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STILL ALONE? – EUROPEAN HUMAN RIGHTS  
CONSEQUENCES FOR ITALY AS A RESULT  
OF MIGRATION CRISIS

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**Summary.** This article explores legal consequences arising from Italy's European human rights legal commitments in confrontation with the migration crisis. The so-called Arab Spring resulted in a great influx of illegal migrants who, from obvious reasons, chose mainly the territory of Italy as the first safe space for their living or as a transit country. At the beginning the process did not seem to become such a disaster and human rights drama. The main purpose of the Authors' analysis is to present the attitude of two main human rights organs of the Council of Europe, namely the European Court of Human Rights as well as the Committee on the Prevention of Torture, Inhuman or Degrading Treatment or Punishment. Against the background of the analysed documents the Authors try not only to present the above-mentioned legal consequences, but also discuss the further role of Italy in the ongoing migration crisis. It

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is more than sure, that in the present day state of affairs Italy cannot be longer left alone as this is in strong contravention with the overwhelming idea of solidarity which has been a foundation of the European integration, including the collaboration within the European Union.

**Keywords:** Italy and migration crisis, European human rights consequences; hot-spots; „push-back” policy; Council of Europe; European Court of Human Rights; Committee on the Prevention of Torture, Inhuman or Degrading Treatment or Punishment; idea of European solidarity.

**Nadal sami? Europejskie zobowiązania praw człowieka Włoch w konfrontacji z kryzysem migracyjnym.** Autorzy koncentrują swoją uwagę na konsekwencjach prawnych, wynikających z europejskich zobowiązań praw człowieka Włoch w konfrontacji z kryzysem migracyjnym. Słynna Arabska Wiosna spowodowała ogromny napływ migrantów, którzy – ze zrozumiałych przyczyn – wybierali terytorium Włoch jako pierwsze bezpieczne miejsce do życia lub kraj tranzytu w poszukiwaniu nowego miejsca przeznaczenia. Proces ten początkowo nie zapowiadał tak wielkiej katastrofy ani dramatu praw człowieka dla obu konfrontujących się stron. Głównym celem niniejszego artykułu jest przedstawienie stanowiska dwóch najważniejszych organów ochrony praw człowieka Rady Europy, tj. Europejskiego Trybunału Praw Człowieka oraz Komitetu Zapobiegania Torturom, Nieludzkiemu bądź Poniżającemu Traktowaniu lub Karaniu. Na podstawie analizowanych dokumentów Autorzy prezentują europejskie konsekwencje prawne dotyczące Włoch, jak również podejmują dyskusję nad dalszą rolą tego kraju w postępującym kryzysie migracyjnym. W obecnym stanie rzeczy jest więcej niż pewne, że Włochy nie mogą dłużej być osamotnione, gdyż pozostaje to w silnej sprzeczności z wiodącą ideą solidarności, która leżała u podstaw europejskiej integracji, w tym w ramach Unii Europejskiej.

**Słowa kluczowe:** Włochy i kryzys migracyjny; europejskie konsekwencje prawne z zakresu praw człowieka; „hotspots”; polityka „push-back”; Rada Europy; Europejski Trybunał Praw Człowieka; Komitet Zapobiegania Torturom, Nieludzkiemu bądź Poniżającemu Traktowaniu lub Karaniu; idea solidarności europejskiej.

## 1. INTRODUCTION

On June 10, 2018 the European public opinion was strongly touched by information that the Italian government did not accept the 629 migrants from Libya who were rescued by the humanitarian SOS Mediterranean organization on its „Aquarius” ship. Among those saved there were mainly youngsters, some pregnant women and children without any care of their next of kin. The Italian Vice Prime Minister Matteo Salvini made an unprecedented decision. However, it was a visible signal for Europe that Italy did not want to stay alone any longer

in a front line of a combat with uncontrolled migration. The similar attitude was presented by Malta's government. Finally the drama found its happy solution at the port of Valencia, Spain<sup>1</sup>. In his emotional statement the Prime Minister of Italy Giuseppe Conte sent his words of gratefulness to the Spain's government, calling its attitude as a „gesture of solidarity” with Italy, which has been still lonely in its struggle with migration crisis.

It may be assumed that the above-presented newest incident could be a kind of a corner-stone in the EU's new approach to immigration reform. However, leaving aside this kind of speculations, at this moment one should concentrate the attention at the European consequences that Italy has already faced against the background of its international human rights commitments. Actually, this is the main purpose of the present analysis.

## 2. ITALY AND THE EUROPEAN HUMAN RIGHTS SYSTEM

Being a traditional member of the international human rights protection movement, Italy has a long list of legal commitments in this regard. The present analysis is limited to the European normative standards, concentrating and elaborating legal achievements of the Council of Europe as well as the European Union<sup>2</sup>. Bearing this in mind, the following considerations will be limited mainly to the Council of Europe's organs attitude, which, however, does not change the fact that in many aspects both of the above-mentioned European legal regimes can lead to intercrossed practical results<sup>3</sup>.

The Council of Europe – as far as the treatment of illegal immigrants or refugees is concerned – works mainly through two legal instruments, i.e. the

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<sup>1</sup> S. Jones, *Aquarius refusal was betrayal of European values, says charity boss*, The Guardian, 17 June 2018 – <https://www.theguardian.com/world/2018/jun/17/aquarius-refusal-was...> (access: 15.6.2018).

<sup>2</sup> Italy was a founding member state of this organizations, i.e. from May 5, 1949. Likewise, it was the initial member of the original three European Communities, i.e. consequently the European Coal and Steel Community (ECSC) under the Paris Treaty of April 18, 1951, the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) under the Rome Treaty of March 25, 1957. European Communities were at the very beginning unfocused on human rights protection. This long lasting process is described in detail a.o. by P. Alston (ed.) with the assistance of M. Bustelo, J. Heenan, *The EU and Human Rights*, Oxford 1999, *passim*. Nonetheless, from the present-day perspective the situation is visibly different. Therefore, in this presentation some references to the EU „human rights” law have also been included.

<sup>3</sup> This correlation is even more visible after 2009 when the Charter of Fundamental Rights of the European Union of 2000 got its legally binding power. OJ EC C364 of 18.12.2000, pp. 1–22.

European Convention of the Protection of Human Rights and Fundamental Freedoms (ECHR) of November 4, 1950 (entry into force: September 3, 1953)<sup>4</sup> and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of October 26, 1987 (entry into force: February 1, 1989)<sup>5</sup>. Both treaties were properly ratified by Italy, the first one on October 26, 1955 (entered into force: October 26, 1955) and the second on December 29, 1988 (entered into force: February 1, 1989). Therefore, both treaties have a binding force to Italy, what gives them quite far-reaching practical effects, what is especially visible in the ECHR system<sup>6</sup>. Importantly, both conventions are tightly interconnected, although they are independent treaties.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) was created according to Article 1 of the Convention of 1987. Its competencies *ratione materiae* are subordinated to Article 3 of the ECHR (prohibition of torture). Thus, within its own control competences, the CPT goes „hand in hand” with the European Court of Human Rights (ECtHR). Actually, the latter one quite often makes references to the CPT’s reports, which are prepared during regular or *ad hoc* visits to the member states concerned.

Even though current crisis is the biggest one in the EU’s history, it is not the first one affecting the EU Member States. This is clearly visible in statistical data. Bearing this in mind, it was just the matter of time when both the Council of Europe’s human rights organs started to be very sensitive with the problem of a quick growth of immigrants and refugees from North Africa, who tried in a great desperation to request asylum or international protection in Italy and Malta<sup>7</sup>. It should be stressed that in those days those countries desperately called

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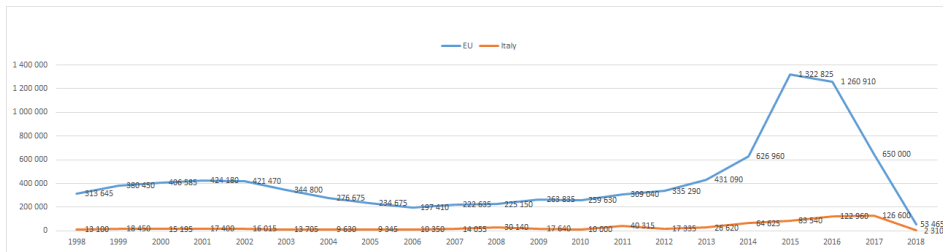
<sup>4</sup> European Treaty Series, No. 005. The European Court of Human Rights derived the *non-refoulement* principle from Articles 2 and 3 of the ECHR. However, as the scope of this Convention is wider, it supplements and expands the Convention relating to the status of refugees, signed at Geneva on 28 July 1951, United Nations, Treaty Series, vol. 189 (1954), No. 2545. The 1951 Convention (and its 1967 Protocol) are fundamental to the EU’s Common European Asylum System (CEAS). See: Article 78 of Treaty on Functioning of the European Union. Consolidated version of the Treaty on the Functioning of the European Union, OJ EU C326, 26.10.2012, pp. 47–390. More on the CEAS: V. Chetail, P. De Bruycker, F. Maiani, *Reforming the Common European Asylum System: The New European Refugee Law*, „Immigration and Asylum Law and Policy in Europe” 2016, vol. 39.

<sup>5</sup> European Treaty Series, No. 126.

<sup>6</sup> This is directly connected with the complaint (individual or inter-state one, Articles 33 and 34 of the ECHR) procedure of judicial nature which by itself is legally binding for a state-party to the ECHR.

<sup>7</sup> See: Parliamentary Assembly of the Council of Europe, *Asylum seekers and refugees: sharing responsibilities in Europe*, Doc. 12630, Strasbourg, 6 June 2011.

for the EU solidarity, but the EU Member States never agreed to initiate procedures applicable in case of mass influx of immigrants<sup>8</sup>. Thus, it was more than obvious that Italy would be forced to quickly build a proper system of dealing with the large-scale arrivals by sea<sup>9</sup>.



Graph no. 1. Asylum applications submitted between the 1998 and January–May 2018 (for the EU) and January–April (for Italy) by Authors<sup>10</sup>.

The above-mentioned circumstances and information about dramatic events at the Southern Mediterranean maritime border of Italy resulted in the CPT's decision of carrying out an *ad hoc* visit to Italy from 27 to 31 June 2009. This visit appeared to the CPT as necessary „to look into new policy – including the implementation of the policy – of the Italian authorities to intercept, at sea, migrants /.../ and to send them back to Libya or other non-European States (fre-

<sup>8</sup> Procedures are stipulated in Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ EC L212, 7.8.2001, pp. 12–23. See also: M. Kenig-Witkowska, *Problematyka „uchodźców środowiskowych” w prawie międzynarodowym*, „Państwo i Prawo” 2013, n. 10, p. 17.

<sup>9</sup> On the legal-institutional system of admittance of migrants see: I. Bokszczanin, *Włochy*, [in:] *Uchodźcy w Europie. Uwarunkowania, istota, następstwa*, K.A. Wojtaszczyk, J. Szymańska (eds.), Warszawa 2017, pp. 315–321.

<sup>10</sup> Data: Eurostat, *Asylum applicants by citizenship till 2007 Annual data (rounded) [migr\_asyctz]*, [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_asyctz&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyctz&lang=en) (access: 5.03.2018), Eurostat, *Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data (rounded) [migr\_asyappctza]*, [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_asyappctza&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza&lang=en) (access: 05.03.2018), Eurostat, *650 000 first-time asylum seekers registered in 2017*, „News Release” 2018 vol. 47 of 20.03.2018, <http://ec.europa.eu/eurostat/documents/2995521/8754388/3-20032018-AP-EN.pdf/50c2b5a5-3e6a-4732-82d0-1ca-f244549e3> (access: 26.3.2018), data for the January–May 2018 (for the EU) and January–April 2018 (for Italy) after Eurostat, *Asylum and first time asylum applicants by citizenship, age and sex Monthly data (rounded) [migr\_asyappctzm]* (Last update: 27-06-2018), [http://ec.europa.eu/eurostat/product?code=migr\\_asyappctzm&language=en&mode=view](http://ec.europa.eu/eurostat/product?code=migr_asyappctzm&language=en&mode=view) (access: 2.07.2018).

quently referred to as the „push-back” policy)”<sup>11</sup>. The final observations and conclusions of the CPT’s delegation were not positive for the Italian government. The members of the delegation complained especially about the co-operation at the central level, which they found in certain respects unsatisfactory (denial of access to certain documents and information; delivery not in a timely manner or even incomplete).

According to the CPT, the „push-back”<sup>12</sup> policy and operations were chaotic and inadequately prepared as far as the formal identification of migrants was concerned. Moreover, some allegations of the disproportionate use of force on Italian vessels or ill-treatment of migrants by Italian service personnel were not subjected to full investigations<sup>13</sup>. Obviously, the lack of proper identification of persons subordinated to the „push-back” operations arose the problem of compatibility with the *non-refoulement* principle, especially because Libya could hardly be regarded as a place of safety<sup>14</sup>. Taking this into account the CPT concluded that „*Italy’s policy in its present form, of intercepting migrants at sea and obliging them to return to Libya or other non-European countries, violates the principle of non-refoulement, which forms the part of Italy’s obligations under Article 3 of the European Convention on Human Rights*”<sup>15</sup>. Consequently, the CPT urged the Italian authorities to make a substantial review of their practice at stake, with special reference to necessary humanitarian and medical care for those in need as well as effective access to procedures guaranteeing respect for the principle of *non-refoulement*.

The Italian Ministry of Foreign Affairs prepared its observations to the CPT’s report in which it tried to respond to main allegations<sup>16</sup>. In this nine pages

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<sup>11</sup> Report to the Italian Government on the visit to Italy carried out by the 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, p. 4.

<sup>12</sup> „Push-back policy” (called by Italy as „return”) started to be implemented in May 2009 and it aimed at returning migrants to the countries from which they departed, i.e. mainly Libya and Algeria.

<sup>13</sup> Report to the Italian Government, op. cit., pp. 7–12.

<sup>14</sup> However, Italy actively supports development of Libyan migration services, including Libyan maritime units of border guards. It hopes that Libyan authorities will limit the number of attempts to cross the Mediterranean Sea and establish efficient asylum system. The later development would authorise Italy to claim that Libya is a safe country, so migrants arriving to Italy would be send back to Libya, if no individual obstacles to return would be identified *ad casum*. Nevertheless, the EU Member States objected the proposal to conclude the EU-Libya migration agreement (similar to the EU-Turkey agreement). See: N. Nielsen, *EU mulls Turkey-type migrant deal with Libya*, EUobserver of 12.1.2017, <https://euobserver.com/migration/136523> (access: 19.03.2018).

<sup>15</sup> Report to the Italian Government, op. cit., p. 21.

<sup>16</sup> See: Italian Observations on the Report by the Committee for the Prevention of Torture, following its ad hoc mission to Italy (July 27 – July 31, 2009), Rome, February 26, 2010.

long paper some figures were offered to mitigate the generally non-positive picture of the Italian policy. For example, the reference was made to the group of 53 migrants who were brought to Italy because of their problems with health on October 8, 2009 and then positive decision concerning 523 persons who wanted to apply for asylum in the period between October 9, 2009 and November 20, 2009 who were taken to Italy. While not diminishing these facts, the most important part of the Italian's government reply can be found in the last sentence in which the Italian Authorities „reiterate their willingness to fully and extensively cooperate with the Committee on Prevention of Torture and confirm to remain seriously seized of this matter”<sup>17</sup>.

A similar conclusion was presented by the ECtHR in its Grand Chamber's judgment in *Hirsi Jamaa and others v. Italy*<sup>18</sup>. The applicants (eleven Somali nationals and thirteen Eritrean nationals) within the group of app. 200 persons left Libya on three vessels wanting to reach the Italian coast. During the action they were intercepted on the high sea by ships of the Italian Revenue Police. The immediate action of return to Tripoli was initiated. According to the applicants, they were not identified properly as all their personal properties (including documents) were confiscated and they were not informed about the place of their destination. In consequence, they claimed to be the victims of an arbitrary *refoulement* as they were not able in any way to challenge their return to Libya or request international protection from Italian authorities.

In the unanimous opinion of the European judges Italy violated the prohibition of torture (Article 3 of the ECHR), prohibition of collective expulsion (Article 4 of the protocol No. 4 to the ECHR) as well as the right to effective remedy (Article 13 of the ECHR) in conjunction with Articles 3 and 4 of Protocol No. 4 to the ECHR. Additionally, under Article 46 of the ECHR each of the applicant was ordered a sum of 15.000 euros as a just satisfaction for suffering a non-material damage. The financial burden for Italy was increased by the procedural costs and expenses (1,575.74 euros)<sup>19</sup>.

An interesting concurring opinion of Judge Pinto de Albuquerque is attached to this judgment. He insisted on a truly decisive move to a broad construction of State jurisdiction. Just to quote his words „*the full range of conceivable immigration and border policy /.../ constitute forms of exercise of the State function*

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<sup>17</sup> Ibidem, p. 9.

<sup>18</sup> Judgment of the ECtHR in the case of *Hirsi Jamaa and Others v. Italy* of 23 February 2012, app. 27765/09.

<sup>19</sup> For more legal reflections connected with the *Hirsi Jamaa* Case see: C. Costello, *Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored*, „Human Rights Law Review” 2012, vol. 12: 2, pp. 322–324.

*of border control and a manifestation of State jurisdiction, wherever they take place and whoever carries them out*<sup>20</sup>.

Unfortunately, the still-growing influx of migrants created more and more complicated situation between the respondent authorities, human rights organs, non-governmental humanitarian organizations and the European societies as well. It was not that long when in December 17, 2015 the CPT monitored a return flight from Rome to Lagos in Nigeria<sup>21</sup>. The removal action was coordinated by the European Border and Coast Guard (Frontex)<sup>22</sup>. Among basic problems identified by the CPT's delegation there were the following: the information concerning the imminent removal was given to detainees on the day of departure; some persons were removed while the asylum procedures were still pending in the courts<sup>23</sup>; there was no systematic medical examination of the removed persons (serious problem of avoiding exhaustion syndrome) and complaints procedures was improper and ineffective<sup>24</sup>.

On the other hand, the CPT did not notice any instance of ill-treatment during their return operation and underlined the true professionalism of the escort staff. Nonetheless, during the present operation the CPT recommended that all the files of persons detained in CIE Ponte Galeria should be updated with relevant information, including about still pending legal procedures; the protection

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<sup>20</sup> Concurring opinion of Judge Pinto de Albuquerque, p.78 of the pdf version of judgment – see: HUDOC database.

<sup>21</sup> The removal operations by air (Joint Return Operations – JRO) were coordinated and co-financed by Frontex together with the monitoring activity of the CPT. The JRO between Italy and Nigeria was the second such operation. Non-governmental organisations may also monitor return operations, as the EU Member States were obliged to establish that kind of monitoring mechanism by Article 8 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ EU L348 of 24.12.2008, pp. 98–107.

<sup>22</sup> 2016 News. *Italy and Spain: CPT reports critical that safeguards for foreign nationals returned by air not adequate*, <https://www.coe.int/en/web/cpt/-/italy-and-spain-cpt-report-critical>, (access: 5.06.2018).

<sup>23</sup> The applicants should be allowed to remain in the country until the first-instance decision in their asylum case according to Article 9 of the 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, OJ EU L180 of 29.6.2013, pp. 60–95. However, the list of exceptions which could legitimately be applied in order not to suspend a removal during the appeal procedure has to be strictly read. C. Costello, E. Hancox, *The Recast Asylum Procedure Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee* [in:] *Reforming the Common European Asylum System...*, p. 400.

<sup>24</sup> Report to the Italian Government in the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or degrading Treatment or Punishment (CPT) from 16–18 December 2015, CPT.Inf(2016)33, Strasbourg 15 December 2016, pp. 4–9, 14.



of privacy of detainees should be respected (e.g. in toilets); detainees subject to removals should undergo a medical examination (and once again if the removal failed – once they returned to detention). A strong attention was paid to the reduction of the risk of the violation of the *non-refoulement* principle. Among the necessary guarantees for the persons under return operation, the CPT enlisted the prohibition of a removal when: 1/ a court has suspended such a removal and the procedure is still pending before a court and 2/ such a request for suspension is still legally possible<sup>25</sup>. Finally, the CPT recommended a proper attention to the psychological aspects of escort duty (selection and training of the staff)<sup>26</sup>.

The formal response of the Italian Government to the above-mentioned report presents a totally different picture<sup>27</sup>. This creates a little bit confusing situation in which it only may be assumed that Italy – being on the forefront of the European scrutiny – tried to maximally repair its own image. This is because migration crisis appeared during a financial crisis which severely hit, *inter alia*, Italy<sup>28</sup> and it shed a light on a visible lack of solidarity from other European partners<sup>29</sup>.

In addition to a really active involvement of the CPT into the „Italian migration crisis” the situation of that country started also to gain interest of the ECtHR. Nearly similar problem appeared in the case of *Khalifa and others v. Italy*<sup>30</sup>. In this case three nationals of Tunisia entered Italy as a part of a group of migrants who were stopped by the Italian coastguards and placed on the island of Lampedusa on 17–18 September 2011. At first, they were transferred to the first

<sup>25</sup> Those recommendations are in-line with the ECtHR judgments e.g. in *S.D. v. Greece* of 11 June 2009, app. 5354/07. More in C. Costello, *Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law Symposium: Part V: The Right to Belong: Citizenship and Human Rights*, „Indiana Journal of Global Legal Studies” 2012, No. 19, pp 282. Confront with the Court of Justice of the European Union judgment in *J.N. v Staatssecretaris van Veiligheid en Justitie* of 15 February 2016, C-601/15.

<sup>26</sup> *Ibidem*, pp. 10–17.

<sup>27</sup> Response of the Italian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Italy from 16 to 18 December 2015, CPT/Inf(2016)34, Strasbourg 15 December 2016, pp. 3–7.

<sup>28</sup> For some countries, the crisis was an incentive to limit rights and reception standards of asylum seekers. F. Trauner, *Asylum policy: the EU’s ‘crisis’ and the looming policy regime failure*, „Journal of European Integration” 2016, Vol. 38, Issue 3, pp. 312–314.

<sup>29</sup> This can already be stated in the CPT’ observations concerning Greece – Preliminary observations made by the delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) which visited Greece from 10 to 19 April 2018, CPT/Inf(2018)20, Strasbourg, 1 June 2018, pp. 4–7.

<sup>30</sup> Judgment of the ECtHR in the case of *Khlaifia and Others v. Italy* of 1 September 2015, app. 16483/12.

reception centre for registration. The place was overcrowded and it lacked proper sanitation. At the second stage of the action the applicants were transferred to a very poor reception centre, partially damaged by fire. As a result of an arising frustration, the applicants escaped to Lampedusa and participated in a demonstration, which took place there. Being stopped by the police, the applicants were finally placed on overpopulated ships where they faced different forms of mistreatment on behalf of police officers.

This initiated criminal investigation regarding the unlawful arrest of migrants on the board of ships was not concluded in a proper time, as the national judge agreed with the public prosecutor's request to drop any charges. Finally, the applicant based their complaints about unlawful deprivation of liberty on Articles 5 (1), 5 (2) and 5 (4) of the ECHR. Additionally, they claimed that the conditions of their detention violated Article 3 of the ECHR. They also complained of violation of prohibition of collective expulsion (Article 4 of Protocol No. 4 to the ECHR), because their individual decisions were drafted in the same way<sup>31</sup>.

The seven judges Chamber of the ECtHR found unanimously a violation of Article 5 (1), (2) and (4) of the ECHR. However, it did not identify a violation of prohibition of torture (Article 3) as far as the conditions of detention on the ships were concerned. Moreover, in that judgment additional decisions were made by majority of votes (all by 5:2 votes) about the violation of: Article 3 as far as the conditions in one detention centre (CSPA of Contrada Imbriacola) were concerned, Article 4 of the Protocol No. 4 to the ECHR, and about a violation of the right to effective remedy (Article 13 of the ECHR) taken together with Article 3 and 4 of Protocol No. 4 to the ECHR. As a result, Italy was obliged to pay to each of the applicant 10,000 euros in respect of non-pecuniary damages as a just satisfaction under Article 46 as well as to cover costs and expenses (9,344.51 euros).

On 1 February 2016 under Article 43 of the ECHR this case was transferred to the Grand Chamber, which on December 15, 2016 found unanimously that only Articles 5 (1), (2) and (4) had been violated by the Italian government<sup>32</sup>. Reaching this conclusion, the amount of just satisfaction for the applicants was adequately decreased to 2,500 euros per person and the procedural costs and expenses were to be paid jointly to the applicants (15,000 euros).

The above-presented case has already been widely commented. The first judgment was appreciated, especially owe to the ECtHR's rigorous attitude to-

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<sup>31</sup> Those issues were clarified by the ECtHR in the judgment in the case of *Čonka v Belgium* of 5 February 2002, app. 51564/99. Prohibition of collective expulsions can also be found in Article 19 (2) of the Charter.

<sup>32</sup> Judgment of the ECtHR Grand Chamber in the case of *Khlaifia and Others v. Italy* of 15 December 2016, app. 16483/12.

wards prohibition of torture, applicable (as an absolute right) even in the situation of emergency. Secondly, the broad interpretation of „collective expulsion” within the meaning of Article 4 Protocol No. 4 to the ECHR was also worshipped<sup>33</sup>.

On the other hand, the same optimism could hardly be connected with the attitude of the Grand Chamber, as it seemed to be much more „flexible”, noticing a truly difficult situation of Italy. It was more than a clear in the statement that „reality check of the situation suffered by the applicant vis-à-vis the actual situation in which Italy found itself due to the migratory pressure at the time of Arab Spring, following which it had declared of state of emergency”<sup>34</sup>. Adding to this even more, the Grand Chamber stated that „it would certainly be artificial not to consider that the undeniable hurdles faced by the applicants originated from a situation of extreme difficulty confronting the Italian authorities at the relevant times” (para 185, p. 3).

The CPT has organized another *ad hoc* visit to Italy from 7 to 13 June 2017. This time the CPT’s experts focused on the situation of foreigners who were staying in the „hotspots”<sup>35</sup> and in immigration detention centres (Lampedusa, Pozzallo, Trapani) as well as in a mobile „hotspot” at Augusta port. Finally, closed removal centres in Caltanissetta, Ponte Galeria (Rome), Turin and holding facilities at Rome Fumicino Airport were also visited. Therefore, the CPT focused on different types of migrants: in hotspots and in immigration detention centres – persons whose needs were unidentified upon their arrival and in closed removal centres – those who were denied asylum and were subjects to return.

For the first time the CPT in its final report did not notify any excessive use of force or other forms of ill-treatment. Similarly, the health-care services was on a „good” level in a broad sense (i.e. number of medical staff and equipment of health-care facilities). CPT contested only that an access to lawyers and to infor-

<sup>33</sup> See: *Case and Comment*, „European Human Rights Law Review” 2016, issue 1, p. 87.

<sup>34</sup> *Strasbourg Observers. The Grand Chamber’s ruling in Khlaifia and Others v. Italy: one step forward, one step back?* – <https://starborugobservers.com/2017/01/10/the-grand-chamber-ruling>, p. 2, (access: 18.06.2018).

<sup>35</sup> The first „hotspots”, as operational centres were created between 2015–2016 in the neuralgic Southern Italian regions (Lampedusa, Trapani, Pozzallo, Porto Empedocle, Augusta, Taranto). These are the closed centres in which the first aid and temporary detention should be provided. See: I. Bokszczanin, op. cit., p. 327. For the first time the concept of establishing „hotspots” was mentioned in European Commission, *Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions – A European Agenda On Migration*, COM(2015) 240 final, Brussels, 13.5.2015, p. 6. It was confirmed in European Council, *European Council meeting (25 and 26 June 2015) Conclusions*, doc. EUCO 22/15, Brussels, 26 June 2015, point 4(c), <http://www.consilium.europa.eu/media/21717/euco-conclusions-25-26-june-2015.pdf> (access: 11.07.2018).

mation for detained persons was not provided promptly and was not sufficiently detailed<sup>36</sup>. The Committee also recommended to take further practical efforts to reduce the risk of violation of *non-refoulement* principle<sup>37</sup>.

Comparing to the previous similar reports of the CPT, the present one addressed such „details” like: regulation of the procedures applicable in the „hot-spots” in a legally binding documents; installing showers in a mobile „hotspot” in Augusta; introduction of an offer leisure activities for foreigners at Lampedusa „hotspot”; recommendation for the officers working directly with inmates of hotspots not to be equipped with truncheons and guns as it can „*unnecessarily impacts negatively on the overall relaxed atmosphere at the ‘hotspots’*”. More serious recommendation concerned unaccompanied minors<sup>38</sup> who spent sometimes several weeks at the „hotspots”<sup>39</sup>.

Those recommendations can seem really surprising, especially if one realizes that just before the time of the CPT’s visit Italy was facing for several days over 1,000 new arrivals in the „hotspots”. Interestingly, a more serious problem was identified, namely acts of aggression among the migrants themselves, which resulted in security-related issues<sup>40</sup>.

It is worth noting that after its 2018 report the CPT called for the European solidarity for Italy. The CPT’ delegation was „*particularly impressed by the way in which the Italian authorities were handling the situation on a daily basis in the places visited. In this context, the CPT recalls that it has clearly stated the need for co-ordinated European approach and support address the phenomenon of mass migratory arrivals*”<sup>41</sup>.

### 3. PERSPECTIVES

We started our consideration with a recollection of an unfortunate story. But it can be treated as a desperate cry of Italy for solidarity assistance. After the so-called „Arab Spring” in 2011 the rapidly growing waves of irregular migrants

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<sup>36</sup> Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 13 June 2017, CPT/Inf(2018)13, Strasbourg, 10 April 2018, pp. 3–4.

<sup>37</sup> Ibidem.

<sup>38</sup> For broader orientation see: L. van Waas, *The Children of Irregular Migrants: A Stateless Generation?*, „Netherlands Quarterly of Human Rights” 2007, vol. 25, n. 3, pp. 437–458.

<sup>39</sup> Ibidem, pp. 9–10, 13, 19–20.

<sup>40</sup> Ibidem, p. 31–32.

<sup>41</sup> Ibidem, p. 6.

arrived mainly at the most south-exposed parts of Europe: Italian Lampedusa island, Malta, Cyprus and Greece. Today it is difficult to imagine how different the „climate” connected with the problem looked like<sup>42</sup>.

It seems worth reminding that it was exactly Italy which organized a year-long naval and air operation in 2013 („Mare Nostrum”), thanks to which app. 150,000 persons from Africa and the Middle East arrived safely in Europe. Limited supported which was provided to Italy by other EU Member States forced Italian government to extend that operation. Finally, on October 31, 2014 Italian actions were replaced by Frontex’s operation „Triton”. It has a limited scope as it focuses on boarder surveillance and operates within 30 miles of the Italian coast<sup>43</sup>.

The founding fathers of the idea of European integration glorified the solidarity as a leading common value upon which a better world had to be built on. This sounded more than as a beautiful promise, especially in the early 50<sup>th</sup> of last century<sup>44</sup>. In its famous Declaration of May 9, 1950, Robert Schuman stated 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*”<sup>45</sup>.

From the present-day perspective it is hardly to belief that idea of European solidarity started to be so diminished<sup>46</sup>. Migration crises highly divided European partners. The processes of adoption of Council decisions on relocation of persons in clear need of international protection who applied for asylum in Italy and Greece perfectly illustrate this split<sup>47</sup> – the first decision was adopted

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<sup>42</sup> See a very detailed studies: *Opening the Door? Immigration and Integration in the European Union*, V. Novotný (ed.), Brussels 2012.

<sup>43</sup> L. Davies, A. Nelsen, *Italy: end of ongoing sea rescue mission „puts thousands at risk”*, „The Guardian”, 31 October 2014 – <https://www.theguardian.com/world/2014/oct/31/italy-sea-mission...> (access: 15.06.2018).

<sup>44</sup> *Ojcowie-założyciele UE*, [http://euroepa.eu/about-eu/eu-history/founding-fathers/index\\_pl.htm#ff\\_single\\_5](http://euroepa.eu/about-eu/eu-history/founding-fathers/index_pl.htm#ff_single_5) (access: 20.06.2018).

<sup>45</sup> Text of the Declaration – <https://europe.eu/european-union/about-eu/symbols/europe-day>, (access: 20.06.2018). See also: J. Łukaszewski, *Robert Schuman – człowiek, myśl, dzieło*, [in:] *Ojcowie współczesnej Europy. Materiały z konferencji*, M. Borysewicz (ed.), Warszawa 1993, s. 20.

<sup>46</sup> T.G. Grosse, J. Hetnarowicz, *Solidarność – zapomniana wartość Unii. Kryzys uchodźczy (migracyjny) a podział między państwami członkowskimi*, [in:] *Uchodźcy w Europie...*, pp. 221–222.

<sup>47</sup> On the importance of solidarity in those decisions in: B. Gronowska, P. Sadowski, *Włochy w obliczu kryzysu imigracyjnego. Wyzwanie dla ochrony praw człowieka*, forthcoming.

by consensus<sup>48</sup>, but the later decision did not refer to consensus<sup>49</sup>. Moreover, Slovakia and Hungary (accompanied by Poland<sup>50</sup>, which was granted leave to intervene on their side) demanded annulment of the Decision(EU) 2015/1601. However, other EU Member States have also been lagging behind the schedule of implementation of relocation decisions<sup>51</sup>. Those tensions prove that, for sure, fears about a state of national security, social cohesion and a rising of xenophobia are increasingly visible in a number of European societies. Those concerns are more and more popular as the migration crisis continuous, albeit at a smaller scale. Thus, fears about the stability of the EU are truly justified. Therefore, it is hard not to agree with Advocate General Yves Bot who expressed his „*impression that, behind what is by common consent called the ‘2015 migration crisis’, another crisis is concealed, namely the crisis of the European integration project, which is to a large extent based on a requirement for solidarity between the Member States which have decided to take part in that project*”<sup>52</sup>.

Hopefully, the EU Member States have not been refraining from showing their financial and operational solidarity with Italy. In recital 15 of the Council Decision 2015/1601 it was explicitly recalled that „*Italy and Greece /.../[received] substantial emergency assistance and EASO operational support. Italy and Greece were the second and third largest beneficiaries of funding disbursed during the period 2007–2013 under the General Programme ‘Solidarity and Management of Migration Flows’ (SOLID), and, in addition, received substantial emergency funding.*”. The prospects in that regard also confirm a dedication to keep efficient solidarity with those countries as the EU’s priority. In recital 15 of the Council Decision 2015/1601 the EU Member States assumed that „*Italy and Greece will likely continue to be the main beneficiaries of the Asylum, Mi-*

<sup>48</sup> See: recital 22 of 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, OJ EU L239 of 15.9.2015, pp. 146–156.

<sup>49</sup> See: recital 17 of 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, OJ EU L248, 24.9.2015, pp. 80–94.

<sup>50</sup> On Polish legal and political approach to the crisis: P. Sadowski, K. Szczawińska, *Poland’s Response to the EU Migration Policy* [in:] *The Migrant Crisis: European Perspectives and National Discourses*, eds. M. Barlai, B. Fähnrich, C. Griessler, M. Rhombert, Münster 2017, pp. 218–221.

<sup>51</sup> See: European Commission, *Relocation: EU Solidarity Between Member States, November 2017*, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171114\\_relocation\\_eu\\_solidarity\\_between\\_member\\_states\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171114_relocation_eu_solidarity_between_member_states_en.pdf) (access: 10.07.2018), pp. 1–2.

<sup>52</sup> Opinion of Advocate General Yves Bot delivered on 26 July 2017 in Cases C-643/15 and C-647/15 Slovak Republic, Hungary v. Council of the European Union, § 24.

*gration and Integration Fund (AMIF) in 2014–2020.*”. That approach would at least help Italy to overcome financial burden associated with an increased demand for migration management.

It was exactly in 2015 when Brussels officially pronounced its plans to create migration centres outside EU in order to facilitate the process of asylum applications<sup>53</sup>. However, offshoring processing of asylum applications raises serious concerns regarding, *inter alia*, the responsibility of the EU Member States for ensuring adequate reception standards and effective appeal procedures from decisions on a rejection of asylum<sup>54</sup>. Nevertheless, this idea was reiterated during the European Council summit in June 28, 2018<sup>55</sup>. It is unclear what would be the role of external centres in managing the European crisis – would they be: detention centres for migrants intercepted at sea or at the borders of Italy or Malta, or asylum application and reception centres in which migrants would be able to submit asylum claims and wait for final decisions in their case? The role of the UNHCR and IOM who would be involved in running those centres is also unclear. However, unspecific wording of the request from the European Council to the European Commission shows that the EU Member States learnt a lesson and they are aware of the possible tensions of that proposal with international law, including a *non-refoulement* principle, Articles 2, 3, 5 and 6 of the ECHR and Articles 6, 7 and 9 of the International Covenant of Civil and Political Rights<sup>56</sup>.

Proposed amendments to the Common European Asylum System include solidarity measures as well. They are mainly visible in a concept of establishing a legally binding and automatically applied relocation system, which (according to the European Commission) would ensure a better burden sharing<sup>57</sup>. It would

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<sup>53</sup> I. Trynor, *Brussels plans migration centres outside EU to process asylum applications*, „The Guardian”, 5 March 2015.

<sup>54</sup> See: S. Carrera, E. Guild, *Offshore processing of asylum applications. Out of sight, out of mind?*, CEPS Commentary of 27 January 2017, pp. 1–5.

<sup>55</sup> European Council, *European Council conclusions of June 28, 2018*, PRESS 421/18, <http://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/pdf> (access: 10.07.2018).

<sup>56</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966.

<sup>57</sup> According to the European Commission’s proposal it would be a part of a revised Dublin system. See: 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, Brussels, 4.5.2016. Dublin system helps to identify a country which is responsible for proceeding with an individual asylum claim in case of migrants who applied for asylum in at least two EU Member States or who illegally crossed the border of one EU Member State (or overstayed their visa) and applied

set-up a mechanism of a transfer of some asylum seekers from the most affected countries to other EU Member States. This could give Italy a fresh breath. Nevertheless, it will not solve all of the migration crisis dilemma.

However, other measures, which are implementing the Global Approach to Migration and Mobility (GAMM)<sup>58</sup>, should help to mitigate the crisis. That overarching framework of the EU external migration and asylum policy defines how the EU conducts its policy dialogues and cooperation with non-EU countries, based on clearly defined priorities. GAMM is based on four equally important pillars: 1) better organising legal migration, and fostering well-managed mobility, 2) preventing and combatting irregular migration, and eradicating trafficking in human beings, 3) maximising the development impact of migration and mobility and 4) promoting international protection, and enhancing the external dimension of asylum.

GAMM's priorities were reflected in an ambitious Valletta Summit Action Plan of November 11–12, 2015, which aims, *inter alia*, at: 1) addressing the root causes of irregular migration and forced displacement, 2) supporting reinforcement of the protection of migrants and asylum seekers, 3) contributes to prevention and fight irregular migration, migrant smuggling and trafficking in human beings and 4) encourages closer works to improve cooperation on return, readmission and reintegration. More specifically, to fight with an illegal transit of migrants via Libya, the EU decided to take specific actions focusing on training of Libyan coast guards, protecting and assisting migrants and refugees, supporting local communities, improving border management<sup>59</sup>. Moreover, the EU

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for asylum in another EU Member State. Currently the system operates under 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, OJ EU L180 of 29.6.2013, pp. 1–30.

<sup>58</sup> European Commission, *Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions – The Global Approach To Migration And Mobility*, COM(2011) 743 Final, Brussels, 18.11.2011. It started with Presidency Conclusions, *Presidency Conclusions on the Global Approach to Migration: Priority actions focusing on Africa and the Mediterranean*, European Council, Brussels, 15–16 December 2005. More on GAMM in: P. Sadowski, *Capacity building in a field of migration: the cases of Moldova and Georgia*, Web Journal of Current Legal Issues 2012, No. 1, <http://www.bailii.org/uk/other/journals/WebJ-CLI/2012/issue1/sadowski1.html> (access: 28.07.2015).

<sup>59</sup> See: Council of the EU, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, Press Statements And Remarks 43/17 of 03.2.2017, <http://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/pdf> (access: 20.06.2018).



established a joint migration task force with the African Union and the UN in November 2017 to enhance cooperation to respond to migration challenges in Africa, in particular in Libya. Finally, in June 2018, EU leaders called for further measures to reduce illegal migration on the Central Mediterranean route. They agreed<sup>60</sup>, among others, to: 1) step up efforts to stop migrant smugglers operating out of Libya or elsewhere, 2) continue to support Italy and other frontline EU countries, 3) increase their support for the Libyan coastguard, humane reception conditions and voluntary humanitarian returns and 4) enhance cooperation with other countries of origin and transit as well as voluntary resettlement.

Nevertheless, there are country-by-country proposals, part of which may bear doubts regarding a concept of a true European solidarity. German academics' proposal of 2018 exemplifies those concerns as their new approach to immigration reform concentrates on people with „proper” professional qualifications<sup>61</sup>, who are more willing to integrate and are less disruptive. However, the above-mentioned proposals represent a split between European countries focusing on the „quality” of newcomers and countries which present a truly rights-based approach. Italy has limited options in that regard. However, even though its geographical location put it at the frontline of what has become one of the world's „most perilous migration routes”<sup>62</sup>, Italy's actions aimed at humanizing the situation of arriving migrants undoubtedly proved that it represents the supporters of the latter group.

We fully agree with the conclusion that „*the only thing which can be said to be accidental about the 'refugee crisis' is the conflicts which gave rise to it. Every other element in this crisis is the result of a complex web of choices made in drafting of the key legal instruments which govern the treatment of refugees under international and domestic law*”<sup>63</sup>. Likewise, one cannot deny that the migration crisis has reached its pick in Europe. On July 5, 2018 the Dunja Mijatović Commissioner of Human Rights Commissioner for Human Rights of the Coun-

<sup>60</sup> See: Council of the EU, *European Council conclusions, 28 June 2018*, Press Release 421/18 of 29.6.2018, pp. 1–2, <http://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/pdf> (access: 10.07.2018).

<sup>61</sup> <http://www.dw.com/en/german-academics-propose-new-approach-to-immigration-reform> (access: 20.06.2018). Actually, the similar attitude was presented in 2015 by the experts of the Migration Policy Centre of the European University Institute – *Towards a pro-active European labour migration policy. Concrete measures for a comprehensive package*, Policy Brief, Migration Policy Centre Robert Schuman Centre for Advanced Studies – European University Institute, San Domenico di Fiesole, March 2015, *passim*.

<sup>62</sup> I. Trynor, *op. cit.*, p. 2.

<sup>63</sup> Ch. Kilroy, *The Role of International and Domestic Law in Creating the Refugee Crisis which Faces Europe*, „European Human Rights Law Review” 2015, issue 6, p. 559.

cil of Europe appealed that „European states must put human rights at the centre of their migration policies”<sup>64</sup>. In her statement there was a strong reference to obligation of ensuring a sufficiently resourced and fully operational system for saving people at sea.

It could be hardly denied that „*a fundamental problem is that there is no European policy on immigration, with national governments jealously guarding their powers over admission and asylum procedures*”<sup>65</sup>. Article 67(2) of the Treaty of Functioning of the European Union has not effectively altered that policy, although it stressed that Common European Asylum System is built on solidarity. If we really want to give Italy a relief, Brussels has „*to declare that EU frontier search-and-rescue patrols would be introduced, spanning the Mediterranean from Lebanon to Gibraltar*”<sup>66</sup>. Otherwise, Italy will be left to pay „*the bill for the rest of Europe*”. This would be an unacceptable output of the non-solidarity *de facto*, because (as Advocate General Yves Bot accurately stated) „solidarity is among the cardinal values of the Union and is even among the foundations of the Union. How would it be possible to deepen the solidarity between the peoples of Europe and to envisage ever-closer union between those peoples, as advocated in the Preamble to the EU Treaty, without solidarity between the Member States when one of them is faced with an emergency situation?”<sup>67</sup>. However, one should recall that there are no „simple solutions” to migration crisis. Forced relocations (which ignore the justified needs and preferences of asylum seekers) would be inefficient, what would only undermine CEAS. Therefore, the EU should focus its efforts on search and rescue operations and continue its involvement in ensuring stabilization in neighbouring countries as well as in investing in promotion of human rights in countries of origin. Those are, however, a more long-term actions to take.

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<sup>64</sup> <https://www.coe.int/web/portal/-/european-states-must-put-human-rights-at-the-centre> (access: 05.07.2018).

<sup>65</sup> I. Trynor, op. cit.

<sup>66</sup> Ibidem.

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