements. Same topics have been progressively transferred to a specific EU regulation (Dublin Regulation) still today under reform. EU law foresees also a „subsidiary” protection that widens Dublin regulation’s scope. Moreover, a „temporary” protection in the EU, based on presumptive criteria, deals with persons (groups) exposed to serious risks in the country of origin (EU, 2001). So, “temporary protection” under EU law concerns massive and unanticipated influxes of “displaced persons” coming from non-EU countries, broadening the scopes of Guiding Principles on Internal Displacement previously adopted by the United Nations Commission on Human Rights (UN 1998).

The solidarity principle for the implementation of EU policies and law on asylum and migration has been formally inserted by the Lisbon Treaty under Article 80 of the Treaty on the Functioning of the EU (TFEU, EU 2012). Recently, solidarity has been taken into account for the implementation of article 78 par. 3 TFEU (EU 2012). This provision allows EU institutions to take measures in urgent cases dealing with sudden influxes of third country nationals at EU borders. In similar circumstances, EU institutions resort to a special legislative procedure, requiring qualified majority in the Council and a non-binding opinion from the European Parliament. Recently, two EU member States (i.e. Slovakia and Hungary) have challenged, via article 263 TFEU (EU 2012), a decision of 2015 based on mentioned article 78 n. 3 TFEU for the temporary relocation of international protection seekers from Greece and Italy towards other EU member states (including the applicant states).

In the CJEU’s view, the challenged decision was aimed, inter alia, at implementing the solidarity principle enshrined in art. 80 TFEU (EU 2012; see CJEU, Sept. 6th 2017, Joined cases C-643/15 e C-647/15, *Slovak Republic and Hungary v. Council of the EU*). At point 291 of its judgment, the Court stated what follows: *„Where one or more Member States are in an emergency situation, in accordance with Article 78 (3) TFEU, the burdens arising from the temporary measures taken under this provision for the benefit of this or these Member States must, in principle, be distributed among all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibilities between Member States, given that, under Article 80 TFEU, this principle governs the Union’s asylum policy”*.

Complainant States, inter alia (supported by Poland), objected that, for the purpose of relocating international protection seekers, EU institutions could have (and should have) made recourse to the provisions of mentioned Directive 2001/55 allowing, differently from Article 78 n. 3 TFEU, each EU Member State to voluntarily set the amount of international protection seekers to be received. In the CJEU’s view, the EU institutions’ choice of resorting to article 78 n. 3 TFEU as the legal basis of the contested decision, is placed outside the purposes of same Court’s assessment following an action for annulment (Article 263 TFEU, EU 2012), since this is a matter related to a “political choice” by EU institutions whose opportunity



could not be put at stake by the same Court. The latter Court consequently confirmed the legality of the procedure implemented by EU institutions and affirmed that the legal basis of the same contested decision was correct (Curti Gialdino, 2008, p. 101, Rizzo, 2017, p. 397, Morgese, 2018, p. 63).

On more substantial aspects of mentioned CJEU decision, it can be recalled that under article 2 of the Treaty of the European Union (TEU, EU 2012), the solidarity principle, listed among other EU's basic principles, stems from EU Member States' legal systems, being equivalent to a general principle of law. However, an infringement of solidarity (as well as of pluralism, the prohibition of discrimination, tolerance, justice and equality between women and men) perpetrated by one EU member State does not per se allow the European Commission to open a procedure aimed at formally assessing a breach of EU law. On the other hand, article 3 of TEU (EU 2012) on EU's objectives, at paragraph 3 specifies that EU promotes the solidarity "*between the generations*" and solidarity "*between the Member States*". The same Court of justice of the European communities in its decision of Feb. 7th, 1973, case 39/72, *Commission v. Italian Republic*, which inter alia dealt with Community regulations' effects (being sources of EU law directly applicable in the member States of the EU), stated what follows: "*the fact that one member State, in consideration of its national interests, unilaterally breaks the balance between the advantages and the burdens deriving from its belonging to the Community, affects the equality of the Member States under the Community law and determines discriminations against their citizens, first and foremost those of the State that transgresses the Community rules. (...) this lacking in the duties of solidarity accepted by the member states with their accession to the community shakes the founding of the community legal system*" (pp. 24 and 25).

Therefore, Articles 2 and 3 TEU must be read in a strongly evolutionary perspective. Indeed, these provisions, on one hand, establish the qualities that one State must have with the aim of taking part to the EU and, on the other, same provisions determine the features of the EU as such. Articles 2 and 3 TEU are consequently addressed to EU member states and at the same time qualify the same EU as the guarantor of an "European public order" resulting from the founding treaties. In this way, EU treaties end up enjoying peculiar features fit to distinguish them from other international treaties, becoming true „constitutional treaties" („*traités-constitution*"), as already stated by same CJEU in the well-known *Les Verts* case: "*The European economic community is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty*" (decision of April 23rd, 1986, case 294/83, *Parti écologiste „Les Verts" v. European Parliament*).

Considering the above and according to specific studies at institutional level – e.g. the study named „*The implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, even financially, between member states in the field of border controls, asylum and immigration*" (EU, 2011 b) – the



solidarity principle enshrined in Article 80 TFEU finds its conceptual matrix in the sincere cooperation principle (see article 4 n. 3 TEU, EU 2012).

Under the principle of sincere cooperation, Member States and EU institutions bear a general duty to respect EU law: consequently, they must cooperate „sincerely” with the view of respecting all obligations stemming from EU treaties and legislation. Such an imperative exists also, and particularly, where those obligations stem from provisions of EU law expressed through a broader wording nonetheless setting clear objectives to be pursued. The CJEU has made extensive use of the sincere cooperation principle particularly with the view of ensuring that certain EU law obligations, and also related individual rights, be effectively respected by public administrations, authorities and judiciaries of each EU member State. In the “Area of Freedom, Security and Justice” (where the principle of solidarity relates to border controls, asylum and migration policies), the CJEU, referring to police and judicial cooperation on criminal law, stated what follows: *„It would be difficult for the Union to fulfil its mission effectively if the principle of sincere cooperation (...) should not be imposed in the field of police and judicial cooperation in criminal matters (...)”* (CJEU June 16th 2005, C-105/03, *Pupino*). Reference to the principle of sincere cooperation in the *Pupino* case is all the more significant considering that the policy examined by the Court in that case (i.e. judicial cooperation on criminal matters) had still an “intergovernmental” character, due to European Parliament’s weak competences on same policy, before the Lisbon Treaty reforms. Sincere cooperation applies also to “horizontal” relations between EU and its member States more broadly, including “purely inter-governmental” areas (Common Foreign and Security Policy, Common Security and Defense Policy, see Article 24.3 TEU, EU 2012).

Comparably to the principle of sincere cooperation, the solidarity principle established by art. 80 TFEU is apt to perform mandatory effects where an EU act, even if drafted in broad terms, detects nonetheless clear objectives to be pursued. Being addressed to EU Member States only, that principle can anyway perform defensive effects for individuals whose rights might stem from the provisions of an EU act, depending also on this same act’s wording.

2. Recent EU and national practice on the “external” side of asylum policies

EU relocation decision challenged by Hungary and Slovakia dealt inter alia with a set of international law principles to which same EU law broadly conforms. However, that decision, based on article 78 n. 3 TFEU, had relatively limited scopes and effects. On the other hand, Directive 2001/55 would have never allowed EU institutions to compel EU Member States’ acceptance of international protection seekers’ specific quotas: on the contrary, mentioned EU relocation decision based on Article 78 n. 3 TFEU was meant to perform mandatory effects on EU member states.

Italy is the most important EU country facing migratory flows from Northern Africa. For the first time, the CJEU has made clear reference to the solidarity principle (Article 80 TFEU) particularly in favour of „first-entry” countries such as Italy. However, the problematic issues related to migratory flows from sea, rather



than overland, remain structurally different. We have seen how European Court of Human Rights (ECtHR) had awarded to individuals moving from North-African coasts the protection against *refoulement* „at sea”, as already granted to international protection seekers accessing the EU external terrestrial borders (being such borders equivalent to those of ECHR’s member states).

On this sort of situations, it can be firstly reminded that the rescue obligation is foreseen by the United Nations Convention on the Law of the Sea (in particular article 98, UN 1982): such an obligation, having a general mandatory character, is binding on the Convention’s members and on all operators (boats), public or not, sailing in both international and inland waters. Based on these principles, the “search and rescue” (SAR) practice has been established. Later, this practice has been ruled in details through the 1979 Hamburg Convention on marine research and rescue (UN 1979) establishing a system of Search and Rescue Regions (SRR) and, more substantially, requiring the States to adopt tools aimed at effectively meeting any request for assistance at sea (Caffio, 2017, p. 92).

The combined reading of above mentioned rules – *non-refoulement* at sea and the duty to search and rescue individuals in danger during navigation – gives an idea of how serious the internationally accepted commitments States must respect every time a migratory emergency occurs at their territorial sea or even at waters adjacent to same States’ territorial sea. On the other hand, the issue of refugees and of migrants traveling by sea raises a number of specific problematic issues, including the need that the international obligation – binding both on States and on individuals – to save lives in danger at sea is fully respected at any circumstance. Moreover, the boundaries surrounding States’ competence on migration policies remain still unsettled, considering how such policies can be implemented at national level only in full respect of international protection seekers’ rights and in full respect of international human rights standards.

Above issues can be traced back to the protection of the right to asylum as a fundamental human right internationally granted and to the detection of obligations and rights stemming, for the States and for individuals, from relevant rules on the law of the sea. More generally, the question arises on how migratory flows can be regulated through international agreements between, on one hand, EU countries (and/or same EU) and, on the other, non-EU states. Moreover, the management at national level of international protection seekers raises more specific problems unavoidably connected to related requirements imposed at international and EU levels for the protection of individuals concerned.

EU member States and same EU have concluded international bilateral agreements aimed specifically at the management of international protection seekers. In the light also of a consolidated international praxis, EU can negotiate and approve “readmission” agreements with third countries for the transfer of individuals who in principle do not hold the right to get international protection any longer. Recently, a comparable practice, although if involving also individuals still entitled to ask for international protection, has been examined by the General Court of the European Union (Order of Febr. 28th, 2017, T-192/16, *NF v. European Council*). The case dealt with a “statement” (agreement?) between, on the one



hand, the Member States of the European Union and, on the other hand, Turkey for, *inter alia*, the readmission of non-EU nationals seeking international protection, mostly coming from Syria, entering Turkey and then approaching EU's external terrestrial borders through the so-called "Balkan corridor". Despite the European Commission's monitoring on the agreement's implementation, the General Court considered the EU/Turkey statement as a source (agreement) binding only on the EU member states, not attributable to the Union as such and, consequently, not subjected to the EU's judiciary.

In legal terms, states or international organizations can engage themselves internationally also through practice not formally strict. International organizations in particular can take on important international commitments even when the mutual obligations are contracted by persons who seem sufficiently qualified to represent such organizations in the light of the factual circumstances surrounding the conclusion of the international agreement. According to Article 8 of the Draft articles on responsibility of international organizations (UN 2011), the behaviour of "*an organ of an international organization, acting in this capacity, is assigned to the international organization*". Besides, art. 7 par. 1 of Draft articles on the law of treaties between States and international organizations (UN 1986) reads as follows: "*A person is considered as representing a State (...) if: a) He produces appropriate full powers; or b) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers*". According to the International Court of Justice (ICJ), an international agreement should be traced back to the meaning that makes the rules of the Vienna Convention on the law of treaties applicable to same agreement even only by virtue of the chance that such an agreement, whatever its formal character, entails mutual rights and obligations for the contracting parties (ICJ July 1st, 1994, *Qatar v. Bahrein*, Rec. 112, pp. 23 ff.). On the other hand, the same Court of Justice of the European communities applied for the first time this less formalistic approach in its Opinion n. 1/75 of Nov. 11th, 1975 (Cannizzaro, 2017, p. 256).

In the light of the above, it must be considered how the EU/Turkey statement was negotiated by the rotating Presidency of the Council of the Union and by the President of the Commission; in addition, that statement was adopted at a European Council meeting on EU/Turkey relations, held on 18 March 2016 at the headquarters of the European Council. Finally, same „EU/Turkey statement”, spread in the form of a press release of the European Council and published on the latter's website, is formulated in such a way as to immediately convey the idea that the consensus around it had been directly agreed by Turkey together with the European Union (and/or with the latter's representatives besides those of the EU Member states). As a consequence, being the result of that consensus, the statement in question should be attributed to, on one hand, Turkey and, on the other, to EU as such.

Beyond formalistic aspects above, international law prevents States not only from rebuffing persons qualified as nationals. In fact, States must also protect in more general terms the individual right to life and the right of not being submitted



to torture or inhuman or degrading treatments (i.e. art. 3 ECHR, CoE 1950): this duty extends also in favour of international protection seekers if *refoulement* of these persons toward a „non safe” country of origin or toward an equally „non safe” transit State might put at stake same individuals’ life or safety. Accordingly, the so called EU/Turkey agreement reveals several critical elements linked to the situation of social, institutional and political instability in Turkey, as evidenced by the fact that, after the attempted coup d’état of July 15th, 2016, the ECHR’s implementation to Turkey had been „temporarily” suspended following Turkish government’s request submitted under ECHR’s Article 15 (CoE 1950). Such provision reads as follows: „*In case of war or in the case of another public danger threatening the life of the nation, any High Contracting Party may take measures derogating from the obligations under this Convention, to the extent that the situation requires it and on condition that such measures do not conflict with other obligations deriving from international law*”. However, even if ECHR’s implementation has been interrupted following the triggering of article 15 ECHR in favour of an ECHR’s member State who requested such activation, in this latter State the prohibition of torture or of slavery can’t be suspended; nor same State is enabled, under same conditions, to suspend the right to life and individual physical and spiritual integrity. Finally, even in case that article 15 ECHR is in force, in the concerned Member State of the ECHR no one can be forced to reveal his/her religion, conscience, thought or opinion, nor be accused for this reason. The Strasbourg Court has often ensured a large “margin of appreciation” to the ECHR’s Member States, acknowledging that national authorities are placed more appropriately than the international judge with the view of assessing when „*an emergency threatening the life of the nation*” under article 15 ECHR occurs (e.g., ECtHR Jan. 18th, 1978, *Ireland v. United Kingdom*, Appl. 531/71). An “inter-State” litigation (under article 33 of the ECHR, CoE 1950) aimed at disputing the ECHR’s article 15 implementation has been rarely brought before the ECtHR (see *inter alia* ECtHR’s decision of Dec. 18th 1996, *Aksoy v. Turkey*, Appl. 2198/93; Sheinen, 2016, p. 3).

Interestingly, France, unlike other Council of Europe member states at the same time signatories of the ECHR (essentially the United Kingdom and Turkey), applied art. 15 of same ECHR for the first time as a response to terrorist attacks occurred in Paris on November 13th 2015, giving a wide reading, already followed into the French legal system, of the “state of emergency” criterion.³

In this case, Turkish authorities applied the provision in question beyond the limits established therein. In fact, representatives of the Council of Europe expressed worries about the situation in Turkey for the correct application of same exemptions under Article 15 ECHR (CoE 1950), thus detecting situations where the Turkish authorities violated those individual procedural guarantees (right of defense) provided by the Strasbourg system and that same Turkish government

³ Loi n° 2015-1501 du 20 novembre 2015 *prorogeant l’application de la loi n° 55-385 du 3 avril 1955 relative à l’état d’urgence et renforçant l’efficacité de ses dispositions*, JORF n° 0270 du 21 novembre 2015, page 21665.

could not put at stake via recourse to exemptions under same article 15 ECHR (CoE 2016a and 2016b). Furthermore, the Turkish government's violation of various human rights connected to freedom of expression and the press has been certified also in a report based on art. 19 par. 3 of the International Covenant on Civil and Political Rights (UN 1966) and made public on 18 November 2016 by the UN Special Rapporteur on the promotion of the freedom of opinion and expression at the end of a three-day mission to Turkey (UN, 2016a and 2016b).

At the European Union level, one could also make reference to the so called "*plainte*" (i.e. complaint): with this tool, any individual (including legal persons) can submit an informal request aimed at allowing that European Commission assesses if national authorities of one EU member State have infringed EU law. At a further step, this preliminary assessment allows same European Commission to subsequently and discretionally start a formal infringement proceeding against an EU member State in accordance to art. 258 TFEU (EU, 2012). In this case, via a complaint, the Commission could have started an informal procedure with the view of assessing if, by implementing the EU/Turkey statement in question, EU member States had infringed art. 18 of the Charter of fundamental rights of the EU (EU 2000). However, the Commission has constantly monitored the implementation of same EU-Turkey statement, thereby endorsing the contents of the latter, but also, ultimately, its legal character as a true source of EU law, highlighting both its positive and its several dubious features.⁴

With the view that the EU/Turkey statement would violate the right to asylum and the prohibition of *refoulement*, one could make recourse to the interim measures referred to in Rule 39 of the Strasbourg Court's rules of procedure (CoE 1959). With this tool, a question concerning the correctness of the relocation measure of a third-country national in the implementation of the EU/Turkey statement might be brought before same Court of Strasbourg by a judge of an EU Member State, which simultaneously is a member State of the ECHR, as is well known. Indeed, in the same ECtHR's case-law, Rule 39 of same Court's Rules of procedure has been applied in the light of same *non refoulement* criterion in cases of expulsion of third-country nationals from an ECHR Member State (e.g. ECtHR, Grand Chamber, March 23rd, 2016, Appl. 43611/11, *F.G. v. Sweden*).

Comparable difficulties arise from a Memorandum of Understanding (MoU) on cooperation in the field of development, the fight against illegal immigration, trafficking in human beings, smuggling and the strengthening of border security between the State of Libya and the Italian Republic published on February 2nd 2017 on the website of the Italian newspaper *la Repubblica*⁵.

Firstly, the Italian government didn't respect Italian Constitution's article 80: according to that provision, same government must request national Parliament's

⁴Among many others, see the European Commission report on the implementation of the statement under consideration, COM (2016) 792 fin. of 18 December 2016.

⁵ *La Repubblica* (2017) *Migranti: accordo Italia-Libia, il testo del memorandum*, 2 February 2017 (retrieved from http://www.repubblica.it/esteri/2017/02/02/news/migranti_accordo_italia-libia_ecco_cosa_contiene_in_memorandum-157464439/?refresh_ce).



authorization for the ratification of agreements having political content or implying financial commitments for Italy. Same MoU, in fact, entails a concrete mutual commitment between Italy and the ‘Republic of Libya’ aimed, inter alia, at guaranteeing that Italy supplies “*technical and technological support to the Libyan bodies responsible for fighting illegal immigration, which are represented by the border guard and the Coast Guard of the Ministry of Defense, and by the competent bodies and departments at the Ministry of the Interior*” (Article 1 c of the MoU, but similar expressions are spread in the text). Moreover, one can underline the intrinsically political character (in the meaning of mentioned Italian Constitution’s article 80) of an agreement foreseeing the detention of persons among whom those demanding international protection might be present, notwithstanding relevant international law rules on refugees binding on at least one of the contracting States, that is, Italy (considering how Libya is not part to the Geneva Convention and the New York Protocol).

It is also to be noticed that, on particularly sensitive issues – such as international protection of fundamental human rights – a sovereign State (Italy) has engaged itself with a country (the self-proclaimed “Republic of Libya”) whose statehood according to international law rules, i.e. precisely in order to detect if that “Republic” of Libya is fully entitled to engage itself internationally, is still not completely defined.

Finally, on the reception of international protection seekers, the qualification of Libya as an actual “safe” third country of transit or of origin is seriously questionable anyway.

The MoU’s provisions allowing the *refoulement* from Italy to Libya of international protection seekers raise many difficulties at European and international law levels, at least as far as detention methodologies applied in the refugees’ camps of that country are concerned, since various documents deplore the recourse to widespread violence under same methodologies (cases of torture, inhuman and degrading treatment, killings, rape, arbitrary deprivation of liberty, subjection to servitude or slavery, etc.; Amnesty International, 2016; UN, 2016c; UN, 2017).

If circumstances above will be confirmed, the responsibility of the State of destination (Italy) may arise for complicity directly in the commission of such violations, pursuant to art. 16 of the Draft Articles on International Responsibility of States adopted by the UN International Law Commission (UN, 2002), reading as follows: “*A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State*”.

Concluding remarks

Above pages tried to show, through few significant examples, the high sensitiveness of migration and asylum policies at both political and legal levels.

Firstly, individual rights must be protected in accordance to national, international and European standards. There is now a serious risk that the current turmoil involving both EU member states and EU as such, also in the international scenario, impacts negatively on the aim that such consolidated human rights are fully granted. EU member states, primarily, must comply with relevant international and EU law standards particularly in cases of „intra-EU” resettlement of international protection seekers. The principle of solidarity between EU member states on asylum and migration policies aims at tightening the relevant obligations. With regard to the international policies of both EU and of its member states, agreements aimed at the resettlement of international protection seekers to countries of origin or transit States that do not comply with human rights standards should be prevented. On the other hand, the UN have further stressed and strengthened the undeniable ties connecting the protection of asylum and of refugee seekers with the protection of human rights at international level.

Current EU policies referred to socio-labour inclusion of third country nationals seeking (or enjoying) international protection in the EU could however represent an effective antidote with the view of avoiding an increasing impairment of mentioned individual rights (Murphy, 2013, p. 149 ff.). In particular, Directive 2013/33/EU (EU 2013a), under articles 14 to 17 requires schooling and education of minors, access to work in nine months from the entry in a EU receiving State and access to vocational training for same international protection applicants (Articles 16 and 17). Additionally, in accordance to Directive 2011/95/EU (EU 2011a) non-EU nationals benefiting from international protection in the EU have the right to access specific tools aimed at socio-labour integration (Article 34). Status’ beneficiaries have also the right to access employment and education in one host EU country (Articles 26 and 27). Same individuals must then obtain the recognition of professional qualifications, social and health care, housing and other special conditions relating inter alia to the condition of unaccompanied minors.

The drafting of UN Global compact on safe, orderly and regular migration is approaching its final rounds. The process is opened to UN member States and involves the EU as an observer, in accordance to a UN General Assembly Resolution of 2011 dealing with EU-UN relations. The Global compact won’t be legally binding anyway, but it nevertheless entails relevant aspects of, inter alia, socio-labour inclusion of refugees and of migrants in accordance to several existing conventions and resolutions adopted by the International Labor Organization. The results of the on-going process on the draft UN compact shall consequently be taken in due account with the view of harmonizing at best the different dimensions (international, regional and national) of the challenges caused by movements of persons that, for too many reasons (including economic and environmental crises), are globally increasing.



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