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EUROPEAN REFUGEE 'CRISIS': HOTSPOTS, OFFSHORE PROCESSING, AND HUMAN RIGHTS.

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Introduction

The European migration and refugee policies have undergone rapid changes over the last decade, a change which has been accelerated by the so-called

'refugee' or 'migration' crisis. According to the UNCHR, over one million people arrived in Europe by sea in 2015. Moreover, from January to December 2016, more than 360.000 people arrived in Europe by sea.[1] As a consequence, there have been dramatic reforms to the European Union's migration and refugee policies. The EU Agenda on Migration (Agenda) formed the basis for these reforms, and set out the guidelines on migration and asylum policies to follow in the coming years. This thesis focuses on one measure indicated in the Agenda: the 'hotspot approach'. The hotspot approach represents the EU's central measure for facilitating the registration and identification of asylum seekers arriving in frontline member states, namely Italy and Greece.

The hotspot approach is used as a case study to demonstrate that some changes may occur with little regard or analysis of their legality in member states. This thesis seeks to address the dearth of research on hotspots, their evolution and future, and the problems that this new policy raises in Italy due to a possible lack of compliance with Italian law. The hotspots started to work in Europe in September 2015, thus the analysis will develop mainly on the basis of reports presented by different actors working on the field and on papers presented by the few scholars in the area.

The third chapter of the thesis addresses the idea that the hotspot approach may be a starting point for a transition to a system in which the procedures of identification and registration take place outside the European Union. Whereas the hotspot approach implies the development of processing centres in frontline member states, the latest declarations by some EU leaders expressed interest in the adoption of a system in which these procedures happen outside Europe. Various leaders have referred to the Australian model

[1] UNHCR, Monthly data update: December 2016. http://reliefweb.int/sites/reliefweb.int/files/resources/Monthly_Arrivals_to_Greece_Italy_Spain_Jan_Dec_2016.pdf (last access February 4 2017).

as a system to face the ‘crisis.’ Thus, in the last chapter the thesis seeks to understand why this discussion is occurring at his point in time, taking into consideration securitisation theory and what legal problems can arise. The legal issues are addressed considering the compliance with human rights embodied in the European Convention of Human Rights, a regional treaty which is a feature of European Union member states, but is not relevant in the Australian system.

1. Chapter 1: charting the responses to the “refugee crisis”

1.1. Introduction

Firstly, this chapter will briefly analyse the EU policies contained in the EU Agenda on migration in order to understand the background in which the hotspot approach has been inserted. Secondly, it will analyse the reactions to the Agenda, including the declarations of national and international NGOs and government positions. Lastly, the chapter will discuss the relocation mechanism and the hotspot approach, two urgent measures listed in the EU agenda.

In the conceptualising and defining the hotspot approach, the focus will be on the way in which it is described and understood in EU documents and on a brief overview of its implementation in Greece. For analysing the relocation mechanism, the paper seeks understand how it works, the type of expectations there are of it and on the numbers that it has handled up to 2016**.**

1.2. The European Agenda on migration

On 18 April 2015 one of the worst shipwrecks since the Second World War took place in the Mediterranean Sea, close to the coast of Libya. A boat carrying almost 850 migrants sank after a collision with a Portuguese ship that had come to its rescue. According to the survivors, most of the

passengers had been shut in the hull as soon as the boat left Garabulli, in Libya. Only 28 people were taken to safety by the Italian Navy.[2]
After the sinking, only one of the many the Mediterranean Sea had witnessed that year, the European Council affirmed that the situation in the Mediterranean Sea was a tragedy. The member states announced that the European Union would mobilize all efforts to prevent more deaths at sea. They would achieve this by first, strengthening the European presence at sea through a rapid reinforcement of operations Triton[3] and Poseidon.[4]Second, Member State authorities would combat people trafficking. They would do this in co-operation with Europol[5], Frontex,[6] the European Asylum Support

[2] Miglierini, 'Migrant tragedy: Anatomy of a shipwreck,' *BBC News,* 24 May 2016, http://www.bbc.com/news/world-europe-36278529 (last accessed: 29/01/2017).

[3] European Commission, *Operation Triton*, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/frontex_triton_factsheet_en.pdf (last accessed 28/01/2017).

Operation Triton is a border security joint operation conducted by Frontex, The operation, under Italian control, began on 1 November 2014 and involves voluntary contributions from 15 other European nations (both EU member states and non-members).The operation was undertaken after Italy ended Operation Mare Nostrum, which had become too costly for a single country to fund.

[4] Frontex, *Operation Poseidon*, http://frontex.europa.eu/operations/archive-of-operations/Lq8P8c (last accessed 26/01/2017).

[5] Europol, https://www.europol.europa.eu/content/page/about-europol-17 (last accessed 23/01/2017).

[6] Frontex, http://frontex.europa.eu/ (last accessed 18/01/2017). For a deep analysis of Frontex's structure and development: Campesi, Polizia della Frontiera, DeriveApprodi SRL,Roma,2015.

Office (EASO)[7] and EUROJUST[8], as well as through police cooperation with third countries. Third, member states would prevent illegal migration flows through a stronger cooperation with African countries and other regional partners in order to dismantle the smuggling and trafficking of human beings. They also committed to work on the causes of illegal migration. Finally, member states pledged to reinforce internal solidarity and responsibility among member states. This would be achieved through the implementation of a Common European Asylum System and the launch of a voluntary pilot project on resettlement across the European Union.
The desire to achieve these common goals led to the development of the European Agenda on Migration (EU Agenda on Migration). This process commenced on 29 April,[9] after the European Parliament, underlining the EC's position on the humanitarian crisis, asked the Commission to develop the EU Agenda on Migration.[10] The Agenda was made public on 13 May 2015.[11] It resembled a five-point plan on immigration policy and the

[7] EASO, https://www.easo.europa.eu/ (last accessed 11/01/2017).

[8] EUROJUST, http://www.eurojust.europa.eu/Pages/home.aspx (last accessed 05/01/2017).

[9] The European Parliament, Extraordinary European Council meeting - The latest tragedies in the Mediterranean and EU migration and asylum policies, 23 April 2015,

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0176+0+DOC+XML+V0//EN (last accessed 28/01/2017).

[10] Ibid.

[11] European Commission, COM(2015) 240 final - A European Agenda On Migration, 13 May 2015, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agendamigration/background-.information/docs/communication_on_the_european_agenda_on_migration_en.pdf (last accessed 26/01/2017). For a summary of the agenda: European Commission, *European Agenda on*

implementation of the Common European Asylum System presented by Commission President Junker on 23 April 2014. The EU Agenda also provided for the expansion of the European Asylum Support Office, cooperation with third countries, the promotion of legal migration, and the securing of the EU's external borders.[12]

The document sets out both *urgent measures* in response to the crisis in the Mediterranean Sea and *structural measures* that must be adopted longer term.

> '[T]his Agenda brings together the different steps the European Union should take now, and in the coming years, to build up a coherent and comprehensive approach to reap the benefits and address the challenges deriving from migration.'[13]

1.3. Urgent measures against irregular migration

With the introduction of the Agenda, the Commission launched an immediate response to the humanitarian crisis in the Mediterranean Sea, declaring that the measures that would be taken were going to 'serve as the blueprint for the EU's reaction to future crisis'.[14] In the first part of the

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Migration 2015, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/summary_european_agenda_on_migration_en.pdf (last accessed 22/01/2017).

[12] Jean-Claude Juncker, *My Five Point-Plan on Immigration*, 23 April 2014, http://juncker.epp.eu/sites/default/files/attachments/nodes/en_02_immigration.pdf (last accessed 14/01/2017).

[13] European Commission, *COM(2015) 240 final - A European Agenda On Migration*, 13 May 2015, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf (last accessed 26/01/2017),p.2.

[14] European Commission, *COM(2015) 240 final - A European Agenda On*

document the Commission referred to several urgent measures key in the EU's short-term answer to the migration crisis: saving life at sea and targeting criminal smuggling networks through a collaboration with third countries. The document also proposed launching the 'Hotspot Approach' for processing asylum seekers who arrive in Europe, as well as their relocation and resettlement.

The Agenda recognises the necessity of 'working in partnership with third countries to tackle migration upstream'. The Commission and the European External Action Service (EEAS) will work with partner countries to put in place a three-step strategy to stop dangerous journeys. The first step is the creation of regional development and protection programmes in Africa and the reinforcement of the already existing programmes in the Middle East. The second step is the creation of a multifunctional centre in Niger. Through a collaboration between the International Organization for Migration (IOM), the UNHCR and the Niger authorities, the centre will inform, guarantee local protection and resettlement opportunities. This will help to provide a realistic picture of migrants' journeys and to assist voluntary return options for irregular migrants. The third step is the reconceptualization of migration issues. It will be constructed as a specific component in the Common Security and Defence Policy (CSDP) missions already deployed in countries like Niger and Mali. Collaboration with third countries will be accompanied by political initiatives to promote stability in countries where the political situation is unstable.[15]

Migration, 13 May 2015, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf (last accessed 26/01/2017), p. 3.

[15] European Commission, *COM(2015) 240 final - A European Agenda On Migration*, 13 May 2015, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-

The collaboration with third countries will be followed by a stronger cooperation between member states to prevent more deaths at sea. The EU pledged to restore the level of intervention at sea to that provided by the Italian operation 'Mare Nostrum'.[16] Meeting that commitment requires

migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf (last accessed 26/01/2017), p. 5.

[16] Italian Ministry of Defence, *Mare Nostrum Operation*, http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx (last accessed 26/01/2017).

Operation Mare Nostrum was a year-long naval and air operation commenced by the Italian government on October 18, 2013 to tackle the increased immigration to Europe during the second half of 2013 and migratory ship wreckages off Lampedusa. During the Operation at least 150,000 migrants, mainly from Africa and the Middle East, arrived safely to Europe. The operation ended on 31 October 2014 and was superseded by Frontex's Operation Triton.

For a deep analysis of Mar Nostrum Operation: Cuttitta, '*From the Cap Anamur to Mare Nostrum. Humanitarianism and Migration Controls at the EU's Maritime Borders',* The common European Asylum System and Human Rights: enhancing protection in times of emergencies, centre for the law of EU external relations, http://dare.ubvu.vu.nl/bitstream/handle/1871/52604/cuttitta.mare.nostrum.cleer.pdf?sequence=1&isAllowed=y ,(last accessed 20/02/2017) p 26-29.

Operation Triton faced criticism from several NGOs. For example: AEDH, The new European operation Frontex Plus/Triton: an operation with differing objectives and more limited means than the Mare Nostrum operation, http://www.aedh.eu/The-new-European-operation-Frontex.html (last accessed 23/01/2017).

For a more complete analysis on the difference between Operation Triton and Operation Mare Nostrum: T.G. Hammond, *the Mediterranean Migration Crisis*, Foreign Policy Journal, available at http://www.foreignpolicyjournal.com/wp-content/uploads/2015/05/150519-Mediterranean-Migration-Crisis-Timothy-G-Hammond.pdf (last accessed 20/02/2017), p 7-8.

tripling the budget of Frontex Joint Operations and an increase of assets provided by member states. The Agenda's goal of dismantling criminal networks which take advantage of migrants requires teamwork by European Agencies. The Agenda mentions not only Common Security and Defence Policy (CSDP) operations which identify and destroy vessels used by smugglers, but also a reinforcement of the collaboration between Frontex and Europol to monitor and identify smugglers' movements.

The Agenda seeks to address the recent influx of asylum seekers through a program of relocation and resettlement. First, relocation is meant to be a 'temporary distribution scheme for persons in clear need of international protection', namely refugees who have arrived in Europe. The aim is to guarantee a shared participation of all member states for a common purpose. The Agenda, in the annex, defines the criteria that must be taken into consideration to evaluate the number of refugees each state is to take. Second, resettlement means the transfer of refugees from a third country to a member state, meaning those who have chosen to remain in refugee camps rather than make the journey to Europe.[17] The transfer is made on submission of the United Nations High Commissioner for Refugees (UNHCR) and in agreement with the country of resettlement. Once resettled, refugees are granted the right to stay and any other rights comparable to those granted to a beneficiary of international protection. This resettlement strategy responds to the necessity of granting a safe way of reaching Europe for vulnerable people, helping them avoid criminal

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J. Hartmann and I. Papanicolopulu, 'Are human rights hurting migrants at sea?', Blog of the European Journal of International Law, http://www.ejiltalk.org/are-human-rights-hurting-migrants-at-sea/ (last accessed 20/02/2017).

[17] For a more complete explanation of the resettlement mechanism: http://www.unhcr.org/en-au/resettlement.html (last accessed 20/2/2017).

networks of traffickers and smugglers. Each European state must participate in the resettlement scheme on the basis of the same criteria that have been listed for the relocation system.

Finally, the Agenda introduced a new 'Hotspot Approach' which contemplated the designation of processing centres as hotpots for the processing of recently arrived migrants.[18] A deep analysis of the hotpot approach will be conducted below, as it is the most legally contentious of the newly developed policies for addressing the refugee crisis. Prior to that analysis, the paper will first discuss the longer-term plans to address the crisis, as well as the responses of the international community to the Agenda.

1.4. Long-term measures against irregular migration

In addition to the urgent measures, the Commission will establish structural measures against irregular migration that need to be adopted in a longer term. The Agenda refers to four pillars to achieve this. First, the necessity of reducing irregular migration: this aim will be reached by strengthening relationships with third countries. European migration liaison officers in key third countries will collect data and information regarding the causes of irregular migration. The gathering of data will allow the development of strategies to help countries handling a high influx of refugees. The intention is that European Union will support these third countries to prevent refugees from coming to Europe. Second, the fight against smugglers will be expanded to seek to disincentive their operations. The aim is to transform the smuggling network into a criminal operation with 'high risk and low return', again achieved through collaboration with third countries.

[18] In this thesis the term migrant Is used to comprehend both asylum seekers and irregular migrants arriving at the EU borders.

Third, the Agenda sought to facilitate the return of those found not to be refugees. The Commission considers the presence of failed asylum seekers on EU territory as a problem because their integration in the European community is harder and because it creates a lack of confidence in the system for formal or regular migration. Moreover, the presence of irregular migrants provides strong arguments to those who are looking to criticise and stigmatise migration. To do that, member states were required to harmonize the implementation of the Return Directive,[19] and the Commission would reinforce the role of Frontex. Additionally, the Commission planned to develop the new phase of Smart Borders. The 'Smart Border Package' intended to progress the management of the external borders of the Schengen Area to facilitate crossings for the large majority of legal third country travellers. Furthermore, the Commission will continue to develop the Common Asylum Policy to restore mutual trust among member states and to ensure that the success of an asylum claim does not depend on the state where the person has presented it. The development of a common European system will require the introduction of a new monitoring process, an improvement of the standards on reception and asylum procedures. It will include also a list of 'safe' third countries meaning those that are considered safe by EU institutions and thus require a rapid process for assessing asylum claims.[20]

[19] 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 in the OJEU L 348/98 of 24 December 2012. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Ajl0014 (last accessed 21/01/2017).

[20] The Common European Asylum System (CEAS) is an EU framework of legislative instruments adopted to implement the Geneva Convention Relating to the Status of Refugees in the EU legal system. Pursuant to Article 78(2) TFEU, CEAS comprises (a) a uniform status (definition) of asylum and (b) subsidiary protection; (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d)

Finally, the EU Agenda identified the 'Dublin System' as a mechanism that must be improved. The Dublin System has been recently amended by the Regulation (EU) No 604/2013 of 26 June 2013. It sets out the criteria for defining the member state responsible for analysing asylum claims in one of the member states. The criteria for selecting country of processing cover, in order of decreasing importance: family considerations, recent possession of visa or resident permit in a member state and whether the applicant has entered EU irregularly, or regularly.

These reforms to the Dublin System are unlikely to be the last. As the Commission has made it clear:

'[t]he Dublin system does not work as it should. In 2014, five members state dealt with 72% of all asylum applications EU wide. The EU can provide further assistance, but the rule needs to be applied in full.'[21]

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common procedures for the granting of asylum or subsidiary protection status(e)criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. For more information: Directorates-General Migration and Home Affairs, *What We Do, Policies, Asylum*, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm. (last accessed 19/07/2016).

[21] European Commission, *COM(2015) 240 final - A European Agenda On Migration*, 13 May 2015, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf (last accessed 26/01/2017), p. 13.

For a more complete analysis of the limits of the Dublin System and a general analysis of the measures adopted in the EU Agenda on Migration: Selanec, *'A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation*', Croatian yearbook of European law & policy, Vol.11 No.11 Prosinac 2015, p 90-94,

Instead of reform, some European leaders have put forward alternative models, one of which, an offshore processing system, will be discussed in the third chapter.

1.5. National and international responses to The Agenda

The responses to the EU Agenda from International NGOs have been mixed. For example, John Dalhuisien, the Amnesty International (AI) Director for Europe and Central Asia welcomed the steps taken in the Agenda stressing that the document goes beyond 'the *Fortress Europe* attitude towards the refugee crisis'. Nevertheless, he emphasised the necessity of effective collaboration among member states and he underlined the exigence of a more specific description about the implementation of Operation Triton and the system of resettlement. [22] Interestingly, he argued the Agenda did not define how Operation Triton would act in the high seas area where most of the shipwrecks happen. In addition, AI considers the number of refugees who can access the resettlement system to be extremely

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http://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=222770 (last accessed 20/02/2015).

Hruschka, 'Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission', EU immigration and asylum law and policy blog, http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/ (last accessed 20/02/2017).

Peers, The Refugee Crisis: What should the EU do next?, EU law analysis Blog, http://eulawanalysis.blogspot.com.au/2015/09/the-refugee-crisis-what-should-eu-do.html (las accessed 20/02/2017).

[22] Amnesty International, *EC Migration Agenda Represents Welcome Shift and Must Not Be Undermined by Member States*, 13 May 2015, https://www.amnesty.org/en/latest/news/2015/05/ec-migration-agenda-represents-welcome-shift-and-must-not-be-undermined-by-member-states/. (last accessed 19/08/2016).

low. Each member state would need to resettle 100,000 refugees by the end of 2016 to properly deal with the refugee crisis. The International Organization for Migration (IOM) followed AI in applauding the Agenda. In contrast, the UNHCR and Doctors Without Borders (Médecins sans frontierès) (MSF) were more cautious. UNHCR considered the Agenda an important document in responding to the refugee crisis, especially in regards to the principle of solidarity and responsibility among member states that constitutes the core of the resettlement system. However, it underlined the necessity of a speedy adoption of the system by all the member states and recommended the adequate treatment of minors and vulnerable people in the implementation of the hotspot approach. The reaction of MSF was the wariest among international NGOs.[23] MSF expressed concerns regarding the strengthening of Frontex and Operation Triton in the Mediterranean Sea. It argued that a strong military component in the Agenda could damage the search and rescue efforts of humanitarian organisations. Additionally, MSF exhorted European leaders to ensure that EU policies do not further endanger asylum seekers. Other concerns were expressed regarding the reception centres located in Southern Europe. MSF, after the launch of the Agenda, pledged to continue intervening in the Mediterranean Sea in search and rescue operations and will provide medical support to migrants in danger until the EU can 'prove to make a difference in saving… lives at sea by offering meaningful alternatives to these boat journeys'.

The reactions by member states to the Agenda were more debated. Whereas all member states agreed on the military plans, the resettlement and

[23] Doctors Without Borders Canada/Médecins Sans Frontières (MSF) Canada, *'We Remain Prudent': MSF Responds to Europe's New Agenda on Migration in the Mediterranean*, 13 May 2015, http://www.msf.ca/en/article/we-remain-prudent-msf-responds-to-europe-s-new-agenda-on-migration-in-the-mediterranean.(last accessed 21/02/2017):

relocation policy caused more controversy. The response to these policies changed according to member states' previous participation in the relocation system when it was still voluntary. The European countries that had already participated in the voluntary relocation system, such as Germany, Sweden, Austria, Italy, Greece and Malta, welcomed the idea of a relocation and resettlement system based on criteria because a quota system would reduce the number of migrants in their state. In contrast, the Prime Minister of Hungary, Viktor Orban said:

'[T]he European concept of 'someone letting immigrants into their country' and then 'distributing' them among the other member states is a mad and unfair idea.'[24]

The UK PM David Cameron appealed to British history of offering protection to people in need, but refused the idea of a compulsory quota in the relocation system.[25] The then Home Secretary and now Prime Minister, Theresa May, underlined that the participation in a compulsory relocation system is inconsistent with the UK's right to opt into any piece of legislation in justice and home affairs, including asylum policy. Moreover, she disagreed with the concept of relocation as the right choice to address the migration crisis, preferring instead a reinforcement of military operations to target and stop people-smugglers in the sea and make the return of illegal migrants effective.[26]

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[24] Traynor, 'EU to Impose Migrant Quotas Forcing States to 'Share' Burden of Influx,' *The M&G Online*, 11 May 2015, http://mg.co.za/article/2015-05-11-eu-to-impose-migrant-quotas-forcing-states-to-share-burden-of-influx/. (last accessed 24/08/2016).

[25] EurActiv, 'Britain Rejects Migrant Resettlement Plan,' *EurActiv.com*, May 13, 2015, http://www.euractiv.com/section/david-cameron/news/britain-rejects-migrant-resettlement-plan/ (last accessed on 18/08/2016).

[26] Travis, 'Home Secretary Hardens Refusal to Accept EU Resettlement Programme,' *The Guardian*, May 12, 2015, http://www.theguardian.com/politics/2015/may/11/home-secretary-

As it is clear from international NGOs reactions, there is a widespread concern regarding a military approach to the crisis that could damage the already vulnerable situations of asylum seekers. Yet, member states' reactions to the Agenda underlined a unanimous support for reinforcement of military interventions. However, the application of the solidarity principle embodied in the compulsory relocation system met strong oppositions from some of the states. This type of compulsory mechanism needs the collaboration of all the members to work correctly and if collaboration falters, then the system will fail. Regardless, the reaction of member states who supported more militaristic containment policies made the implementation of the hotspot approach uncontested. However, as the second chapter will demonstrate, its implementation raised concerns regarding its legality under EU and domestic law.

Having identified the principles of the EU Agenda on Migration relating to irregular migration, the next section will give a brief overview of how some specific Agenda policies, namely the 'hotspot' approach and the relocation, have been described in the EU documents. The 'hotspot' approach and the relocation system are mechanisms that need to be analysed together, as the 'hotspot' approach is complementary to the relocation mechanism.

1.6. Hotspot approach in Greece and Italy: working principles.

In analysing the legality and implementation of the hotspot approach, it is first necessary to understand how the system was initially conceptualised by the EU and its member states. The below discussion makes clear that vagueness in the design of the approach has raised significant issues, and means that substantial legal analysis of the implementation must take place at the domestic level. To that end, the thesis will explore the example of Italy in the second chapter, with a brief discussion of Greece prior, to

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theresa-may-eu-emergency-resettlement-programme-theresa-may. (last accessed on 19/08/2016).

contextualise the hotspot system. This section lays out the EU Agenda's design for the hotspot approach, and the issues it raises.

The EU Agenda did not clarify the new 'hotspot' approach. It did not give a definition of hotspots but simply stated how the hotspot approach should be implemented:

> '[T]he European Asylum Support Office, Frontex, Eurojust and Europol will work on the ground with frontline Member States to swiftly identify, register and fingerprint incoming migrants. The work of the agencies will be complementary to one another. Those claiming asylum will be immediately channelled into an asylum procedure where EASO support teams will help to process asylum cases as quickly as possible. For those not in need of protection, Frontex will help Member States by coordinating the return of irregular migrants. Europol 3 and Eurojust will assist the host Member State with investigations to dismantle the smuggling and trafficking networks.'[27]

Because of the lack of the definition, the European Council, in its conclusions of 25-26 June 2015, asked the Commission to present a Road Map on the legal, financial, and operational aspects of the 'hotspot' approach by July 2015.[28] As a response, the Commissioner to Justice and Home Affairs, Dimitris Avramopoulos, presented an unofficial 'explanatory

[27] European Commission, *COM(2015) 240 final - A European Agenda On Migration*, 13 May 2015, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf (last accessed 26/01/2017), p. 6.

[28] European Council, *Press Release on Meeting of 25-26/06/2015*, http://www.consilium.europa.eu/en/meetings/european-council/2015/06/25-26/, (last accessed on 16/09/2016).

note' on 15 July 2015. [29] The annexes to the explanatory note consist of two Road Maps outlining the way in which this approach should be implemented in Italy and Greece. Both documents have been drafted in collaboration with EU agencies and the affected states, namely Italy and Greece. However, again, the explanatory note does not provide a definition of 'hotspot', only defining the aims of the 'hotspot' approach:
'[n]amely the creation of a platform for the agencies to intervene rapidly and in an integrated manner, in frontline member states where there is a *crisis* due to the specific and disproportionate migratory pressure at their external borders.'[30]
The explanatory note also describes two ways in which the hotspot approach can be triggered. One case is when a member state sends a request for support together with a scheme indicating its needs to the European Commission and the pertinent European agencies (Frontex, EASO, Europol and Eurojust). The European Agencies, coordinated by the Commission, would evaluate the request and the submitted scheme to support the member state without delay with a set of actions. Another case is when the Commission itself suggests a member state affected by a high pressure of migration flows should implement the 'hotspot' approach, without a request from a member state.
The operational coordination is led by EU Regional Task Force (EURTF) that is the entity responsible for implementing the hotspot approach on the ground. EURTF consists of a headquarters situated in a strategic position in the affected state. It is responsible for coordinating the activities and

[29] Avramopoulos, *EU Commissioner letter to European Ministers*, 15/07/2015, http://www.statewatch.org/news/2015/jul/eu-com-commissioner-letter.pdf (last accessed 25 January 2017).

[30] European Commission, *Explanatory note on "the hotspot" approach*, http://www.statewatch.org/news/2015/jul/eu-com-hotsposts.pdf (last accessed 12/01/2017), p. 2.

information between experts from the European Agencies and from the member states hosting the hotspots. In Italy the EURTF opened in Catania, Sicily, on 24 April 2016.[31] The type of European agency that performs the role of EURTF coordinator varies according to the challenges of the moment, 'whether the major challenge is pressure at the borders, or processing asylum applications or investigating criminal networks, the relevant agency would need to take up the role of coordinator'.[32]
Furthermore, the explanatory note underlined several times the need for collaboration among the European Agencies and the relevant national authorities. However, it stressed the European Agencies cannot take over the competences and responsibilities of the member states.
The operational support granted by the several actors involved adapts to the specific situation at the external sea or land borders of the frontline member states. It consists of the following process:

1. Registration and screening of irregular migrants to determine their identity and nationality and any other information relevant to understand if they can be considered asylum seekers.
2. Registration in EURODAC, which implies taking fingerprints by member states authorities with the support of relevant European Agencies and special national state experts, if requested.
3. First screening interviews which should be useful to distinguish among the following categories of migrants:

- Persons who wish to apply for asylum
- Persons who can be returned immediately

[31] Frontex, *Eurtf Office in Catania Inaugurated,* 27/04/2016, http://frontex.europa.eu/news/eurtf-office-in-catania-inaugurated-fcQoSr (last accessed on 16/10/2016).

[32] European Commission, *Explanatory note on "the hotspot" approach*, http://www.statewatch.org/news/2015/jul/eu-com-hotsposts.pdf (last accessed 12/01/2017), p. 4.

- Persons about whom the situation remains doubtful

4. Second interviews of migrants to understand migrants' routes and to gather useful information for smuggling and criminal networks analysis.
5. Investigation of criminal networks facilitating the movement of migrants from third states to the European Union (EU) and on the movements from the destination of first arrival to other member states. The enquiry is made in collaboration with the judicial authorities of the host member state and, if needed, with Eurojust.
6. Appropriate asylum procedures should be guaranteed to those who have been recognized as asylum seekers by EASO teams, alongside with UNHCR staff.
7. EASO and UNHCR should support the following preparation of case files. Both agencies should focus on persons in clear need of international protection and ensure swift processing and possibly relocation.
8. The return of migrants that do not have the right to stay in EU is ensured by Frontex and the host member state.

As it clear from the list of activities indicated in the explanatory note, the hotspot approach seems to focus on activities of registration and identification of migrants to distinguish who is entitled to the refugee status and who is an irregular migrant. Irregular migrants are supposed to be sent back to their country of origin. The document, though does not specify the order in which these activities must be implemented and the physical facilities where they take place. [33] Moreover, the description of them is

[33] The explanatory note simply indicated that the adequate reception facilities, necessary to implement the 'hotspot' approach, must be guaranteed by the host member state.

vague, thus not allowing a complete comprehension for the reader. Because of this imprecision, the interpretation of all the steps of the procedure lies with the agencies and/or member states.

Another important issue regards the respect of fundamental rights of asylum seekers. The explanatory note does not have a specific section on this topic. There is just a short reference to the role of the Fundamental Rights Agency (FRA). The EU agencies can use its expertise and its advice on how to address fundamental rights challenges, in line with existing bilateral cooperation agreements.[34] The lack of definition, the absence of a section on substantial fundamental rights and the vagueness of the activities indicated in the EU documents causes problems in the implementation of the hotspot approach. Consequently, it is necessary to look at the domestic implementation of the mechanism in order to understand how it works and which type of problems arises. This analysis will be the focus of the second chapter.

1.7. Hotspots in Greece

Due to the vagueness of the EU Agenda on Migration, it is necessary to examine the domestic implementation of the hotspot approach to understand how it works in practice, and whether that implementation is legal. The main domestic example is Italy, which will be the focus of chapter two. Nevertheless, it is necessary to give a brief overview of the implementation of the hotspot approach in Greece to contextualise the topic.

The number of arrivals by sea in Greece in 2015 touched 856.723 people. Considering that the number of migrants reaching Italian coasts in 2015 reached 153.842 people, the migrants flux in Greece is extremely high. [35]

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[34] Statewatch, *Explanatory note on "the hotspot" approach*, http://www.statewatch.org/news/2015/jul/eu-com-hotsposts.pdf (last accessed 12/01/2017).

[35] http://data.unhcr.org/mediterranean/country.php?id=83 (last accessed 20/02/2017).

Differently from Italy, that implemented the hotspot approach through administrative decrees, Greece implemented the hotspot approach through a domestic law: 4375/2016. [36] Despite the choice of implementing the hotspot approach trough statutes, scholars reported legal uncertainties. [37]

There are five islands that host the designated hotspots in Greece: Lesvos, Chios, Samos, Leros and Kos. The EU regional task force headquarters, in Piraeus, coordinates all of them. According to information provided by the

[36] Law 4375/2016 (as valid on 15 May 2016, unofficial translation commissioned by UNHCR)
«On the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC "on common procedures for granting and withdrawing the status of international protection (recast) (L 180/29.6.2013), provisions on the employment of beneficiaries of international protection and other provisions» available at http://asylo.gov.gr/en/?page_id=113, (last accessed 20/02/2017).

[37] For a deeper analysis of the legal concerns regarding the implementation of the hotspot approach in Italy: C. Ziebritzki,'*Chaos in Chios: Legal questions regarding the administrative procedure in the Greek Hotspots',* eumigrationlawblog.eu, 26 luglio 2016,

http://eumigrationlawblog.eu/chaos-in-chioslegal-

questions-regarding-the-administrative-procedure-in-the-greek-hotspots/ (last accessed 20/02/2017).

For an organic study of the administrative detention of migrants in Greece: Global detention institute, April 2014,https://www.globaldetentionproject.org/countries/europe/greece (last accessed 20/02/2017).

European Commission, all hotspots are currently operational except for Kos'.[38] The capacity of each of them varies from centre to centre:[39]

	Lesvos	Chios	Samos	Leros	Kos
Capacity	1500	1100	850	1000	1000
Current Occupancy	Not available[40]	2283	1054	494	151

From the table, the number of migrants present in some of the structures is higher than their actual capacity. This over crowdedness raises concerns regarding compliance with hygienic and sanitary minimum standards. Moreover, after the EU-Turkey statement, the conditions in the centres became worse[41]. It is not possible to explore the legal and practical consequences of the implementation of the hotspot approach in Greece but a reference to the EU- Turkey statement is necessary.

[38] European Commission, *State of play - hotspots*, 27 January 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_hotspots_en.pdf. (last accessed 4/02/2017).

[39] European Parliament, *On the Frontline: The Hotspot Approach to Managing Migration*, May 2016, http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU(2016)556942_EN.pdf (last accessed 29/08/2016), p. 34.

[40] According to the UNHCR, total reception capacity on Lesvos is 3,500, including both the hotspot at Moria and the government facility at Karatepe. On 6 May 2016, the UNHCR reported the total number of people in both facilities to be 4,152. No extrapolated data for the number of people in the hotspot facility is available.

[41] Those Data refers to the 6 May 2016. European Parliament, *On the Frontline: The Hotspot Approach to Managing Migration*, May 2016, http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU(2016)556942_EN.pdf (last accessed 29/08/2016), p. 34.

The EU-Turkey statement envisaged that, for a temporary period, due to the emergency European Union is facing, all new irregular migrants arriving from Turkey to Greece Islands will be returned to Turkey. For every Syrian being sent back to Turkey from Greek islands, another Syrian will be resettled to Turkey taking into consideration vulnerable situations. Priority would be given to those Syrians who have not tried to enter EU borders irregularly before. The statement also refers to the collaboration between EU and Turkey to allocate specific funds to protect refugees and to a process of liberalization of visas for Turkish citizens. [42]

The EU-Turkey statement has been highly criticized both from a legal and from a humanitarian point of view.[43]Indeed, the criticism has been so

[42] European Council, *Press release on the EU-Turkey Statement*, 18/03/2016, http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/ (last accessed 29/11/2016).

[43] For a first comment on the document see Peers, '*The final EU/Turkey refugee deal: a legal assessment*', EU Law Analysis, 18 March 2016, http://eulawanalysis.blogspot.it/2016/03/the-final-euturkey-refugee-deal-legal.html, (last accessed 20/2/2017).

Roman, *'L'accordo UE-Turchia: le criticità di un accordo a tutti i costi,*' *SIDIBlog*, 21 March 2016, http://www.sidi-isil.org/sidiblog/?p=1736, (last accessed 20/02/2017).

Cannizzaro, *'Disintegration through Law*?' *European Papers*, 2016, http://europeanpapers.eu/en/e-journal/disintegration-through-law last accessed 20/02/2017).

Gatti, 'The EU-Turkey Statement: A Treaty That Violates Democracy,' *EJIL: Talk!,* 18-19 April 2016, http://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/. (last accessed 20/02/2017).

Labayle, *The EU-Turkey Agreement on migration and asylum: False pretences or afool's bargain,* 1 aprile 2016, eumigrationlawblog.eu, http://eumigrationlawblog.eu/the-eu-turkey-agreement-on-migration-andasylum-false-pretences-or-a-fools-bargain/ (last accessed 20/02/2017).

extensive that some NGOs have decided to abandon hotspots where they were working. After the UNHCR decided to leave Lesvos,[44] MSF also interrupted all its activities. MSF considered the EU-Turkey statement as 'unfair and inhumane because it will cause a mass forced return of asylum seekers from Greece'.[45] The departure of several international and national NGOs has left an unfilled gap in service provision, since they were the only ones able to provide particular services.[46]After the departure of international and national NGOs, a report by AI also indicated detainees were provided with poor quality food, inadequate medical care and insufficient blankets.[47]

Baroncini, *L'Unione Europea e la procedura di conclusione degli accordi internazionali dopo il Trattato di Lisbona,* pubblicato su *Revista Uc3m,* in *CDT Vol. 5, Nº1 (2013),* http://erevistas.uc3m.es/index.php/CDT/issue/view/346, (last accessed 20/02/2017).

[44] Unhcr Declaration on EU-Turkey statement, 22 march 2016, http://www.unhcr.org/en-us/news/briefing/2016/3/56f10d049/unhcrredefines-

role-greece-eu-turkey-deal-comes-effect.html (last accessed 20/02/2017).

[45] Il Fatto Quotidiano, *Migranti, Medici Senza Frontiere Lascia Gli Hotspot Di Lesbo: 'Sistema Disumano, Non Saremo Complici'*, 23 March 2016, http://www.ilfattoquotidiano.it/2016/03/23/migranti-medici-senza-frontiere-lascia-gli-hotspot-di-lesbo-sistema-disumano-non-saremo-complici/2575195/ (last accessed 16/12/2016).

[46] European Parliament, *On the Frontline: The Hotspot Approach to Managing Migration*, May 2016, http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU(2016)556942_EN.pdf (last accessed 29/08/2016).

[47] Amnesty International, *Greece: Refugees Detained in Dire Conditions amid Rush to Implement EU-Turkey Deal*, 7 April 2016, https://www.amnesty.org/en/latest/news/2016/04/greece-refugees-detained-in-dire-conditions-amid-rush-to-implement-eu-turkey-deal/ (last accessed 21/11/2016).

For a complete and detailed report on Greek situation: ASGI, 'Esperimento Grecia: il diritto di asilo e la sua applicazione dopo l'accordo (Dichiarazione) Ue-Turchia del 18 marzo 2016. Resoconto del sopralluogo giuridico ASGI del 15 – 19 giugno 2016. http://www.asgi.it/asilo-e-protezione-internazionale/esperimento-grecia-diritto-asilo-dopo-accordo-ue-turchia/ (last accessed 20/02/2017).

It is not possible to analyse deeply the role of the different EU agencies working on the ground in the different Greek hotspots. Nevertheless, the discussed data demonstrate an imbalance among the three primary agencies: Frontex, EASO and EUROPOL. The agency with the highest number of staff spread among the islands is Frontex. In contrast, EASO has a significant presence only in the hotspot of Chios. In all the other hotspots the number of EASO staff does not reach the 20 units. This situation reflects the disproportionate funds that have been allocated to the different agencies to perform their duties. Interestingly, Frontex is the EU agency that focuses on the identification and registration of arrivals. As well as forced return of those who are not recognised as asylum seekers. Whereas EASO is the main agency that assists asylum seekers in the path to access the protection. The emphasis on Frontex more than EASO reflects the intention already expressed in EU documents: more focus on identification and registration procedures instead of guaranteeing the substantial right to access asylum.[48]

Emergency relocation system: working principles and current development.

The intervention of the European Institutions regarding the relocation system is divided in two parts:

The first part concerns a temporary emergency mechanism which introduces a temporary derogation to the Dublin Principle set out in article 13(1) of

[48] For a specific study on the role of Frontex and the compliance with Human Rights: Liguori e Ricciuti, Frontex ed il rispetto dei diritti umani nelle operazioni congiunte alle frontiere esterne dell'Unione europea , in Diritti umani e diritto internazionale, fascicolo n.6 (2012), pp. 539-567.

Ekelund: 'The Establishment of FRONTEX: A New Institutionalist Approach', Journal of European Integration ,Volume 36, 2014 - Issue 2, p 99-116.

Regulation (EU) No 604/2013. Article 13(1) makes, generally, the first state of entrance responsible to assess the asylum applications[49]

The second part concerns a proposal by the Commission which would amend the Dublin System structurally with the introduction of a permanent relocation system triggered in specific critical situations.

The proposal of a permanent mechanism has not been approved yet while the assessment of a temporary emergency mechanism has been followed by two binding decisions of the European Council.[50]

The annex to the European Agenda on Migration intends to clarify the definition of the Relocation mechanism:[51]

> '[R]elocation means a distribution among Member states of persons in clear need of International protection.'

Relocation is a temporary emergency response triggered by Article 78(3) of Treaty on The Functioning of European Union (TFUE).[52] It refers to people

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[49] *Regulation (EU) No 604/2013 of 26 June 2013 (The Dublin Regulation)* in the *OJEU* L 180/31 of 29 June 2013. Article 13(1) states "that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible of examining the application for international protection. That responsibility shall cease 12 months after the date on which the irregular border crossing took place".

[50] *Council Decision (EU) 2015/1523 of 14 September 2015*, in the *OJEU* L 239/146 of 15 September 2015; *Council Decision (EU)1601/2015 of 22 September in the OJEU* L 248/80 *of 24 September 2015.*

[51] European Commission, *COM(2015) 240 final - A European Agenda On Migration*, 13 May 2015, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf (last accessed 26/01/2017), p. 19.

[52] Art 78, Par 3, TFEU: 'In the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the

who are already in the territory of the European Union. Relocation applies in two different circumstances: the first is when a person entitled to International protection status is transferred from the member state that granted the status to another member state where the person has the same status and rights deriving from the recognition of the refugee status in the previous state. The second is the situation in which a person who has applied for international protection is transferred from the state responsible for examining his or her application to another member state where his or her application will be analysed. The Relocation is a voluntary system that requires pre-agreement to such transfers. The system tries to respond to the unfair distribution of asylum applications among member states: in 2014, 72% of the total asylum applications in the EU were received in only 4 member states: Germany, Sweden, Italy and France.[53] The 'distribution key' is based on specific criteria that 'reflect the capacity of member states to absorb and integrate refugees'.[54] The criteria are:

1. The size of the population as this illustrates the capacity to integrate refugees (40%);

Member State(s) concerned. It shall act after consulting the European Parliament.'

[53] European Commission, *The European Agenda on Migration Glossary, facts and figures*, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/glossary_for_the_european_agenda_on_migration_en.pdf (last accessed 18/01/2017).

[54] European Commission, *COM(2015) 240 final - A European Agenda On Migration*, 13 May 2015, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf (last accessed 26/01/2017), p. 19.

2. Total Gross Domestic Product (GDP) as this illustrates the current wealth of a country which is an important element to evaluate its capacity to integrate refugees (40%);
3. The efforts made by the member state in receiving asylum applications and in resettling refugees over the period 2010-2014 (10%); and
4. The unemployment rate (10%).

In September 2015, the European Council presented two binding legal instruments that aim 'to relieve the significant asylum pressure on Italy and on Greece'[55]. These Decisions defined limitations on who can access the Relocation mechanism. Only those who come from states where the success rate for asylum applications exceeds 75% (according to the latest available Eurostat data) and who have presented the asylum claim in Italy or Greece can be considered for relocation. Asylum seekers who have passed through Italy or Greece but have presented the asylum claim in a different member state may be sent back to the first EU country of arrival. Asylum seekers who have presented an asylum claim in Italy or Greece but who, according to the criteria of the Dublin system, should have their request assessed by another member state, are automatically transferred to the relevant state and they are not counted in the number of relocated persons.[56]

Both the decisions are very specific regarding the procedure and the timing of all the system but no one of them mentions the consideration of the

[55] Council Decision (EU) 2015/1523 of 14 September 2015; Council Decision (EU)1601/2015 of 22 September 2015.

[56] Associazione Asilo In Europa, *'Asilo in Europa: La Crisi Dell'asilo in Europa - Parte 1. La Ricollocazione Dei Richiedenti Asilo Fra Gli Stati Europei. Cos'è, Come Funziona? Analisi Delle Decisioni 1523 E 1601 Del 2015*,'October 6, 2015, http://asiloineuropa.blogspot.com.au/2015/10/la-crisi-dellasilo-in-europa-parte-1-la.html.(last accessed 1/02/2017).

willingness of the person that must be relocated. They only generally suggest that Italy and Greece consider:

> '[S]pecific qualifications and characteristics of the applicants concerned, such as their language skills and other individual indications based on demonstrated family, cultural or social ties[57].'

Since this part is embodied in the introduction of the decision and not in the main body of the legal instruments, it is not a binding statement. [58]

The number of asylum seekers that should be relocated by September 2017 remains very high: Council decision (EU) 1523/2015 indicates a relocation of 40.000 persons within September 17 2017 while the Council Decision (EU) 1601/2015 intends to relocate 120,000 persons within September 26 2017. Both the decisions relate to the Relocation from Italy and Greece. Though the idea of the temporary relocation system is positive, the development of the emergency relocation system is meeting serious difficulties and is yet to meet the expectations indicated in the two Decisions.

The first flight from Italy to Sweden took off in October 2015 [59] whereas the first flight from Greece to Luxembourg took off in November 2015[60].

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[57] Council Decision (EU) 2015/1523 of 14 September 2015.

[58] Associazione Asilo In Europa, *'Asilo in Europa: La Crisi Dell'asilo in Europa - Parte 1. La Ricollocazione Dei Richiedenti Asilo Fra Gli Stati Europei. Cos'è, Come Funziona? Analisi Delle Decisioni 1523 E 1601 Del 2015,*'October 6, 2015, http://asiloineuropa.blogspot.com.au/2015/10/la-crisi-dellasilo-in-europa-parte-1-la.html.(last accessed 1/02/2017).

[59] United Nations High Commissioner for Refugees, *'First Group of Asylum Seekers Relocated from Italy to Sweden,' UNHCR,* 9 October 2015, http://www.unhcr.org/news/latest/2015/10/5617cbaf6/first-group-asylum-seekers-relocated-italy-sweden.html (last accessed 3/09/2016).

[60] United Nations High Commissioner for Refugees, *'First asylum-seekers relocate from Greece to Luxembourg,'* 4 November 2015, http://www.unhcr.org/en-au/news/latest/2015/11/563a3c736/first-asylum-

Unfortunately, even though Sweden had always dealt with a high number of asylum applications and had been the first member state accepting to relocate people, it asked to be suspended from the mechanism in November 2015.[61] Subsequently, in December, the European Commission agreed on granting Sweden a one year suspension from its obligations under the Relocation scheme due to the 'the exceptional increase in asylum applications that they are facing'. [62] Moreover, Hungary which since the launch of European Agenda on Migration expressed its aversion to the relocation plan, together with Slovakia, challenged the validity of the relocation system before the European Court of Justice. [63]
Since March 2016, the European Commission started to present monthly reports on the implementation of the emergency relocation system.

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seekers-relocate-greece-luxembourg.html (last accessed 3/09/2016).

[61] Papastamatiou, *Remarks by Commissioner Avramopoulos at the Press Conference in Stockholm*, *European Commission*, 30 November 2015, http://ec.europa.eu/commission/2014-2019/avramopoulos/announcements/remarks-commissioner-avramopoulos-press-conference-stockholm_en (last accessed 3/09/2016).

[62] European Commission, *Press Release - Commission Proposes Temporary Suspension of Sweden's Obligations under the EU Relocation Mechanism,* http://europa.eu/rapid/press-release_IP-15-6329_en.htm. (last accessed 3/09/2016).

[63] Submissions in Slovakia v Council Case C-643/15 of 2 December 2015, OJEU C 38/41, eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CN0643&from=EN (last accessed 20/02/2017).

Submission in Hungary v Council Case C-647/15 of 3 December 2015, OJEU C 38/43, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CN0647&from=EN (last accessed 20/02/2017).

Vikarska, *The Slovak Challenge to the Asylum-Seekers' Relocation Decision: A Balancing Act*, 29 dicembre 2015, http://eulawanalysis.blogspot.it/2015/12/theslovak-challenge-to-asylum-seekers.html (last acessed 20/02/2017).

For a political analysis: Thym, *The "Refugee Crisis" as a challenge of legal design and Institutional Legitimacy*,Common Market Law Review 53: 1545–1574, 2016.

According to the report published on December 2016 only 8,162 people have been relocated (6,212 from Greece and 1,950 from Italy). November saw an increase in the number of transfers with 1,406 persons relocated. The highest number in a single month so far. However, the number of relocated minors is low. Only 172 minors have been relocated so far while from January to December 2016 24,595 unaccompanied minors arrived only in Italy.[64] Clearly then, the relocation mechanism is doing little to alleviate the stresses on frontline member states caused by the large numbers of refugees being registered in their borders. As a consequence, it has been described as a failure by several scholars. [65]

1.8. Conclusion

The EU Agenda on Migration is thus a document that introduces both long-term and urgent measures to handle the large influx of migrants that has come over the previous several years and likely into the future. The Agenda's focus is largely on controlling EU external borders and on concluding agreements with third countries in order to fight human smugglers and to prevent deaths at sea.
Moreover, as the chapter has demonstrated, the relocation mechanism, based on the solidarity principle, is not working properly. Too few people

[64] European Commission, '*Communication from the Commission to the European Parliament, the European Council and the Council'.* Eighth report on relocation and resettlement of 8 December 2016. P.4

[65] Maiani, Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System? EU migration and asylum law and policy, http://eumigrationlawblog.eu/hotspots-and-relocation-schemes-the-right-therapy-for-the-common-european-asylum-system/ (last accessed 20/02/2017).

Carrera, Guild, 'Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU,CEPS policy briefs, no 334, October 2015, https://www.ceps.eu/system/files/PB334%20RefugeeRelocationProgramme.pdf (last accessed 20/10/2017).

have been relocated since the beginning, while arrivals by boat and by foot never stopped. It seems unlikely that the mechanism can reach the hoped number of relocations within September 2017. Lastly, the lack of a definition of the hotspot approach in EU documents does not allow a comprehensive understanding of the mechanism. The lack of a definition seems to be a political choice that leaves the frontline member states to deal with the 'burden' of large influx on migrants. As a result, in order to understand what the hotspot approach is and how it works, it is necessary to look at the domestic implementation in Greece and, more importantly for this thesis, Italy.

2. Chapter 2: the case of Italy and the domestic implementation of the hotspot approach.

2.1. Introduction

The lack of definition regarding the hotspot approach in the EU documents makes it unclear whether it is to be considered a 'working method', that involves several actors, or simply as new detention facilities that have to be built in frontline member states. The absence of a definition requires us to look at the implementation at the domestic level in order to clarify how it is to be implemented, and the type of problems which can arise. Thus, this section seeks to define and delineate the hotspot approach, something that has been lacking in the literature. It then addresses the issues of the right to asylum during the procedures within the hotpots. Lastly, it analyses the compliance of the hotspot approach with provisions on detention listed in Italian law, EU law and the European Court of Human Rights.

2.2. Hotspot approach

As it has already been stressed in the previous chapter, the hotspot approach does not include the allocation of new facilities for its implementation in

affected member states. The EU documents describe it as a new working method that must be implemented through already existing national services. The European Commission's documents also do not contemplate funds to build new facilities in the hotspot areas. [66] Due to the lack of definition in EU documents, it is useful to analyse the domestic implementation of the system to understand what the hotspot approach is, how it works and which type of concerns arise.

2.3. The Italian Roadmap

Greece and Italy decided to implement the hotspot approach in different ways. Greece responded to the European Agenda with the introduction of domestic laws[67] that, among other aspects, address new asylum procedures

[66] European Commission, COM(2016) 85 final, *Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration,* 10/2/2016, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_crisis_state_of_play_20160210_en.pdf (last accessed 6 /02/2017).'€600 million in additional commitments for 2016 to increase emergency funding on migration issues (€94 million), to support the relocation package (€110 million), increased human and financial resources for FRONTEX, EASO and EUROPOL'.

[67] Law 4375/2016 (as valid on 15 May 2016, unofficial translation commissioned by UNHCR)
«On the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC "on common procedures for granting and withdrawing the status of international protection (recast) (L 180/29.6.2013), provisions on the employment of beneficiaries of international protection and other provisions» available at http://asylo.gov.gr/en/?page_id=113, (last accessed 20/02/2017).

and the working principles of the hotspot approach in Greece.[68] Italy, however, has not adopted any legislation to systemize the development of the hotspot approach, rather Italy relies on the 'Roadmap' published by the Italian Minister of Interior; a document which has an uncertain legal status effect.

Council Decision (EU) 2015/1523 expressly required Italy and Greece to develop a Roadmap in order to benefit from the relocation mechanism.[69] According to the Council, the Roadmaps are supposed to 'describe the structural solutions to address exceptional pressure on asylum and migration systems and must comply with domestic legislation'. [70] In the case of Italy, this means compliance also with Legislative Decree 142 of 18 August 2015 which implements European Directives on asylum procedures and reception in italian law.[71] The compliance with this decree will be explored below. The Italian roadmap is divided into four sections: capacity of reception facilities, the relocation process, repatriations of third-country nationals who are considered irregular migrants and, lastly, asylum procedures. Relevant

[68] European Parliament, *On the Frontline: The Hotspot Approach to Managing Migration*, May 2016,http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU(2016)556942_EN.pdf (last accessed 29/08/2016), p. 35.

[69] *Council Decision (EU) 2015/1523 of 14 September 2015*, in the *OJEU* L 239/146 of 15 September 2015.

[70] *Council Decision (EU) 2015/1523 of 14 September 2015*, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1523&from=EN (last accessed 14/01/2017).

[71] Decreto legislativo 18 agosto 2015, n. 142.

Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonche' della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale. (15G00158) (GU n.214 del 15-9-2015).

for an analysis of the implementation of the hotspot approach is the first of these sections, the capacity of reception facilities. The overall capacity of the Italian system amounts to 96,945 places. These places are split between early reception facilities, holding newly arrived irregular migrants for a short time, and long term reception facilities, which constitute the second phase of reception for irregular migrants. The early reception capacity is spread among facilities which are government-run. The capacity was increased significantly in 2015 reaching almost 12,000 places, 'including the available places in the hotspots area'.[72]

The Roadmap envisages transforming these facilities into 'regional hubs,' with the aim of managing large-scale arrivals of migrants. The hubs are considered a key mechanism in the processing of irregular migrants: they are open structures supposed to host irregular migrants who have been registered and identified using photographs and fingerprints. The period of stay in these hubs should last 7 days. After this period people recognized as asylum seekers are supposed to access the 'second reception phase' in facilities that belong to the SPRAR (Protection System for Asylum Seekers and Refugees) network.[73]

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[72] Italian Interior Ministry, *Roadmap Italiana*, 28/9/2015, http://www.meltingpot.org/IMG/pdf/roadmap-2015.pdf (last accessed 11/1/2017), p. 4.

[73] The SPRAR network is described as an 'Italian best practice' because of the general high standards level of accommodation and services performed inside these facilities. Unfortunately, the number of places available in these facilities are less that the current number of people in need to enter this system. For this reason, due the increase of migration flows in 2014, many asylum seekers have been accommodated in other type of structures that are defined as 'Centres for Extraordinary reception' (CASs). The current CAS capacity is 68.093 places while the current capacity of SPRAR is 22.000 places. The Italian government proposed an extraordinary call to increase the capacity of these second phase reception centres with the intention of reaching a capacity of 40000

2.4. Description of the hotspot approach in the Italian Roadmap

The hotspot approach proposed in the EU Agenda is described by the Italian Roadmap as a strategy to channel arrivals toward specific ports.These ports are mostly in Sicily, namely in Pozzallo, Porto Empedocle, Trapani and the Island of Lampedusa. The capacity of the facilities present in these areas amounts to 1500 places while two further closed hotspots are planned in Augusta and Taranto (Puglia). Identification procedures of irregular migrants take place in these closed structures.[74] The Roadmap refers to a medical screening on arrival, followed by interviews in which Italian Police and EU staff agencies ask irregular migrants to complete a form indicating the irregular migrants' details and basic information (foglio-notizie). Importantly, migrants are asked to indicate whether they wish to apply for asylum. All irregular migrants are registered in EURODAC after their fingerprints have been taken.[75]

At the end of this first identification procedure, migration officials should be able to distinguish between three types of people:

1. People who applied for international protection but are not allowed to be relocated. These people are registered in Eurodac as CAT1(asylum seekers), and transferred to the regional hubs within 24/48 hours.

places for the 2016/2017 period.

[74] Italian Interior Ministry, *Roadmap Italiana*, 28/9/2015, http://www.meltingpot.org/IMG/pdf/roadmap-2015.pdf (last accessed 11/1/2017), p. 6.

[75] The EURODAC system is used to collect data of irregular migrants crossing the EU borders and it was introduced by Regulation (EU) No 603/2013 of 26 June 2013 on the Establishment of Eurodac, in the *OJEU* L180/1 of 29 June 2013.

2. People who have applied for international protection and could potentially access the temporary relocation. This category of persons is registered in Eurodac as CAT1(asylum seekers). They are informed on the modalities and possible outcomes of the relocation mechanism. The asylum seekers who accept relocation are then transferred from the hotspot to the specific regional hubs (for asylum seekers who are allowed to be relocated) within 24/48 hours. Subsequently, they fill in a document with the support of EASO experts and cultural mediators.(The foglio notizie) The document contains 'additional information and useful material'to continue the 'matchmaking'operations in order to conclude the relocation. [76] [77]

3. The final group comprises those who do not seek international protection. These people may be transferred to CIEs (centres for identification and expulsion) after being registered as CAT2 in Eurodac (irregular migrants). After registration they can choose to return voluntarily to their country under the Assisted Voluntary Returns programme (AVRs) or will be forced to return home.[78]

Furthermore, the EU Agenda recognizes the development of an operative scheme premised on effective collaboration among Italian authorities,

[76] Statewatch, Briefing - The Italian Roadmap 2015, November 2015, http://www.statewatch.org/news/2015/dec/no-279-Italian-Road-Map-2015.pdf (last accessed 17/09/ 2016). p.6.

[77] Matchmaking operations are activities carried out in the 'Dublin Unit' office in Rome in order to evaluate where to relocate the asylum seeker. 'Matchmaking activities will be carried out with support of 10 EASO experts and liaison officers who will examine the characteristics and profiles of candidates for relocation (education, professional qualifications, foreign language skills) matching them with states' availability for receiving them.

[78] This section is extensively treated in the 'Repatriations' section of the Italian Roadmap (pp. 11-17).

Frontex and Europol staff. The scheme allows for interviewing people who could give relevant information also not in the hotspot areas, such as on rescue vessels or in the disembarkation area. The new regional task force office (EURTF) created in Catania in April 2016 has a fundamental role in the coordination of the actors involved in interviews outside the hotspot areas.

The following personnel are required to undertake the activities described above in each hotspot:

- 6 immigration office staff (Italy)
- 2 investigative police officers (Italy)
- 2 scientific police officers to photograph the foreigners for their information record sheet (Italy)
- a team of 3 Frontex representatives for interviews.
- 6 cultural mediators
- 4 EASO experts
- 10 scientific police officers (Italy) for photo-identification and fingerprinting
- 10 experts from member states identified by Frontex or the EASO to support Italian personnel in photo-identification and fingerprinting activities
- 5 mobile units for photo-identification and fingerprinting in each hotspot area.

2.4.1. First decree

After the roadmap, the Italian government continued to regulate the implementation of the hotspot approach through decrees rather than statutes. This political choice was demonstrated by the Minister of Interior's ministerial decree of 6 October 2015, soon after the Roadmap was launched

on 28 September 2015.[79] The decree repeats some points from the Italian Roadmap.

First, the document that must be filled in by asylum seekers accepting relocation, done whilst in the regional hubs, is defined as the 'European C3 document'. In this way it is implied that all European states that implement the 'hotspot' approach (currently only Italy and Greece) are going to adopt the same document in these circumstances.

As discussed in the previous chapter, only asylum seekers from countries with an asylum recognition rate above 75% can access the relocation mechanism. Assessed against specific Eurodat data (in October 2015, only three countries met these criteria, namely Iraq, Syria and Eritrea.) In light of this, the decree recognizes the possibility of accessing the relocation mechanism for people who arrived on the Italian territory after the 24 March 2015. This means the relocation mechanism is potentially applicable to asylum seekers who arrived before the Council decisions of September 2015.

The decree stresses the need for stronger collaboration among the Department for Civil Liberties and Immigration of the Ministry of Interior, the prefects of Milan, Rome and the persons in charge of the various structures that have been recognized as future regional hubs. A collaboration among the different national authorities is necessary in order to effectively relocate asylum seekers from Italy to other EU states. The decree underlines the necessity of identifying a contact person to facilitate communications among the different authorities. Moreover, it refers to the first operational regional hub, Villa Sikania, which is located in Sicily, as the first centre where the operations to relocate asylum seekers should take place. This

[79] Ministero dell'Interno, *dipartimento per le libertà civili e l'immigrazione:* http://www.meltingpot.org/IMG/pdf/2015_ministero_interno_14106_6-_10_accoglienza.pdf (last accessed 1/2/2017).

decree, thus, simply individuates some organisational problems regarding the lack of communication among involved actors. However, the first decree does not regulate the internal procedures of the regional hubs and the hotspots at all. This lack of indication arises problems that will be discussed below.

2.4.2. Second decree

The Minister of Interior presented another ministerial decree on 8 January 2016.[80] The preamble of this decree stresses the Italian Government's recognition of the concerns raised by international and national NGOs regarding access to asylum. NGOs had warned the government regarding the quick way in which irregular migrants not classified as asylum seekers 'in clear need of international protection' had been receiving decrees of expulsion from the country. In response, the Minister of Interior highlighted the procedural safeguards which protect irregular migrants' right to be informed and their right to claim asylum in Italian law. The decree continued with a reference to Legislative Decree n. 25/2008.[81]

The Legislative Decree affirms that applications for international protection cannot be refused or excluded only because they have not been presented in a timely manner.[82] Moreover, the Legislative Decree stipulates that the competence to recognize whether a person is entitled to international

[80] Ministero dell'Interno: *Dipartimento per le libertà civili e l'immigrazione*. 8 Gennaio 2016 http://www.asgi.it/wp-content/uploads/2016/01/2016_Ministero_Interno_accesso_asilo_garanzie_modalita.pdf (last accessed 1/2/2017).

[81] Decreto legislativo 28 gennaio 2008, n. 25. *Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello status di rifugiato*. (GU n.40 del 16-2-2008).

[82] Art 8, par. 1. Decreto legislativo 28 gennaio 2008, n. 25.

protection belongs only to the relevant territorial commissions.[83] These commissions, in the Italian system, are also the only authority able to evaluate the claim for asylum, according to particular cases defined by law. This second Decree also emphasises that asylum seekers are vulnerable people. Current Italian regulations establish procedural safeguards to guarantee an effective right to asylum. These include the right to information on one's rights and duties under the procedure, the right to be assisted by an interpreter, the right to legal representation and legal guardianship, the right not to be expelled on the basis of nationality, and the freedom from detention solely to examine an asylum claim. Furthermore, Italy has not adopted a list of safe third-countries because the granting of asylum implies an individual evaluation dependent on the specific situations and experiences of the applicant.[84] In this way the decree implies that evaluations of the asylum claims cannot be based *only on the nationality of the applicant.*[85] The conclusion of the decree clarifies the principle of legality, reflecting that not allowing the presentation of an asylum claim constitutes a clear violation of law.

Despite a detailed list of substantial rights that belong to asylum seekers when they arrive on the Italian territory, also the second decree does not give any information regarding the implementation of identification and registration procedure in hotspots, leaving Italian police and EU agencies staff without a common procedure to follow.[86]

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[83] Art 29. Decreto legislativo 28 gennaio 2008, n. 25.

[84] For a deep analysis of the concept of third safe countries: Morgese, '*Recenti inziative dell'Unione Europea per affrontare la crisi dei rifugiati'*; diritto, immigrazione e cittadinanza, 2015 Fascicolo 3-4,
p. 15-49.

[85] *Convention Relating to the Status of Refugees*, 28 July 1951, entry into force: 22 April 1954.

[86] Paleologo, *Il Ministero dell'interno interviene con l'ennesima circolare per*

2.4.3. Third Decree

On 1 June 2016, the Minister of Interior presented a third decree, the first containing guidelines for the implementation of the procedures within the hotspots.[87] The document was titled 'Standard operating procedures applicable to Italian Hotspots' (SOP). It was drafted in collaboration with the EU commission, Frontex, EASO, Europol, IOM and the UNHCR. The importance of this decree is clear because it is the first document that gives a definition of what the hotspot approach is. The Decree defines the hotspot approach as including both a structural element and an organisational approach. The first element is structural:

> '[S]tructurally, it is a designated area, usually (but not necessarily) in the proximity of a landing place where, as soon as possible and consistent with the Italian regulatory framework, new arrivals land safely.'[88]

In these areas all the registration and identification procedures are concluded. Subsequently, after being informed of the possibility of claiming asylum, migrants are fingerprinted. They receive detailed information on the procedure of international protection, the relocation programme and the assisted voluntary return (AVR). They are then introduced to the relevant procedures with the support of the competent EU agencies.

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limitare la discrezionalità delle questure nell'ammissione alla procedura di asilo e garantire il diritto all'informazione. Le associazioni ribadiscono le loro richieste alle Questure ed a Frontex, http://dirittiefrontiere.blogspot.com.au/2016/01/il-ministero-dellinterno-interviene-con.html (last acessed 21/02/2017)

[87] Italian Ministry of the Interior, *Standard Operating Procedures (SOPs) Applicable to Italian Hotspots*, http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_english_version.pdf (last accessed 12/12/2016).

[88] Ibid, p. 4

The second element of the hotspot approach, according to the SOP, is organisational.

> '[T]he Hotspot is a method of teamwork, in which the Italian authorities and non-governmental organisations work closely and in full cooperation with European support agencies in order to ensure procedural, standardised and fully operational management of activities, while aiming at the interest of guaranteeing the most sustainable solutions for incoming third country nationals or stateless persons.'[89]

It is thus clear from the SOP that the hotspot approach must be understood comprehensively. Essentially, the hotspot approach is a mechanism composed of specific facilities (in Italy and Greece) that are part of a bigger scheme that sees the collaboration of EU agencies and member states in order to process irregular migrants and asylum seekers.

Aside from the definition, the document contains guidelines for each separate moment of the identification process: the entrance in hotspots areas, the stay in hotspots areas, the exit from hotspot areas. Moreover, it clarifies the role of the different EU agencies:

> EUROPOL support Italian judicial police in their investigations, collect and analyse all material relevant to the fight against trafficking in migrants.
>
> EASO supports competent national authorities providing them with specific 'know how' in the various step of the asylum procedures.
>
> Frontex has the main role among all the EU agencies in the hotspot approach. It supports the relevant authorities in the identification and registration procedures, including nationality screening. It checks identification documents through experts and collaborates with the

[89] Ibid.

Italian authorities to return asylum seekers whose applications have been denied or who have no right to remain in EU territory.[90]

After the analysis of the decrees that implemented the hotspot approach in Italy, certain issues need to be addressed. First, a delicate topic, such as a new asylum mechanism, should be regulated by statute. This rule is expressed in Italian Constitution. Namely, the Italian Constitution individuates some issues, such as migration, that must be regulated only by statute, meaning an act of parliament.[91]

Moreover, only the last decree, the SOP, gives information regarding the way in which procedures must be implemented in the hotspots. This delay in instructing the actors involved and a more general lack of information on whether there is a chronological order in the procedures has caused problems. This vagueness has caused differences in the ways these procedures are implemented in the various hotspots. For example, there is a deep difference relating the time in which identification and registration procedures are concluded in Pozzallo and Trapani hotspots. This time difference affects both the length of time irregular migrants or asylum seekers spend in detention and the effective respect of the right to asylum. Moreover, various NGOs witnessed that asylum seekers often received a

[90] It's not possible to explore the role and the responsibility of the different EU agencies but interesting issues have been explored by scholars: Casolari,'*the EU's hotspot approach to managing the migration crisis: a blind spot for international responsibility?*' The Italian Yearbook of International Law Online, 2016,Volume 25,, pages 109 – 134.

[91] Art 10. Costituzione Italiana.

Vassallo Paleologo, Negli Hot Spots "sperimentali" di Pozzallo e Lampedusa si eludono le garanzie previste in favore dei migranti e si pratica il prelievo forzato delle impronte digitali. Ancora senza basi legali, ma gli organi di controllo non vedono. Ed a Trapani, nel CIE di Milo, parte all'improvviso l'Hot Spot che si doveva "aprire" il 3 agosto. Nuova pratica o effetto annuncio? http://dirittiefrontiere.blogspot.com.au/2015/12/negli-hot-spots-sperimentali-di.html (last accessed 17/10/ 2016)

decree of expulsion in Pozzallo while such a situation has rarely happened in Trapani.[92]

Furthermore, Statewatch condemned the lack of any reference to access to legal representation or to the right to appeal for those who have been classified as irregular migrants neither in the Roadmap or in the SOP.[93]

2.5. Access to asylum

This section focuses on issues regarding the right to access asylum. It is based on reports by national and international NGOs from September 2015 to the beginning of 2016.

The right to access asylum is clear in Italian and EU law. The Legislative Decree 142/2015 implementing directives 2013/32/EU[94] and 2013/33/EU,[95] that try to harmonize the reception and assessment of people in need of international protection at the EU level, expressly provides for the right of asylum seekers to be informed of their ability to access the asylum procedure. Implementing one of the most important principles embodied in Article 8 of 2013/32/EU, the legislative decree 142/2015 defines asylum seekers as 'any persons who have expressed the willingness to seek

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[92] Vassallo Paleologo. *Nuovo Regolamento 'SOP' per l''Approccio Hotspot'. Circolari Senza Basi Legali, Non Sanano Prassi Illegittime. Ci Sarà Pure Un Giudice a Berlino?* http://dirittiefrontiere.blogspot.com.au/2016/06/nuovo-regolamento-sop-per-lapproccio.html (last accessed 17/10/2016).

[93] Statewatch, Briefing - The Italian Roadmap 2015, November 2015, http://www.statewatch.org/news/2015/dec/no-279-Italian-Road-Map-2015.pdf (last accessed 17/09/2016).

[94] 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, in OJEU L 180 of 29 June 2013, p. 60.

[95] 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, in OJEU L 180 of 29 June 2013, p. 60.

international protection'.[96] A person does not have to present a formal request, his or her request can be expressed either orally or in writing since the article does not refer to any specific form.[97] The same Decree clarifies that 'reception measures apply to any person seeking international protection in the national territory, including borders, transit areas and territorial waters' and that reception measures apply from the moment a willingness to apply for asylum is expressed. [98] If we link those provisions to Article 4 of the Italian Navigation Code, it follows that all reception measures apply to anyone who claims asylum anywhere in the national territory, borders and transit areas included. Since Italian ships in high sea are considered Italian territory, the provisions listed above also apply when migrants are rescued by vessels on the high sea.[99]

[96] Art 2. Legislative decree 142/2015: Ai fini del presente decreto s'intende per: a) richiedente protezione internazionale o richiedente: lo straniero che ha presentato domanda di protezione internazionale su cui non e' stata ancora adottata una decisione definitiva ovvero ha manifestato la volonta' di chiedere tale protezione.

[97] For a broader analysis of the right to asylum in EU and Italy: R. F. Ghersi, *'Diritto di Asilo in Italia e in Europa'*, Rivista trimestrale di diritto pubblico, fasc.4, 2011, pag. 917-934.

[98] Art 1, par 1 Legislative decree 142/2015. Il presente decreto stabilisce le norme relative all'accoglienza dei cittadini di Paesi non appartenenti all'Unione europea e degli apolidi richiedenti protezione internazionale nel territorio nazionale, comprese le frontiere e le relative zone di transito, nonche' le acque territoriali, e dei loro familiari inclusi nella domanda di protezione internazionale.

Art 1, par 2. Legislative decree 142/2015. Le misure di accoglienza di cui al presente decreto si applicano dal momento della manifestazione della volonta' di chiedere la protezione internazionale.

[99] art 4. Regio Decreto 30 marzo 1942, n. 327

Codice della Navigazione. (042U0327) (GU n.93 del 18-4-194).*Le navi italiane in alto mare e gli aeromobili italiani in luogo o spazio non soggetto alla sovranità di alcuno stato sono considerati come territorio italiano*.

The procedures contained in both the roadmap and in the SOP contain provisions that foster uncertainty in respect of the right to access asylum for irregular migrants. The arbitrary determination by Italian police of whether a person is an asylum seeker or an economic migrant is a substantial issue in the access to asylum. According to article 10 of legislative decree 25/2008, reviewed by legislative decree 142/2015, the police have the only authority to receive the request for asylum. The authority to assess asylum claims belongs to the Territorial Commissions for International Protection. These Commissions must follow strict procedures before deciding whether a person is an irregular migrant or an asylum seeker/refugee. [100] Despite this unambiguity in Italian law, many national and international NGOs report that Italian police frequently arbitrarily decide whether a person is an asylum seekers or an irregular/economic migrant. [101] According to reports, this assessment occurs at the Italian border, both during processing within formally recognised hotspots and also in landing areas which are not

[100] Art 12. Decreto Legislatibo 28 Gennaio 2008, n 25.

[101]ASGI, *ASGI al ministero dell'Interno: la natura degli hotspots va chiarita*. http://www.asgi.it/notizia/ministero-interno-natura-giuridica-hotspots/ last accessed 29/09/2016) p. 5 e ss.

Oxfam, *Hotspots, Rights Denied: The lack of a legal framework is threatening the rights of migrants reaching Italy*, May 2016, https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp-hotspots-migrants-italy-220616-en.pdf (last accessed 9/9/2016). p. 13-16.

Fondazione Migrantes. *Fondazione Migrantes: perplessita' sulle procedure negli hotspost* http://www.asgi.it/approfondimenti-speciali/fondazione-migrantes-perplessita-sulle-procedure-negli-hotspots/ (last accessed 20/9/ 2016).

Consiglio Italiano per i rifugiati:*tavolo di asilo:hotspot luoghi di illegalita.* http://www.cir-onlus.org/it/comunicazione/news-cir/51-ultime-news-2016/2001-tavolo-asilo-hotspot-luoghi-di-illegalita (last accessed 21/9/2016).

MSF.*Rapporto di Medici Senza Frontiere sulle condizioni di accoglienza nel CPSA di Pozzallo.*
http://archivio.medicisenzafrontiere.it/pdf/Rapporto_CPI_CPSA_Pozzallo_final.pdf (last accessed 21/9/2016). p.11.

considered as hotspots.[102] Examples of police determining asylum status have been noted by a number of NGOs. ASGI, the Italian association comprised of experts in migration law, reported in October 2015 that police officers have prepared a form they give to irregular migrants during the registration procedures. The forms were structured with multiple choices on why the migrant had chosen to come to Italy, translated in several languages. The migrants were required to select one among various options related to economic reasons, such as ' escaping poverty' and 'to find a job'. However, there was no option that indicated the migrant was seeking asylum. This is clearly a problem and is indicative of the legal issues raised by ambiguities and inconsistencies in the implementation of the hotspot approach in Italy.

It is also necessary to address the role of the cultural mediator. The document given to irregular migrants at the borders or within the hotspots (foglio notizie) needs, to be valid, the signature of a cultural mediator.[103] However, Oxfam reported issues with this requirement and broader issues with this document. In a report presented in June 2016, Oxfam condemned the registration procedures that 'clearly show several flaws in connection with individual rights protection and the lack of a minimum system of legal

[102] The SOP documents in the section related to the applicability of SOP (B1) states that the procedures listed in the document apply within the hotspot 'but This does not preclude the application of these procedures in situations different from formally identified Hotspot, such as may be, for example, places of landing that are not operational Hotspots'. If these procedures are implemented outside the formally recognised hotspots, also all the pathologies linked to this system can take place in these areas. This practice has been condemned by Statewatch: Maccanico, '*The Italian Roadmap 2015 Hotspots, readmissions, asylum procedures and the re-opening of detention centres',* statewatch.org, http://www.statewatch.org/news/2015/dec/no-279-Italian-Road-Map-2015.pdf, (last accessed 21/02/2017).

[103] ASGI, *ASGI al ministero dell'Interno: la natura degli hotspots va chiarita*. http://www.asgi.it/notizia/ministero-interno-natura-giuridica-hotspots/ last accessed 29/09/2016) p. 5 e ss.

guarantees'.[104] Oxfam made known that migrants are interviewed by a team composed of two persons from Frontex, a cultural mediator and a police officer who coordinated the group. The interviews last few minutes. Migrants are asked questions, similar to those contained in the form the migrants have to fill in (foglio notizie), such as their personal details and the reason why they decided to come to Italy. Oxfam refers to two different versions of the foglio notizie. This is because, since the establishment of the hotspot approach, the version of the form has varied among hotspots or over time. The forms listed by Oxfam are different from those highlighted by ASGI because, among other options, there is the possibility to tick the box 'Asylum or Request for political asylum'. The 'Foglio Notizie' must be signed by the migrant, the police officer responsible for the interview and the cultural mediator. The form does not require a signature from Frontex experts, even if they are present during the interview. This means that the responsibility to ascertain the nationality of migrants falls upon the cultural mediator. Alessandro Pansa, the chief of Italian police, affirmed in a submission to a Parliamentary Commission the essential role of cultural mediators in the asylum determination process. He argued they are crucial since the police do not have the capacity to determine the nationality of the applicant. It is the mediator who is responsible for confirming the nationality of people arriving.[105] Nevertheless, Oxfam regards the cultural

[104] Oxfam, Hotspots, Rights Denied: The lack of a legal framework is threatening the rights of migrants reaching Italy, May 2016, https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp-hotspots-migrants-italy-220616-en.pdf (last accessed 9/09/ 2016), p. 15.

[105] Camera Dei Deputati. *Commissione parlamentare di inchiesta sul sistema di accoglienza e di identificazione, nonché sulle condizioni di trattenimento dei migranti nei centri di accoglienza, nei centri di accoglienza per richiedenti asilo e nei centri di identificazione ed espulsione.* http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/pdf/69/audiz2/audizione/2016/01/20/leg.17.stencomm.data20160120.U1.com69.audiz2.audizione.0037.pdf (last accessed 21/09/ 2017).

mediator as a non-officially recognized professional since they belong to a group which is not protected by any professional register. As expressed above, the absence of cultural mediators during the first procedures and their doubtful professionality raises concerns regarding the respect of the right to asylum.

Oxfam interviewed many migrants between late-2015 and early-2016 regarding the way in which the interviews are conducted during the registration and identification procedures. Some of them reported they had not been interviewed. Others said they were left alone with Frontex officers, a police officer and a cultural mediator who works in collaboration with the Minister of Interior. Neither independent international NGOs such as the UNHCR or EU agencies specialized in asylum procedures such us EASO participated at this stage. Furthermore, other national associations that work in the disembarkation area on the base of specific agreement with the Minister of Interior were not present. The absence of these impartial actors makes it difficult to ascertain whether interviewed people have properly understood all the information relating to the claim of asylum or the access to relocation. As a consequence, many of them do not claim asylum, instead ticking one of the other options in the form. This leads to situations in which, on the base of the chosen option, a person can be defined as an economic migrant instead of an asylum seeker. According to Oxfam, that those who are defined as economic migrants tend to belong to nationalities that cannot access the relocation mechanism.

Classing a migrant as an economic one has significant consequences. They receive a decree of expulsion in which they are required to leave Italy within 7 days. After having received the decree they are usually brought to a remote train station in villages that are far from cities, in order to avoid an

appeal of the decree.[106] As a consequence, if those people are not able to make contact with lawyers or associations that can follow them in this procedure, they end up remaining in the territory without any status. These migrants often risk being intercepted by organized crime. This occurred in Taranto on 30 March 2016, when 251 irregular migrants from Marocco were left at the train station with a decree of expulsion because they had not understood the official information and the content of the Foglio notizie. They spent several nights at the station with food and clothes provided by volunteers. Some of them were approached by people belonging to local organized criminal groups.[107] The Italian government itself expressed concerns regarding the right to be effectively informed in the decree presented on the 8th of January. In this decree the Minister of Interior highlighted that the right to be effectively informed had been also underlined by the Italian Supreme Court.[108] The Corte di Cassazione ruled that if there are indications that third country nationals or stateless citizens desire to present an application for international protection while they are in border crossing areas, the relevant authorities have a duty to inform them of their right to do so. Moreover, interpreting assistance must be granted if it is necessary to facilitate access to the asylum procedure. If these procedural safeguards are not followed correctly, the decree of expulsion is invalid. The decree reminds that, in the Italian system, there are no categories, such us

[106] Lasciateci Entrare. *Accogliere: la vera emergenza..Rapporto di monitoraggio della campagna Lasciatecientrare su accoglienza, detenzione amministrativa e rimpatri forzati*. http://www.lasciatecientrare.it/j25/attachments/article/193/lasciateCIEntrare%20rapporto%202016-2.pdf (last accessed 22 /09/2106), p. 24-26.

[107] Camera dei deputati. Interpellanza urgente n. 2-01354 dell'On. Donatella Duranti ed altri sulla situazione degli hotspot presenti sul territorio italiano, nel quadro delle politiche di accoglienza dei migranti. Seduta di Venerdi' 26 Aprile. http://www.interno.gov.it/sites/default/files/duranti_on._n._2-01354.pdf (last accessed 25/09/ 2016).

[108] Corte di Cassazione. Sezione VI civile. Ordinanza 25 marzo 2015, n. 5926. https://www.eius.it/giurisprudenza/2015/054.asp (last accessed 25/09/2016).

the category of economic migrant, stipulating to whom it is possible to confer or deny international protection. There are only cases of people that, independently from their nationality, can access the guarantees recognized by the Geneva Convention if they meet the relevant requirements.[109] The last report by the Human Rights Commission of the Italian Senate, published on 16 February 2016, confirmed these results. The Human Rights Commission made broad enquiries into the Italian detention centres for migrants and asylum seekers, exploring the implementation of the hotspots as well. After having visited the hotspot in Lampedusa, the Human Rights Commission required the Italian government to explain the purpose of the brief pre identification procedures in the hotspot of Lampedusa. The 'foglio notizie' captures a particular attention since its purpose is not clear.[110] The concern regarding the purpose of the 'foglio notizie' has been shared by scholars as well. It is not clear if it must be intended as functional to the collection of general data by the Italian police or, on the other hand, if it is crucial to determine asylum seekers status. In the latter case, it causes a deep violation of the access to asylum defined in the Refugee Convention because asylum seekers do not have the tools for a comprehensive information of what is happening around them.[111]

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[109] Convention Relating to the Status of Refugees, 28 July 1951, entry into force: 22 April 1954.

[110] Senato della Repubblica Italiana,Commissione Straordinaria per la Tutela e la Promozione dei Diritti Umani. *Rapporto sui Centri di Identificazione ed Espulsione in Italia,Febbraio 2016*. http://www.asylumineurope.org/sites/default/files/resources/senato_cie_report_2016.pdf (last accessed 29 /09/2016), p. 21.

[111] Gornati, *le nuove forme di trattenimento dello straniero irregolare in Italia: dall' evoluzione dei CIE all'introduzione dei c.d. "hotspot"*Diritti umani e diritto internazionale (ISSN 1971-7105),Fascicolo 2, maggio-agosto 2016 p 473-481, p. 477.

For a deeper understanding of the problems discussed above, may be useful to explore the already existing problems concerning the access to asylum in Italy: Mori,*' Profili*

2.6. Detention under Italian law

The reception of asylum seekers and irregular migrants in the Italian legal system is based on different facilities. Each of them refers to a specific category of people or to a specific step along the path to the recognition of their status as a refugee. Other centres host irregular migrants who do not satisfy the necessary requirements to be entitled to the refugee status. In this case, they are detained in centres for identification and expulsion (CIE) waiting to be forcibly returned to the country of origin. The hotspot approach inserts itself in this framework. For this reason, a brief overview of the system may be useful to understand the changes that the implementation in Italy has caused.

Starting from 2011, as a result of the massive influx of migrants arriving to Italy after the 'Arab Spring', a substantial reform of reception facilities for asylum seekers and irregular migrants started to take place. In 2015, the system was mainly based on three different type of facilities: first, government run centres that are usually based on massive infrastructures organised in prebuilt house units (Cda/Cara). Second, flats or small facilities belonging to the Protection system for asylum seekers and refugees network (SPRAR). Third, hotels, holiday villages or other temporary facilities that should be utilized to host people who cannot access the SPRAR network due to a lack of places available (Cas).[112] The SPRAR had been created in 2002 to guarantee an effective integration for those who obtained the refugee status. It has been described in the Italian roadmap as a good technique to export in the rest of Europe because it offers services such as

problematici dell'accoglienza dei richiedenti protezione internazionale in Italia',Diritto dell'Unione Europea (Il), fasc.1, 2014, pag. 127 -140.

[112]Campesi, Chiedere Asilo in tempo di crisi. Accoglienza, confinamento e detenzione ai Margini d'Europa.in Academia.edu. http://www.academia.edu/23166256/Chiedere_asilo_in_tempo_di_crisi._Accoglienza_confinamento_e_detenzione_ai_margini_d_Europa (last accessed 1/02/ 2017). P. 9.

language courses and internships for the guests.[113] Cas, Cda and Cara facilities, on the other hand, are meant to guarantee accommodations and meals without other services that are extremely useful for a person who, if recognised as a refugee, needs to be integrated in the community.[114]
Due to these inconsistencies, the Italian government further reformed reception system for asylum seekers in 2014. Legislative decree 142/2015 defines these changes and implements the most recent EU Directives concerning the reception and the definition of people seeking for asylum.[115] On the base of this decree, the Italian reception system for asylum seekers should be divided among a phase of first aid, early reception and definition of the status of the person and long term reception for asylum seekers.

1) The phase of first aid refers to the immediate moments after disembarkation at the sea borders. Irregular migrants are immediately transported in centre of first aid and assistance.[116]
2) The phase of first aid and definition of the status of the person takes place in first reception centres.[117]

[113] Italian Interior Ministry, *Roadmap Italiana*, 28/9/2015, http://www.meltingpot.org/IMG/pdf/roadmap-2015.pdf (last accessed 11/01/ 2017), p. 5.

[114] For a proper overview of the detention centres in Italy: Campesi, *la detenzione amministrativa degli stranieri*, Carrocci Editore, Roma, 2015, p. 195-230. Gatta, '*Criminalizzazione della clandestinità tra scelte nazionali e contesto europeo'*, Rivista Italiana di Diritto e Procedura Penale Anno: 2015 Fascicolo: 1 Pagine p 188-198.

[115] Decreto legislativo 18 agosto 2015, n. 142.Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonche' della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale. (15G00158) (GU n.214 del 15-9-2015).

[116] Art.8, par. 2, Decreto legislativo 18 Agosto 2015, n. 142.

[117] Art. 9, Decreto legislativo 18 Agosto 2015, n.142.

3) The stage of second reception takes place in second reception facilities linked to the SPRAR framework.[118]

The last report presented by 'Lasciateci entrare', a campaign composed by several actors that collaborate to monitor detention facilities for migrants in order to publicly denounce what happens inside, referred to inhumane conditions in Cas facilities[119]. This due to the lack of food, clothes and professional employees. The section exploring SPRAR facilities that have been recently visited is slightly better: food and clothes are not an issue most of the time but the access to legal and other type of services which are essential for an integration into the society is usually not guaranteed. An absence of those services not only makes life harder for asylum seekers who try to integrate in Italy, but also increases vulnerable situations.[120]

Since the implementation of the hotspot approach does not require the affected state to build appropriate facilities for this purpose, Italy has to transform the already existing facilities in hotspots. The roadmap, in the section related to the hotspots, plans, first, to channel the arrival of irregular migrants through 4 main areas of arrivals: Pozzallo, Porto Empedocle, Trapani and Lampedusa for a complex capacity of 1500 people. Consequently, the government planned to create hotspots also in Augusta and Taranto in order to reach 2500 available places due to December 2015. At the beginning of 2016, only two structures were actually operational in Lampedusa and Pozzallo.[121] In these areas, there were already early

[118] Art.14. Decreto legislativo 18 Agosto 2015,n.142.

[119] Lasciateci Entrare. *Accogliere: la vera emergenza.Rapporto di monitoraggio della campagna Lasciatecientrare su accoglienza, detenzione amministrativa e rimpatri forzati*. http://www.lasciatecientrare.it/j25/attachments/article/193/lasciateCIEntrare%20rapporto%202016-2.pdf (last accessed 22 September 2016), p. 84-104.

[120] Ibid.

[121] European Commission, COM(2016) 85 final, *Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration,* 10/2/2016, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-

reception facilities belonging to the category of first aid facilities. Due to the structure of the centres, it was relatively easy to transform them in closed hotspots. The other hotspots took more time to reconfigure because they needed more substantial structural changes, such as strengthened security features. Currently, only the hotspots in Pozzallo, Lampedusa, Trapani and Taranto are operating with a capacity of 1600 people.[122]

The legislative decree 142/2015 sets the general principle according to which asylum seekers cannot be detained for the only reason that their asylum claim is being examined.[123] The legislative decree contains also specific exceptions in which detention is allowed only after police commissioner's approval. The police commissioner analyses each application and has discretion to detain the concerned person with a written act that must be adequately justified. The elective exceptions to the general rule are defined by law. [124]

The exceptions refer both to options listed in the Refugee Convention referring to specific cases in which the applicant cannot be recognised as an asylum seeker and to some particular situation that makes the person a peril for the public order or the state according to EU directives. The exceptions are strictly defined by law and comprehend these circumstances:

1) Detention in an Identification and Expulsion Centre for a foreign national who has already been expelled

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do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_crisis_state_of_play_20160210_en.pdf (last accessed 6/02/2017), p. 9.

[122] European Commission, *State of play - hotspots*, 27 January 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_hotspots_en.pdf. (last accessed 4/02/2017).

[123] Art 6, Decreto legislativo 18 Agosto 2015, n.142.

[124] Exceptions are listed in article 6, par. 2, 3 and 4 of Decreto legislativo 18 Agosto 2015, n 142.

2) Asylum seekers submitting their asylum application after having received an expulsion decree (i.e. claiming asylum after the establishment of detention measures),
3) Asylum seekers considered dangerous for order and public safety (in case of previous conviction for specific crimes), socially dangerous, suspect terrorists or in case of flight risk (if prior to the asylum application the applicant has delivered false personal details to the sole purpose of preventing the adoption or execution of an expulsion decree.)[125]
The Legislative Decree 142/2015 must be interpreted in light of EU Directive 2013/33/EU. [126] The provisions of the directive envisage the detention of asylum seekers as a measure of last resort. Therefore, the detention of asylum seekers in any type of detention centre must be allowed or extended only when no one of the other coercive measure applicable to the specific case is possible. Regardless, detention cannot be prolonged over the time strictly necessary to assess the asylum claim according to fast procedure timing. Possible delays in administrative proceedings cannot justify an extension of the situation of detention. Moreover, the detention measure can apply only until the specific reasons on which it is based exist. Art 7 of legislative decree 142/2015 defines the detention conditions. Any type of reception centre must guarantee gender differences, allocating separated spaces for women. The family unit, if possible, must be

[125] Art 1 par. F, *Convention Relating to the Status of Refugees*, 28 July 1951, entry into force: 22 April 1954: 'the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:(a)he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;(b)he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;(c)he has been guilty of acts contrary to the purposes and principles of the United Nations'.

[126] Article 8, ss. 2 and 4, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJEU L 180 of 29 June 2013, p. 96.

maintained and vulnerable persons must be periodically checked in order to evaluate the compatibility with a situation of detention. People whose health conditions are incompatible with detention cannot be detained. UNHCR staff, lawyers and relatives of detained asylum seekers can access the detention centres.[127] The access can be limited only due to security, public order reasons and causes linked to the administrative management of the centres.[128]

Giving a brief overview of the EU and the consequently Italian law concerning the detention of asylum seekers is necessary to understand how the hotspot approach inserts itself in this framework.

2.7. **The hotspot approach and detention**

The roadmap presented by the Minister of Interior in September 2015 sets a time limit of 24-48 hours to implement the first registration and identification procedures within the hotspots for those who can access the relocation mechanism. All the procedures must be concluded in this specific time limit. After that, asylum seekers are transferred to open facilities (regional hubs) located in other parts of the country.[129] The provisions contained in the Roadmap have been replaced by the Standard operative procedure document (SOP). The SOP does not set a time limit in which the

[127] Art 7, par.2, Decreto legislativo 18 Agosto 2015, n 142.

[128] Il Diritto di asilo tra accoglienza ed esclusione, Edizioni Dall'Asino, Roma, 2015, p 75-85. For a more complete overview on detention of asylum seekers in Italy: Savio, *'La nuova disciplina dello trattenimento dei richiedernti asilo*'. In Diritto, immigrazione e cittadinanza, 2015, Fasc.3-4, p. 142-161. For a broader analysis of asylum seekers detention in EU law: *Tsourdi,'Asylum Detention in EU Law: Falling between Two Stools?*' Refugee Survey Quarterly, 2016, 35, 2016, p. 7–28. For a focus on the challenge to refugee protection through detention of asylum seekers: De Bruycker, Tsourdi,'the Challenge of Asylum Detention to Refugee Protection', Refugee Survey Quatterly, vol 35, p 1-6.

[129] Italian Interior Ministry, *Roadmap Italiana*, 28/9/2015, http://www.meltingpot.org/IMG/pdf/roadmap-2015.pdf (last accessed 11/01/ 2017), p. 9.

first registration and identification procedures must be completed. The SOP asserts that 'From the moment of entry, the period of stay in the facility should be as short as possible, compatibly with the national legal Framework.'[130] Moreover, at page 8, the document asserts that 'Unless there are exceptional inflows calling for the adoption of different initiatives, the person can leave the Hotspot only after having been photo fingerprinted as envisaged by current regulations and if all the security checks in national and international police databases have been completed…'

Analysing the two different documents, the former presented in September 2015 and the latter in June 2016, it seems that the difference depends on the on the incapacity to conclude the first identification and registration procedures in 72 hours as indicated by the Roadmap. For this reason, the SOP indicates no time limit to conclude this process. Even if the legislative decree 142/2015 does not contain any specific provisions relating to hotspot facilities, the SOP document expressly requires compliance of its provisions with the Italian legal framework.

Since the hotspots have been created in CPSA and CPA facilities, the provisions contained in the SOP document must comply with the Italian laws that regulate the detention in these specific centres.[131] Legislative decree 142/2015 affirms that residence in accommodation centre is

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[130] Italian Ministry of the Interior, *Standard Operating Procedures (SOPs) Applicable to Italian Hotspots*, http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_english_version.pdf (last accessed 12/12/ 2016), p. 9.

[131] Paleologo, '*Negli "hub chiusi" e negli "hot spot" l'accoglienza si trasforma in detenzione e si inaspriscono le pratiche di deportazione e di chiusura delle frontiere. Le violazioni dello stato di diritto a danno dei migranti non proteggono dal terrorismo', Diritti e Frontiere Blog,* http://dirittiefrontiere.blogspot.com.au/2015/06/negli-hub-chiusi-e-negli-hot-spot.html *(last acessed 21/02/2017).* Paleologo, *Il disumano oltre gli "Hotspot". I centri di accoglienza italiani verso il default di sistema,* http://www.a-dif.org/2016/11/13/il-disumano-oltre-gli-hotspot-i-centri-di-accoglienza-italiani-verso-il-default-di-sistema/ (last acessed 21/02/2017).

compulsory only at night.[132] The act refers to centres listed in Legislative decree 142/2015.[133] Moreover, the decree affirms that single asylum seekers can have residence imposed in a specific place or geographical area.[134] However, these cases are exceptional and such restrictions must be adequately justified by the prefect/police commissioner in a written document specifying the reasons. The document must be given to the asylum seeker personally.

The incongruities between the two documents raise ambiguities on the legal status of hotspots facilities. [135]As it has been underlined by scholars, it is not clear if they are to be centres of first aid due to their emergency nature, or whether they must be intended as centres of identification and expulsion.[136] The difference, and the necessity of clarifying their status, is relevant because detention in centres of identification and expulsion is allowed under Italian law whereas the detention in first aid centres, as underlined above, is unlawful. This problem would have also arisen without the introduction of the SOP. However, the absence of any time limit in identification and registration procedures in the SOP clearly introduces a hypothetical institution of indefinite detention that is not contemplated in the Italian system. As a consequence, also ASGI, a national association that

[132] Art.10, para. 2, Decreto legislativo 18 Agosto 2015, n.142.

[133] Art 9, para.1, Decreto legislativo 18 Agosto 2015, n.142.

[134] Art 5, para.4, Decreto legislative 18 Agosto 2015, n.142.

[135] Vassallo Paleologo. *Nuovo Regolamento 'SOP' per l''Approccio Hotspot'. Circolari Senza Basi Legali, Non Sanano Prassi Illegittime. Ci Sarà Pure Un Giudice a Berlino?* http://dirittiefrontiere.blogspot.com.au/2016/06/nuovo-regolamento-sop-per-lapproccio.html (last accessed 17/10/2016).

[136] Gornati, *op.cit,* p. 477.

comprehends experts on migration law, asked the government for an explanation of the legal status of hotspots.[137]

Due to the lack of a legal status, it is necessary to explore reports presented by national and international associations in order to individuate the relevant problems relating to detention of asylum seekers.

A report by MSF about the situation in Pozzallo contains a passage describing a situation of detention which goes beyond legal provisions: 'A police car is parked in front of the emergency exit of the centre. It is positioned in such a way as to obstruct the door which is therefore unusable. The block continues even after identification operations, thus preventing access to the external spaces within the centre (delimited by external fences). This fact causes tension among guests, especially in case of prolonged retention in the centre. Access to external spaces is also prohibited to women, children and unaccompanied minors.' MSF also claimed that the main entrance of the centre was blocked by security officers (Carabinieri and/or the police) 'by means of a wooden board used to bar the door on the outside.'[138] Despite MSF's criticisms, the conditions in the centre did not improve. As a result, MSF decided to leave the centre of Pozzallo in December 2015 citing the conditions and the subsequent impossibility of the organization's work within the centre.[139]

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[137] ASGI, *ASGI al ministero dell'Interno: la natura degli hotspots va chiarita*. http://www.asgi.it/notizia/ministero-interno-natura-giuridica-hotspots/ last accessed 29/09/2016) p. 5

[138] MSF.*Rapporto di Medici Senza Frontiere sulle condizioni di accoglienza nel CPSA di Pozzallo.* http://archivio.medicisenzafrontiere.it/pdf/Rapporto_CPI_CPSA_Pozzallo_final.pdf (last accessed 21 September 2011). p.10.

[139] Redazione, *MSF lascia CPSA di Pozzallo 'condizioni indegne, manca la volontà di cambiare'*, Meridione news, http://meridionews.it/articolo/39385/medici-senza-frontiere-lascia-il-cpsa-di-pozzallo-condizioni-indegne-manca-volonta-di-cambiare/ (last acessed 1/10/ 2016).

According to Oxfam, the issue of extended detention arises from two main reasons. First, the immense influx of migrants does not allow the conclusion of registration and identification procedures in a short period of time. Moreover, for vulnerable categories of people such us unaccompanied minors and women the situation is even worst. Human Rights Watch reported that young male children stayed for over one month with unrelated adults in the Pozzallo hotspot, designated for short-term stays, due to the lack of space in the shelters for children. This situation exposes them to the risk of sexual abuse and violence from adults. Unaccompanied people under the age of 15 cannot leave the centre, and can only access the adjacent courtyard. Delays in transferring children appear primarily due to the chronic lack of capacity in dedicated shelters for unaccompanied children. There are four early reception facilities specifically for children in Sicily, but none of them are close to Pozzallo, one of the most important points of arrival.

The second one is the use of prolonged detention as a coercive measure on people who refuse to give fingerprints. Many asylum seekers interviewed by Oxfam declare that they were detained in the centre until they did not provide their fingerprints. Usually they are kept in different part of the centre in order to demotivate them and discourage them. They also reported to have been transferred from a centre to another until they decided to be fingerprinted.[140] Both these strategies have been also recognised by Frontex staff in the declaration to the Parliamentary Commission on 13 January

[140] Camera dei Deputati, *Commissione parlamentare di inchiesta sul sistema di accoglienza e di identificazione, nonché sulle condizioni di trattenimento dei migranti nei centri di accoglienza, nei centri di accoglienza per richiedenti asilo e nei centri di identificazione ed espulsione*, seduta n. 36 del 13 Gennaio 2016 http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/html/69/audiz2/audizione/2016/01/13/indice_stenografico.0036.html# (last acessed 1 February 2017), p 3. 'The process of forced fingerprint taking is composed of several phases: an advisory phase, an attempt phase, and finally, if a person still does not collaborate, he or she can be taken to another centre…' Miguel Angel Nunos Nicolau, Frontex coordinating officer.

2016 and by Felice Romano, Italian trade Union of Police Workers, during his interview to the periodical 'Internazionale'. He expressly recognised the practice of leaving irregular migrants who did not want to comply with fingerprints requirements isolated in specific areas of the centre.[141]

The European Commission has repeatedly asked Italy to reform the legal basis for the detention of migrants in the early reception facilities and the fingerprints procedures.[142] The documents requested Italy to reform Italian law in order to 'allow the use of force for taking fingerprints and to include provisions on longer term detention for those migrants who resist fingerprinting.' As a response the SOP document contained provisions allowing a proportionate use of force to overcome the refusal.[143] It is not possible to analyse in this paper the compliance of the use force for taking fingerprints with the Italian law system and the Italian constitution but it is important to underline that such request and the actual implementation could be in breach of national and constitutional law, as has been underlined by ASGI.[144] Regarding the Commission's request to intervene in order to

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[141] Internazionale, *Hotspot, le impronte dei migrant*i, http://www.internazionale.it/video/2016/05/12/hotspot-le-impronte-dei-migranti (last accessed 1/10/2016) ' When we are confronted with foreign citizens who do not want to comply with fingerprints requirements, we leave them in these places, in these spaces where they have to stay until we manage to fully identify them..'

[142] European Commission, COM(2016) 85 final, *Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*, 10/2/2016, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_crisis_state_of_play_20160210_en.pdf (last accessed 6 February 2017), Annex 3. COM/2015/0679 final, *Progress Report on the Implementation of the hotspots in Italy*, 15/12/2015, http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52015DC0679 (last accessed 21/01/ 2017), p. 4.

[143] Italian Ministry of the Interior, *Standard Operating Procedures (SOPs) Applicable to Italian Hotspots*, http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_english_version.pdf (last accessed 12/12/2016), p. 15.

[144] ASGI, *l'identificazione dei cittadini stranieri da parte delle forze dipolizia e il divieto dell'uso della forza per i rilievi foto-dattiloscopici*, Scheda pratica (aggiornamento al 14

include provisions that allow a longer detention in early reception facilities, it is relevant to analyse the latest judgment handed down by the European Court of Human Rights (ECtHR) in December 2016.[145] The case involves the detention of three irregular migrants who were detained in the CSPA of Lampedusa in September 2011 until a violent revolt broke out among the migrants. Consequently, they were transferred in a sport area from which they managed to escape to reach the city centre of Lampedusa where they started a demonstration. As a response they were conducted to ships that were moored in the harbour where they spent several days before being forcibly returned to Tunisia.

The court found that the applicants' placement in the CPSA in Lampedusa and on the ships can be regarded as a deprivation of liberty ex Article 5 paragraph 1 of the European Convention of Human Rights (ECHR). Even if the government defined the CPSA a centre for initial rescue and assistance and not a detention centre, the court affirmed that the determination of whether someone has been deprived of his liberty must be based on his or her concrete situation. In this specific case the court disagreed with the Italian government and concluded that, having regard to the restriction imposed on the applicants by the authorities and in spite of the nature of the classification of the CSPA in Italian domestic law, the applicants were deprived of their liberty.

Moreover, the court affirmed that Italian law does not expressly provide for the confinement of migrants who, like the applicants, are placed in a CSPA. The lack of an Italian law that allows the detention in these specific facilities violates article 5 paragraph 1 of the ECHR due to the fact that 'any

dicembre 2014), http://www.asgi.it/wp-content/uploads/2014/12/IDENTIFICAZIONE.-OBBLIGHI-E-FACOLTA.pdf (last accessed 20/09/ 2016).

[145] Judgement of 15 December 2016 *Khlaifia And Others v Italy*, application no. 16483/12, ECHR 2016, [74].

deprivation of liberty must be affected in accordance with a procedure prescribed by law.' In other words, the ECHR requires any arrest or detention to have a legal basis in domestic law that in this case is absent. This finding is corroborated by the senate's Special Commission which in its report noted that stays at the Lampedusa centre, which in principle should be limited to the time strictly necessary to establish the migrant's identity and the lawfulness of his presence in Italy, sometimes extended over 20 days 'without there being any formal decision as to the legal status of the person being held.'[146]

Since the centre in Lampedusa is the same centre that has been transformed into a hotspot recently and since the lack of a domestic law that allows the detention in early reception centres, the prolonged detention of irregular migrants and asylum seekers in these types of infrastructures could be possibly in violation of the same articles underlined by the *Khlaifia and Others v Italy case.*[147]

2.8. Detention conditions

[146] Senato Della Repubblica Italiana, Commissione straordinaria per la tutela e la promozione dei diritti umani, rapporto sullo stato dei diritti umani negli istituti penitenziari e nei centri di accoglienza e trattenimento per migranti in Italia,6 Marzo 2012, https://www.senato.it/documenti/repository/commissioni/dirittiumani16/Rapporto_carceri712.pdf (last accessed 1/02/2017).

147 Judgement of 15 December 2015 Judgement of 15 December 2016 Khlaifia And Others v Italy, application no. 16483/12.

Paleologo, A Lampedusa il nuovo "approccio hotspot" ha le caratteristiche del trattenimento illegittimo sanzionato dalla Corte Europea dei diritti dell'Uomo. I respingimenti differiti di massa violano i diritti fondamentali della persona, http://dirittiefrontiere.blogspot.com.au/2016/02/a-lampedusa-il-nuovo-approccio-hotspot.html (last accessed 21/02/2017),

The conditions of detention in the newly created hotspots are extreme. The large influx of migrants has caused an overcrowding in most of the centres: mainly in Lampedusa and Pozzallo. This is because their proximity to the most important disembarkation areas in the country. Various reports from national and international NGOs underline lack of food, clothes, a complete absence of privacy, a situation of constant violence and sexual harassments. For example, migrants interviewed by Oxfam reported that they spent protracted periods without possibility to leave the hotspot of Pozzallo, in absence of basic necessities[148] As discussed above, also MSF expressed similar concerns, to the extent that the organization left the centre in Pozzallo in December 2015. The Khlaifia and Others v Italy judgment is an extreme important case also because recognised a violation of Article 3 of ECHR on the prohibition of torture, inhumane and degrading treatments. Whit this judgment The Court found that serious problem of overcrowding, poor hygiene and a lack of outside contacts in the CPSA amounted to torture. These findings have been correlated by Senate's Special commission and Amnesty International's findings. [149] More recently, in November 2016, Amnesty International analysed in detail the violation of

[148] Oxfam, *Hotspots, Rights Denied: The lack of a legal framework is threatening the rights of migrants reaching Italy*, May 2016, https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp-hotspots-migrants-italy-220616-en.pdf (last accessed 9/09/ 2016), p. 13-16.

[149] Senato Della Repubblica Italiana, Commissione straordinaria per la tutela e la promozione dei diritti umani, *rapporto sullo stato dei diritti umani negli istituti penitenziari e nei centri di accoglienza e trattenimento per migranti in Italia,6 Marzo 2012*, https://www.senato.it/documenti/repository/commissioni/dirittiumani16/Rapporto_carceri712.pdf *(*last acessed 1/02/2017*).*

Amnesty International USA, *Italy: Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo*, 21 April 2011, http://www.amnestyusa.org/sites/default/files/eur300072011en.pdf (last accessed 21/01/ 2017).

the right to access asylum, the use of force in taking fingerprints, the unlawful detention and unacceptable conditions. [150]

On the basis of this analysis the request to allow a longer period of detention in these centres by the EU Commission is extremely worrying. Such a request not only does not take into consideration concerns and data raised by various national and international NGOs, but also dismisses the findings presented by the European Court of Human Rights. [151]

2.9. Conclusion

From the analysis provided above, the hotspot approach must be understood comprehensively as a mechanism made of closed facilities that are part of a broader scheme with the aim to facilitate the initial phase of processing asylum seekers at the borders. Nevertheless, the way in which the hotspot approach has been implemented in Italy and the late introduction of detailed documents has created some issues.

Firstly, the Italian government implemented the hotspot approach through ministerial decrees instead of statute. This means that the decrees did not pass through the Italian Parliament. This political choice seems to be in contravention of the Italian constitution, which establishes that some issues,

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[150] Amnesty International, *Hotspot Italy*, 2016, https://www.amnesty.ie/wp-content/uploads/2016/11/Hotspot-Italy-final-WEB.pdf (last accessed 6/02/2017).

[151] For interesting and deeper analysis of the concerns regarding hotspots and detention: Costello, Mouzourakis, '*EU Law and the Detainability of Asylum-Seekers'*, Refugee Survey Quarterly, 2016, 35 (1): 47-73.

For a more general analysis of detention of irregular migrants in Europe, and its compliance with The ECHR: Pichou,'Reception or Detention Centres? The Detention of Migrants and the New EU 'Hotspot' Approach in the Light of the European Convention on Human Rights', social science research network,2016, http://papers.ssrn.com/abstract=2730654 (last accessed 21/02/2917).

such as migration, must be regulated only by statute. Secondly, the delayed introduction of the SOP document, coming several months after the opening of the hotspot facilities, was a problem. The document was the most detailed among the decrees, and yet inserted itself after the hotspots had been operating for an extended period already. Between September 2015 and June 2016, this delay resulted in each hotspot implementing the identification and registration procedures in different ways, causing inconsistencies of treatment in the various facilities. Moreover, various reports expressed concerns regarding the right to access asylum in the hotspots. The practice of distinguishing between economic migrants and asylum seekers without a proper assessment of a person's asylum claim seemed to become the norm. Indeed, the detention of asylum seekers during identification and registration procedures has been verified. This situation of detention occurs in contravention of national law because people cannot be detained in first aid centres, categories that this paper has demonstrated include hotspot facilities. Consequently, the Italian government needs to define the legal status of hotspots as soon as possible in order to clarify which type of centres they are and which domestic laws apply to them. The same concerns have been expressed by a recent judgment of the ECHR.[152] The next chapter will focus on the link between the European hotspots and the Australian offshore processing system, as the latter be the natural consequence of the former.

3. Chapter 3: EU hotspots and Australian offshore processing system: an evolution?

[152] Judgement of 15 December 2016 *Khlaifia And Others v Italy*, application no. 16483/12.

This chapter aims to demonstrate that the EU asylum policies are undergoing a process of securitization that, despite being initiated decades ago, is intensifying with the so called 'migration crisis' or 'asylum crisis'. Examples include the Turkey statement, and similar agreements that EU leaders are contemplating with third countries who are not parties of the 1951 Refugee Convention, and the hotspot approach.[153] Moreover, the declarations by European leaders regarding the application of an Australian offshore processing system in Europe seem to suggest that the EU is clearly interested in understanding, and potentially applying, the Australian model as a consequence of this process.

The analysis starts with a comparison of the securitization process concerning asylum in Australia, just before the adoption of the first offshore processing system in 2001, and the securitization process currently occurring in Europe. The language of war and the subsequent policies will be the focus of the analysis. Subsequently, the legal applicability of a hypothetical processing system will be explored. Unlike Australia, European member states are signatories of the European Convention of Human Rights (ECHR). As a consequence, a European processing system needs to comply with the Convention. Art 5 of ECHR and two recent judgments delivered by the Supreme Court of Nauru and the Supreme Court of Papua New Guinea will be at the centre of the analysis.

3.1. Appeal of the Australian Offshore Processing System

European Union leaders have started to look deeply into the 'Australian system' in order to find a way to react to the 'refugee crisis'. The recent

[153] While we are writing Italy signed an agreement regarding migration influxes with Libya on 2 February 2017: Repubblica, February 2017,www.repubblica.it/esteri/2017/02/02/news/migranti_accordo_italia-libia_ecco_cosa_contiene_in_memorandum-157464439/ (last accessed 21/02/2017).

declaration of the German Interior minister Thomas de Maizière refers to Australia as a model to imitate for addressing the enormous influx of refugees. He reported that a policy of deterrence through which migrants are not allowed to reach European Union coasts would discourage them from embarking on extremely dangerous journeys.[154] Also the last declaration of the Austrian minister referred to the adoption of the Australian model in order 'to protect the external borders and to tell whoever tries to come to Europe illegally, 'You won't get through'.[155] Moreover, EU institutions have started to explore the Australian model, checking the practical and legal applicability within European Union.[156]

3.2. The Australian Offshore processing system

Australia's migration system, unique among states, is based on mandatory detention for all unlawful non-citizens,[157] meaning those from another country without a valid visa. This is the consequence of the Australian focus

[154] 'The elimination of the prospect of reaching the European coast could convince migrants to avoid embarking on the life-threatening and costly journey in the first place' (Loewenstein, 'A Punitive Approach to Refugees Will Lead Europe to Unrest and Corruption,' *The Guardian*, May 4, 2015, https://www.theguardian.com/commentisfree/2015/may/04/a-punitive-approach-to-refugees-will-lead-europe-to-unrest-and-corruption. (last accessed 21/1/ 2016).

[155] Florian Eder, 'Austrian Proposal for an Australian Migration Solution,' *Politico*, December 14, 2016, http://www.politico.eu/article/austrian-proposal-for-an-australian-migration-solution/. (last accessed 17/01/ 2016).

[156] European Parliamentary Research Service, *Briefing - Refugee and asylum policy in Australia*, November 2016, http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593517/EPRS_BRI(2016)593517_EN.pdf (last accessed 4/02/2017).

[157] Parliamentary Research Service, *Immigration Detention in Australia*, 20 March 2013, http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1311498/upload_binary/1311498.pdf;fileType=application/pdf (last accessed December 5, 2016).

on deterrence as the underpinning principle of its migration policy.[158] The policy of mandatory detention was introduced in 1992 after a high number of arrivals from South-East Asia and it is based on the principle that all unlawful citizens are detained except if they have been granted a bridging visa. The bridging visa allows them to stay lawfully in Australia while they apply for another visa or they organise to leave the country.[159] However, those arriving without a visa, such as by boat, are ineligible for a bridging visa and they are consequently detained. [160] Those arriving by boat are overwhelmingly asylum seekers, something that historically has been the case. Based on specific agreements that Australia has concluded with third countries in the Asia Pacific region, asylum seekers arriving in Australia illegally are intercepted at sea, forcibly transferred to third countries where they are detained indefinitely in extraterritorial processing centres, waiting for their asylum claim to be processed. Currently, third countries involved in detention are the Republic of Nauru and Papua New Guinea (Manus Island). [161] The decision to process asylum seekers in third countries started in 2001

[158] Pickering, Weber, '*New Deterrence Scripts in Australia's Rejuvenated Offshore Detention Regime for Asylum Seekers', Law & Social Inquiry,* vol. 39, no. 4, 2014 pp. 1006-1026.

[159] Ibid. p. 1.

[160] Kaldor Centre for International Refugee Law, *Factsheet - Immigration detention*, 21 October 2015, http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Immigration_detention.pdf (last accessed 12 January 2017).

[161] Madeline Gleeson, *' Offshore processing: refugee status determination for asylum seekers on Nauru'*, Andrew and Renata Kaldor centre for International Refugee Law, January 2017, http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_offshore_processing_RSD_PNG.pdf (last accessed 21/02/2017).

Madeline Gleeson,*'Offshore processing:refugee status determination for asylum seekers on Manus Island; Papua New Guinea';* Andrew and Renata Kaldor Centre for International Refugee Law, January 2017, http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_offshor

with the so called ‘Pacific Solution’. The Pacific Solution last until 2007, the year in which the processing centres on PNG and Nauru where closed. However, in 2012, the Labor government announced they were reopening the offshore processing centres. This chapter is concerned with understanding how Australian migration policies evolved to allow offshore detention, previously an unprecedented approach, and whether such a policy is developing in Europe. Key to understanding Australia’s introduction of offshore processing, and whether Europe may adopt it, is the theory of securitisation.

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e_processing_RSD_PNG.pdf (last accessed 21/02/2017),

It is not possible to analyse the issues concerning the Australian Offshore processing system in detail, for this reason some basic readings are suggested: Andrew and Renata Kaldor Centre for International Refugee Law, June 2016, ‘*The cost of Australia’s asylum policy: A guide to sources’,* http://www.kaldorcentre.unsw.edu.au/sites/default/files/factsheet_the_cost_of_australia_asylum_policy.pdf,(last accessed 21/02/2017).

Regarding the Conditions in the camps: Andrew and Renata Kaldor Centre for International Refugee Law, *Offshore Processing: conditions,* April 2015, http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Offshore_processing_conditions.pdf (last accessed 2170272017). Conditions in detention have been denounced by several NGOs and government enquiries, one among all, the recent enquiry presented by The Guardian on the ‘Nauru Files’, containing a list of incident reports written by staff in Australia’s migration detention centre on Nauru: the Guardian, August 2016, https://www.theguardian.com/news/series/nauru-files (last accessed 21/01/2017).

Fleay, Hoffman, ‘Despair as a Governing Strategy: Australia and the Offshore Processing of Asylum-Seekers on Nauru’, Refugee Survey Quarterly, vol. 33, no. 2, 2014, p. 1-19.

Clearly then, offshore processing has several generalised elements that European leaders are interested in utilising. First, the system is premised on what Australia calls the 'no advantage policy,' under which asylum seekers are treated the same as those who have remained in refugee camps around the world waiting to access UNHCR resettlement programs. Second, asylum seekers are kept in large 'processing' centres outside of the country they are seeking to reach, often in areas that are isolated and sparsely populated. Lastly, third countries are essential in offshore processing, with willing countries able to house detention centres and others able to take in recognised refugees being key to its functioning. At no point in the process are asylum seekers allowed to enter the country operating the system, a principle Australia took to its extreme.

3.3. Securitization

The general theory of securitisation was first explored by the Copenhagen School, and later expanded by several scholars.[162] The theory posits that every issue can be represented as a threat to survival of a specific object. The process through which this occurs is the core of the social construction that has been defined as securitisation. Securitization theory suggests that an issue will be securitised when the following three components are met: an issue is dramatised and represented as a threat; a referent object is presented as being in critical danger and, lastly, actors carry out speech acts that create the previous two components. The referent object is the entity that needs to survive and it is generally embodied by the state since it is 'the actor historically endowed with security tasks and most adequately structured for the purpose.'[163] The issue dramatised as the threat puts the referent object in

[162] McDonald, 'Securitization and the Construction of Security,' in *European Journal of International Relations*, no. 4/2008.

[163] Buzan, Waever, De Wilde, *Security, a new framework for analysis*, Lynne Rienner Publishers, 2009, p.30

peril of survival. The threat does not necessarily exist, and the object may not in fact be at risk. Instead, the creation of a threat and referent object requires actors who perform so called 'speech acts'. The speech act is the means through which securitisation takes place and they include various practices which aim to transfer an issue from a non-securitised status to a securitised one. The most common speech act is the use of language and terms that create alarm around the issue, portraying it as an imminent peril that needs a fast and assertive response. The aim of this whole process is to obtain political consent that justifies certain type of policies. It reflects the political choice to consider it as a security threat in order to allow the use of extraordinary measures. The invocation of security is the way through which actions outside legal procedures are legalised, and indeed normalised, because of the urgency of the threat. It is essential to act as fast as possible in order to survive. [164]

3.3.1. Securitization of migration and asylum

Securitisation theory can apply to several sectors. This chapter is concerned with its application to migrants' and asylum seekers' movement and integration. Despite the modern link between migration and security policies, the connection is not inevitable. Historically, migration policies have belonged to the institutional frameworks associated with economic and labour policies. In some cases, migration has been incorporated into the sphere of foreign affairs. This is particularly the case where migration issues have been considered as linked to international trade and economic policies. However, today it is almost taken for granted that migration issues are the competence of interior ministers. This reflects that, in many countries, migration and asylum policy have been quietly reborn as security

[164] Buzan, Waever, De Wilde, *Op cit,* p. 21-45

policies.[165] In Australia, this process is most advanced, and has culminated in the implementation of an offshore processing system that was only made possible by this advanced process of securitisation. It is necessary to understand how this occurred in Australia, if scholars are to explore why some Europeans are openly discussing the possibility of a European offshore processing system.

3.3.2. The securitization of asylum in Australia

This section analyses how migration and asylum has been securitized in Australia. The focus will be on the period before 2001, the year in which Australia adopted the offshore processing system. The implementation of mandatory detention for unauthorized asylum seekers followed the already existing practices of detaining unauthorized arrivals onshore. In this way, the policies already applying to irregular migrants were expanded to asylum seekers. As a consequence, those who were claiming asylum started to be detained while their refugee status was determined.[166]

The possible detention of south-east Asian refugees coming by boat to Australia in the 1970s was strongly rejected by the public because they were regarded as escaping a terrible war. Consequently, the Minister of Immigration granted entry permits and accommodated people in hotels in Australia.[167] However, such a welcoming was not granted to those who arrived irregularly in later decades. The second wave of asylum seekers who reached Australia in the late 1980s by boat started to be portrayed as irregular migrants by political actors. Depicting them as irregular migrants, rather than as refugees, allowed their categorization as a threat to state

[165] Campesi, *Polizia della Frontiera*, Derive e Approdi, Roma, 2015, p.21

[166] Watson, *The securitization of humanitarian migration*, Taylor and Francis, ProQuest ebook central, 2009, p. 80-81.

[167] Stevens, 'Asylum seeking in Australia,' in *International Migration Review* 36/2002, p. 871.

sovereignty because they affected the state's control of its borders and its right to decide about who can and who cannot enter Australia.[168] This depiction by the media and political actors of asylum seekers arriving by boat has persisted. The ongoing evolution in the construction of the asylum seeker as an 'irregular migrant' allowed the government to pass the *Migration Amendment Act,* which introduced mandatory detention for asylum seekers. After this amendment, asylum seekers arriving in Australia irregularly, meaning without permission, were detained during the asylum procedure. If they were recognised as refugees they could obtain a valid permit to enter Australia. If the asylum claim did not succeed, they were forced to leave the country.[169] With this provision, Australia came to be the first and only democratic state that allowed indefinite detention of asylum seekers for the entire period in which their asylum claim is assessed.[170] The use of securitisation theory, and the tracing of multiple speech acts, allows us to chart how the 'asylum seeker' transformed into the 'irregular migrant'.

3.3.3. Tampa Crisis

In the process of securitising asylum policy, scholars have identified 2001 as a key year. Early in the year, Prime Minister John Howard expressed his views regarding how Australia should deal with unauthorised arrivals by sea, who he claimed were 'pouring' into the country. The solution, according to the Prime Minister, was to strengthen the law in order to avoid abuses of the system. He described them as 'queue jumpers', in the sense that they were not respecting the resettlement programme for refugees run

[168] Stevens, 'Asylum seeking in Australia,' cit., p. 865.

[169] Stevens, 'Asylum seeking in Australia,' cit., p. 878.

[170] Brennan, *Tampering With Asylum: A Universal Humanitarian Problem*, University of Queensland Press, St. Lucia, 2003.

by the UNHCR.[171] These two speech acts were important manifestations of the broader effort to cast non-visa holding asylum seekers as overwhelming the country, thus requiring special responses, and to reconstruct them as selfish people jumping ahead of other, more 'deserving' asylum seekers. This construction of a hierarchy of asylum seekers was completely artificial, with no reflection in international law, but it formed the basis for the government's later development of specific policies and strategies targeting asylum seekers arriving by boat. However, at this point in the year, Prime Minister Howard was still constrained by the lingering humanitarian image of boat-borne asylum seekers. Referring to a boat carrying 348 people that had arrived on Australia's territory of Christmas Island in the previous days, he strongly refused the idea of pushing boats back. He argued that Australia is a humanitarian country, '[w]e don't turn people back into the sea, we don't turn unseaworthy boats which are likely to capsize and the people on them be drowned'.[172]

Despite these declarations, the arrival of a seaworthy vessel, the *Tampa*, allowed the government to accelerate the process of securitising asylum seekers. *Tampa* was a Norwegian commercial vessel that had rescued a boat carrying asylum seekers from a shipwreck in the waters between Australia and Indonesia. The commercial nature of the vessel meant the Tampa was a very different boat from the rickety vessels used to reach Australian coasts. It was an international ship without any danger of sinking, a 'seaworthy boat'. The Tampa's captain intended to return the asylum seekers to Indonesia, which was the closest port, but the asylum seekers on board demanded to be disembarked in Australia. Following these demands, the ship entered Australian waters. Despite this, the Australian Government told

[171] Neil Mitchell interview with John Howard.' *Radio 3AW*, 17 August 2001. http://sievx.com/articles/psdp/20010817HowardInterview.html (last accessed 1/01/ 2017).

[172] Ibid.

the captain it would refuse the asylum seekers and, as a consequence, they should be brought to Indonesia.[173] The choice of denying the landing of Tampa was a measure that had never been taken before: not only was Tampa was an international vessel, it had been brought into the rescue operation by a request from the Australian Government's coast watch service. Scholars have identified the *Tampa* incident as an 'intensification of the securitization of humanitarian migration in Australia.'[174] As a proof of this escalation, John Howard, in an interview immediately following these events, referred to an 'uncontrollable numbers of irregular migrants' arrivals in Australia and to the necessity to draw 'a line' against them. He reaffirmed the intention not to let *Tampa* land in Australia. He concluded saying that among the Government's priorities was the aim to 'protect Australia's borders and to defend our right to decide who comes to this country and in what circumstances.'[175] The same declaration regarding the ability to choose who is allowed to enter Australia was underlined also on a TV programme on 29 August 2001, [176] and famously at the launch of the Liberal party's election campaign.[177]

The language used by the government just after the Tampa crisis is clearly linked to the language of war. The idea of an invisible line around Australia that asylum seekers are trying to overcome recalls the defensive line of an

[173] Marr and Wilkison, Dark Victory, Allen & Unwin, Crow's Nest, 2003.

[174] Watson, *The securitization, cit.*, p. 96.

[175] Neil Mitchell interview with John Howard.' *Radio 3AW*, 31 August 2001, http://pmtranscripts.pmc.gov.au/release/transcript-12043 (last accessed 3/02/2017).

[176] Enderby, 'Immigrants - Case for the Third Umpire,' *The Australian*, August 30, 2001. https://global.factiva.com/ha/default.aspx#./!?&_suid=148607560783808124370381505425 (last accessed 3/02/2017).

[177] Howard, *Speech in Sydney, NSW*, October 28th, 2001, http://electionspeeches.moadoph.gov.au/speeches/2001-john-howard (last accessed 5/02/2017).

imaginary battlefield. The asylum seekers, even before the *Tampa case*, were increasingly being described by the media as irregular migrants and framed as a threat to Australia's sovereignty. As a consequence, it became evident that they must be handled as such a threat. Reading Howard's declaration, it seems that before the *Tampa* case Australia still had control of its borders. The *Tampa* cargo of a high number of unexpected arrivals with whom Australia had to deal changed the situation. After having stated that Australia would do 'whatever was necessary', a phrase itself usually reserved for national crises such as terrorist attack, to solve the situation and remove the *Tampa* from Australian waters.[178] After the failure of negotiations with Indonesia and Norway, the government sent the Australian military to board the vessel.[179] Asylum seekers were transferred to a navy vessel, some with the use of force and others who thought they would be entering Australia.[180] Despite these expectations, the Australian government had speedily concluded an agreement with Papua New Guinea, Nauru and New Zealand. On the basis of this agreement, asylum seekers on the *Tampa* would be processed on these third countries where, except for New Zealand, they would be detained for the entire asylum process. This moment marked the beginning of the Pacific Solution which started as an exceptional measure to a situation that had been described by the Government and media as an external crisis. However, it became formally

[178] Clennell and Allard, 'The Loneliest Ship In The World,' *Sydney Morning Herald*, 30August 2001. https://global.factiva.com/ha/default.aspx#./!?&_suid=148608173560402822153661177419 (last accessed 3/02/ 2017).

[179] Watson, *The securitization, cit.*, p. 101.

[180] Mares, (2002) *Borderline: Australia's Response to Refugees and Asylum Seekers in the Wake of the Tampa*, University of New South Wales Press, Sydney, 2002.

adopted as 'normal' response to unauthorized arrivals by boat.[181] The language used by the Australian Government before and during the Tampa crisis demonstrated the speech act typical of a securitization process can be strategic in passing policies that had been asserted as unacceptable beforehand.[182] Watson and Scott also argued that a strategic use of a speech act can be done with the purpose of winning an election. Howard, went on to win two more elections before being unseated at the 2007 election, six years after the Tampa crisis.

The decision to adopt the Pacific Solution was accompanied by a series of measures that made the securitisation of the issue even more clear: Media were not allowed to go close to *Tampa* in order to avoid the publication of pictures that would made the asylum seekers more human. Moreover, the navy staff who were directly in contact with the asylum seekers on the boat were under a 'no communication order'. They were not allowed to share pictures or stories with anyone, including family.[183] This measure, which started as an exceptional one, became the normal rule for everyone who worked in Australian detention centres. This type of approach still applies for those who are working on Nauru and Manus Island. Section 42 of the *Australian Border Force Act* made it an offence for an 'entrusted person' (an employee of the Australian Border Force) to record or disclose 'protected information', meaning information obtained by that person in the course of their employment. [184]Essentially, this means that an employee working in an offshore facility – including health care workers – could risk

[181] Watson, *The securitization, cit.*, p. 102.

[182] Watson, *The securitization, cit.*, p. 98.

[183] Marr and Wilkison, Dark Victory, Allen & Unwin, Crow's Nest, 2003.

[184]*Australian Border Force Act 2015* (Cwlth), http://www.legislation.gov.au/Details/C2016C00650. (last accessed 3/02/2017).

up to two years' imprisonment, if they speak about conditions in detention centres to the media or other organisations.

3.3.4. The deviant refugee

As the Australian experience demonstrates, the choice of security policies towards asylum seekers claiming for protection can be accepted and shared by the public audience only if they are described as a threat to state structural values, such as a threat to state sovereignty. The language used by public leaders and media becomes, consequently, very relevant because asylum seekers needs to embody and symbolise deviance. This specific way of portraying them provides justification for repressive state response. As Pickering has underlined, the use of war metaphors is strategic because any war requires a militaristic and defensive response in order 'to repel whatever is hostile and threatening'.[185] As a consequence, a process of criminalisation of asylum seekers has broadly taken place in media and political leaders discourses in western countries. The representation of the refugee as a deviant 'offers a reading that begins to address the increasingly punitive regimes that are greeting those seeking the protection of developed nations.'[186] Pickering states that the criminalisation of refugees makes them different others to the extent that they become unworthy of protection because they are nationally, racially, socially or bodily different.
The same process that allowed Australia to take its asylum polices on an extreme level may be currently happening in Europe, where, despite a different history and a different background, some similarities can be seen.

3.4. Origins of EU migration policies

[185] Pickering, *Refugees and state crime*, The federation press, Leichhardt, NSW, 2005 p. 27.

Every, Augoustinos.*'Constructions of Racism in the Australian Parliamentary Debates on Asylum Seekers'*, Discourse & Society, vol. 18/no. 4, 2007, p. 411-436.

[186] Pickering, *Refugees, op cit.*, 2005, p. 23.

The EU developed a Common European Asylum system (CEAS) in 1990. Core to the CEAS is the so-called Dublin System. The Dublin System is a mechanism which is based on the idea that all EU countries are safe and was passed in order to avoid the so called 'forum shopping', namely the fact that asylum seekers could apply for asylum in more than one-member state. The Dublin system has been subjected to various amendments: the 2003 Dublin regulation defines a list of criteria that determine the state responsible to assess the asylum claim.[187] The responsible state is, generally, the first state of arrival. This specific mechanism means that most asylum seekers remain 'stuck' in the first EU state they can reach by boat, foot or plane without a possibility of choosing the state where claiming asylum. The member states concerned correspond to the countries that lack the financial resources to face such large migratory influxes. This mechanism has been criticised by many scholars and was also at the centre of an ECtHR judgment in 2011.[188]In *MSS v Belgium and Greece* (2011) the Court condemned Belgium for subjecting an Afghan asylum seeker to inhuman and degrading treatment by sending him back to Greece.[189] This occurred because under the Dublin System, Greece was the responsible country for assessing the asylum claim. The *MSS* judgement undermined the key element of the Dubin System, that all EU countries are safe for asylum seekers. The System was amended again in 2013.[190] Despite this episode and criticisms

[187] COUNCIL REGULATION (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, in the *OJEU* L 50/1 of 25 March 2003.

[188] Moreno lax, '*Dismantling the Dublin System: M.S.S. v. Belgium and Greece***,** European Journal of Migration and Law, Vol. 14, 2012, p 1-31.

[189] Judgement of 21/01/2011 *MSS v Belgium and Greece*, Application No. 30696/09, ECHR 2011.

[190] Regulation (EU) No 604/2013 of 26 June 2013 (The Dublin Regulation) in the *OJEU* L 180/31 of 29 June 2013.

presented by various scholars[191], the core mechanisms of the Dublin system have not been repealed by recent reforms that have characterised the EU asylum policies. The relocation mechanism, introduced by the EU Agenda does not contemplate any structural reforms to the Dublin system at all.[192] In fact, despite the relocation mechanism failure, reforms simply introduced a derogation to the Dublin System. This choice to externalise asylum seekers in frontline member states is clearly in line with the deeply analysed hotspot approach that requires the construction of detention centres in some of the member states, namely Italy and Greece, that have to deal with the highest number of arrivals by boat.[193] Furthermore, the Italian government has recently outlined the idea of floating hotspots. The idea was to find a ship that could contain up to 1000 people and to moor them close to the Italian coast in order to facilitate first registration and identification procedures of asylum seekers.[194]

This escalation in the externalisation of asylum seekers at the borders or, theoretically, also on floating boats has been taken to the extreme by the

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[191] Peers, 'EU Law Analysis: The Refugee Crisis: What Should the EU Do Next?,' *EU Law Analysis*, September 8, 2015, http://eulawanalysis.blogspot.com.au/2015/09/the-refugee-crisis-what-should-eu-do.html. (last accessed 2/02/2017).

Carrera et al., 'The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities,' *SSRN Scholarly Paper*, December 16, 2015, http://papers.ssrn.com/abstract=2715460.(last accessed 21/02/2017),p. 15.

[192] Campesi, Chiedere Asilo in tempo di crisi. Accoglienza, confinamento e detenzione ai Margini d'Europa.in Academia.edu. http://www.academia.edu/23166256/Chiedere_asilo_in_tempo_di_crisi._Accoglienza_confinamento_e_detenzione_ai_margini_d_Europa (last accessed 1/02/2017).

[193] Garelli and Tazzioli, '*The EU hotspot approach at Lampedusa'*, Opendemocracy, February 2016,https://www.opendemocracy.net/can-europe-make-it/glenda-garelli-martina-tazzioli/eu-hotspot-approach-at-lampedusa (last accessed 21/02/2017).

[194] Mauro, Il giallo degli hotspot galleggianti*, L'huffington post* , http://www.huffingtonpost.it/2016/05/31/migranti-hotspot-galleggianti_n_10223384.html (last accessed 1 February 2017) and Nielsen, Italy's 'Floating Hotspot' Idea to Sink in Legal Waters, *Eu observer*, https://euobserver.com/migration/133659. (last accessed 12 December 2016).

adoption of the EU-Turkey 'Statement'. The statement seems to distinguish between 'good' and 'bad' asylum seekers. The good asylum seekers are those who remained in Turkey waiting to be resettled by the UNHCR programme. Those are the ones who are transferred to Europe before those who have tried to reach Europe illegally, the 'bad' asylum seekers. 'Bad' asylum seekers are spread out in Greek open and closed camps. [195]The 'Statement', and its creation of a hierarchy of refugees, replicates the approach taken by Howard during the *Tampa* crisis.

3.5. Europe, Migration and Securitisation: a Journey to Offshore Processing?

The years of 2015-2016 have been difficult for Europe. Terrorist attacks occurred in many EU countries, starting from the Charlie Hebdo shooting at the beginning of January 2015,[196] and reaching their peak in the massacre of November 13, where 130 people died in Paris. [197] In 2016, Brussels was the victim of a bomb attack, and in July a truck killed 86 in Nice. At the end of December 2016, 12 people were killed in an attack in Berlin. Aside from these events, the ongoing Syrian war and a general deterioration in the situation in the Middle East and in North Africa pushed many people to leave their homes. As a consequence, over one million people crossed

[195] Tazzioli *La Grecia dei campi, l'Europa degli hotspot,* Euronomade,,Luglio 2016, http://www.euronomade.info/?p=7602 (last acessed 21/02/2017).

[196] Rayner, Charlie Hebdo attack: '*France's worst terrorist attack in a generation leaves 12 dead',* The telegraph, http://www.telegraph.co.uk/news/worldnews/europe/france/11331902/Charlie-Hebdo-attack-Frances-worst-terrorist-attack-in-a-generation-leaves-12-dead.html (last accessed 1/02/ 2017).

[197] BBC,*'What happened at the Bataclan?*' BBC news, http://www.bbc.com/news/world-europe-34827497,(last accessed 1/02/2017).

European borders in 2015 both by sea and foot. [198] Moreover, due to the lack of safe routes and the interruption of Mare Nostrum operations, the deaths at sea increased rapidly. The complexity of these events constitute the context that needs to be used in order to understand the securitization of the migration discourse in the European Union.

3.5.1. A Crisis?

The use of securitisation language can be seen in the adoption of terms such as a 'crisis' of migratory movements in Europe and an 'invasion' of Muslims. The mainstream media started to refer to the 'migration crisis' in April 2015, after a shipwreck that caused the death of more than 900 people. [199] Described as the most dramatic shipwreck at the EU borders in decades, this event was the starting point of the so called 'migration crisis' or 'refugee crisis', both of which use the loaded and pejorative term of 'crisis'.[200] Aside from the use of crisis language, which appeared in mainstream media and formal EU documents,[201] other terms, such as 'Muslim invasion', started to be used by far-right wing websites.[202] Aside

[198]UNHCR, Monthly data update: December 2016. http://reliefweb.int/sites/reliefweb.int/files/resources/Monthly_Arrivals_to_Greece_Italy_Spain_Jan_Dec_2016.pdf (last accessed 4/02/2017).

[199] Miglierini, '*Migrant tragedy: Anatomy of a shipwreck*,' *BBC News,* 24 May 2016, http://www.bbc.com/news/world-europe-36278529 (last accessed: 29/01/2017).

[200]BBC,' *Migrant crisis: Migration to Europe explained in seven charts', BBC news,* http://www.bbc.com/news/world-europe-34131911 (last accessed 1/02/2017)

[201] See, for example, European Commission, *European Agenda on Migration 2015,* http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/summary_european_agenda_on_migration_en.pdf.

[202]FarreIl, '*Welcome to Italy: this is what a real immigration crisis looks,'* The Spectator, http://www.spectator.co.uk/2015/06/the-invasion-of-italy/ (last accessed 29/01/2017).

Squires, '*Italians revolt against migrant 'invasion'*, The Telegraph, http://www.telegraph.co.uk/news/worldnews/europe/italy/11542063/Italians-revolt-against-migrant-invasion.html (last accessed 29/01/2017).

from these extreme groups, European leaders started to use the term 'invasion' in referring to asylum seekers or irregular migrants. Matteo Salvini, Italian leader of the right-wing party 'Lega Nord', recently affirmed that Milan has been invaded by migrants.[203] Other more influential leaders, such as Geert Wilders, leader of the Freedom Party in the Netherlands, called for a 'de- islamisation' of Europe.[204] Marine Le Pen, who is running for the French Presidency, has avoided the use of 'invasion', but has spoken of France being 'submerged' in a 'terrifying' wave of migrants who represent only a 'burden' to society.[205]

As is clear from this analysis, this type of language recalls the language of war. As Pickering underlined in her book, the choice to overlap immigration discourses and criminal discourses with tactical and war speeches is a strategic one. The development and utilisation of this t language reflects the theory explored by the Copenhagen school. A crisis invokes extraordinary measures which are outside the legal bounds of a democratic society, and the notion of an 'invasion' also suggests urgent measures to 'repel' an invader. It is this creation of an 'invader' which creates the notion of an

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Sidway, '*The Muslim Migrant Invasion and the Collapse of Europe*,' jihad watch, https://www.jihadwatch.org/2016/04/the-muslim-migrant-invasion-and-the-collapse-of-europe (last accessed 29/01/2017)..

Millière, '*Muslim invasion of Europe'*, Gatestone Institute, https://www.gatestoneinstitute.org/6721/muslim-invasion-europe (last acessed 29 January 2017).

[203] Millar, '*Milan 'CONTROLLED' by migrants after 'INVASION' claims Lega Nord'*, Express, http://www.express.co.uk/news/world/701638/milan-lega-nord-migrants-control invasion-Matteo-Salvini (last acessed 5 February 2017).

[204] Waterfield, '*Islam now a monster in our midst, claims Geert Wilders'*, The times, http://www.thetimes.co.uk/article/islam-now-a-monster-in-our-midst-claims-geert-wilders-mv3x2l60x (last accessed 5/02/2017).

[205] Nossitant, '*For Marine Le Pen, Migration Is a Ready-Made Issue'*, The New York times , https://www.nytimes.com/2015/10/06/world/europe/for-marine-le-pen-migration-is-a-ready-made-issue.html?_r=0 (last accessed 5/02/017).

'other', a dehumanised individual that recalls Howard's refusal to allow pictures to be shown of asylum seekers aboard the *Tampa*. This is due to the fact that the threat, in this case the 'invasion' of migrants, justifies priority actions. Those actions are prioritised because the referent object, in this case Europe, or even France.

3.5.2. European Agenda

With this understanding of the securitisation of migration, it is clear why EU policies embodied in the EU Agenda on Migration have developed in recent years and reflect certain approaches. The EU Agenda seems to focus on dealing with the crisis through a securitisation lens. The Agenda focuses primarily on the protection of EU borders and the fight against smugglers. This is achieved through cooperation with third countries and a strong policy of forced returns, partly reflected in the EU-Turkey 'Statement' and later agreements, some still developing. The language used in the document clearly exemplifies a war language: sentences such as 'fight against smugglers' through a 'systemic identification, capture and destruction of smugglers vessels' are repeated in most sections of the document. Moreover, the Agenda refers repeatedly to the 'deportation' and 'forced return' of those who are not considered genuine refugees.

This approach has been strongly criticised by scholars and important institutions. According to Carrera, not enough emphasis is placed on opening up legal paths to Europe.[206] This political choice has the consequence that people who are escaping the war are still relying on smugglers to reach the EU. This type of approach has been criticised also the Parliamentary Assembly of the Council of Europe. The Parliament Assembly stressed that EU countries should avoid 'a narrow emphasis on border control and security' in dealing with the migration crisis, and instead

[206] Carrera, '*Whose European Agenda on Migration?*' Centre for European Policy studies, https://www.ceps.eu/content/whose-european-agenda-migration (last accessed 5/02/2017).

embrace a 'holistic, rights-based and effective' approach involving countries of transit and origin'.[207] The consequence of such approach has been a shift away from compliance with fundamental rights, a political choice that has been criticised as the 'Achilles heels of the current European Agenda on Migration.'[208]

Having charted the securitisation of migration policy in Australia and Europe, and demonstrated that Europe is increasingly moving towards it, at least in language and policy, the implementation of an offshore processing system, the paper now proceeds to assess the legality of such a policy under the European Convention on Human Rights.

3.6. Offshore processing and the European human rights framework: Art. 5 ECHR

Offshore processing has several generalised elements that European leaders are interested in using. First, the system is premised on what Australia calls the 'no advantage policy,' under which asylum seekers arriving by boat are treated in the same way as those who have remained in refugee camps around the world waiting to access UNHCR resettlement programs.[209] Second, the former are kept in large 'processing' centres outside of the country they are seeking to reach, often in areas that are isolated and sparsely populated. Lastly, third countries are essential in offshore processing, with willing countries able to house detention centres and others

[207] Council of Europe, Parliamentary Assembly, *PACE urges a 'holistic and rights-based' approach to migration through transit countries*, September 2015, http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=5799&lang=2 (last accessed 5/02/2017).

[208] Carrera, Blockmans, Gros, Guild, Elspeth, '*The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities'* (December 16, 2015). CEPS Essay, No. 20/16 December 2015. Available at SSRN: http://ssrn.com/abstract=2715460, p. 22.

[209] Rowe, O'Brien, '*Genuine' refugees or illegitimate 'boat people': Political constructions of asylum seekers and refugees in the Malaysia Deal debate*', Australian Journal of Social Issues, *The,* vol. 49, no. 2, pp. 171-193.

able to take in recognised refugees being key to its functioning. At no point in the process are asylum seekers allowed to enter the country operating the system, a principle Australia took to its extreme as we saw above.
The European Convention of Human Rights (ECHR) is the basis for the protection of human rights in Europe. Introduced following WW2, the Convention now has 52 contracting states comprising every state in Europe. The convention is referenced in the Treaties of the European Union, though the EU has not acceded to the Convention. The Court of the ECHR is the European Court of Human Rights, which is the final court of appeal for matters relating to Convention rights. The ECtHR's jurisprudence must be taken into account by contracting states' courts, and the Court has the right to provide compensation in the cases where domestic law is found incompatible with the Convention.[210]

3.6.1. Art 5 of ECHR

Article 5 sets out a general right to liberty and security of person which includes a guarantee against arbitrary arrest or detention. The deprivation of this right is allowed only in specific circumstances defined by Convention law and in compliance with a procedure dictated by domestic law.[211] If a

[210] Zwaak, "*Council of Europe*." Netherlands Quarterly of Human Rights 16.2,1998,p.201-227.

Dzehtsiarou,*'Ed bates, the evolution of the European Convention on human rights: From its inception to the creation of a permanent court of human rights*.' Human Rights Law Review 13 (1),2013,198-201.

[211] Art 5 sec.1, ECHR: 1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:(a) the lawful detention of a person after conviction by a competent court
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so
(d) the detention of a minor by lawful order for the purpose of educational supervision or

contracting state cannot prove that the measure is covered by one of the exceptions set out in Article 5(1)(a)-(f), a violation of the Convention occurs. The subsequent provisions of the Article refer to the rights belonging to anyone who has been detained or arrested. The subject of lawful detention must be informed of the reasons of the arrest in a language he or she can understand and must be able to exercise the right to access a court.[212] If someone has been the victim of arrest or detention in contravention of these provisions, he or she has a right to compensation.[213] Article 5 has particular importance among the rights in the ECHR. Scholars have argued that 'its deprivation may have direct and inverse effect on the enjoyment of many other rights'[214]. For example, the Court has that the deprivation of liberty exposes the person concerned to a situation of strong vulnerability in which the possibility of being subjected to torture and

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his lawful detention for the purpose of bringing him before the competent legal authority
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

[212] Art 5 sec 2,.ECHR: Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

Art 5 sec 3. ECHR: Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Art 5 sect 4, ECHR: Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

[213] Art 5 sec 5, ECHR: Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

[214] Council of Europe, *Guide On Article 5 of the Convention*, June 2014, http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf (last accessed 12 January 2017).

inhuman and degrading treatment is increased. The Court frequently notes the fundamental importance of Article 5 for protecting the right of individuals to be free from arbitrary detention at the hands of the authorities.[215]

3.6.2. Offshore processing and Art 5

This section assumes it would be possible to attribute state responsibility under ECHR to a contracting state operating a processing centre in a third country, that is likely not to be a party to the ECHR. This assumption is based on the jurisprudence of the ECtHR. In the controversial *Bankovic and others v Belgium and others* case the Court held that the jurisdiction of a state is primarily territorial with a limited list of exceptions.[216] However, this emphasis on strict territorial jurisdiction was largely undermined in the *Al-Skeini v United Kingdom* decision.[217] The Court, whilst reaffirming its territorial jurisdiction, elaborated on the exceptions to the rule and did away with the controversial concept of 'legal space' that had limited the Court's

[215] Judgement of 27 July 2006, *Bazorkina v. Russia*, application no. 69481/01, ECHR 2006, p. 33.

For a deeper analysis of Art.5: Macken, Preventive detention and the right to personal liberty and security under article 5 ECHR. The International Journal of Human Rights 10 (3), 2006, 195-217.

Patel, '*Focus on article 5 of the ECHR'*, Judicial Review, vol. 10, no. 4, 2005 p. 303.

Rainey, Wicks and Ovey, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2014, p 213-246.

[216] Judgement of 12 DEC 2001, *Bankovic v Belgium*, application no. 52207/99, ECHR 2001, [57].

[217] Judgement of 7 July 2011, *Al-Skeini and Others v. United Kingdom*, application no. 55721/07, ECHR 2011.

For a deeper analysis of the ECtHR Jurisdiction: Miltner, *'Revisiting extraterritoriality after Al-Skeini: the ECHR and its lessons'*, Michigan Journal of International Law, vol. 33, no. 4, 2012, p. 693-747.

jurisdiction to European territory.[218] The exceptions fall into two categories: first, the exception of effective control over a territory.[219] Secondly, the concept of state authority and control that includes the exercise of public powers through consent, invitation, or acquiescence of the territorial government[220] and the use of force by the state's agent operating outside its territory.[221] A possible development of an offshore processing system by a contracting state, if based on the Australian experience, would likely fall within the exceptions listed by the court. It is arguable that effective control over a territory occurs because the camps in the Pacific Islands are entirely controlled and financed by Australian government. They operate solely to process asylum seekers aiming to reach Australia, and essentially act as Australian processing centres. Alternatively, the agents operating the camps are Australian agents. Even though employees in Nauru and PNG are both locals and Australians, all of them are employed by a private security company that has been contracted by Australia to manage the camps. [222]Moreover, detainment and use of force are acts only capable of being authorised by a government, and are thus an expression of public power. These employees are thus agents of the Australian government, and their presence and control has been consented to or acquiesced in by the Nauruan and Papuan governments through a series of MOUs. Aside from this analogy with the Australian situation, the ECtHR has made clear on several occasions that it will not allow states to artificially avoid their

[218] Rainey, Wicks and Ovey, *op.cit.* p. 92.

[219] Judgement of 7 July 2011, *Al-Skeini and Others v. United Kingdom*, application no. 55721/07, [138].

[220] Ibid.[135]

[221] Ibid.[136]

[222] Gleeson,*'Offshore:behind the wire on Manus and Nauru'*, New South Publishing, Sydney, 2016 p 33.

responsibilities under the Convention. In the *Issa and others v Turkey*, the Court wrote in obiter:

*'[*A]ccountability… stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.'*[223]

The use of offshore processing camps by ECHR contracting states arguably constitute an artificial construct designed to 'perpetuate' acts, the prolonged detention of asylum seekers, that it otherwise would not be able to perform on its own territory.

Likewise, alternative tests have been put forward for assessing jurisdiction under the ECHR. *In Al-Skeini and others v United Kingdom*, Judge Bonello proposed in his concurring opinion a functional test for asking whether a state can uphold its Convention duties. He underpinned his theory of jurisdiction with the proposition that:

*'*The duties assumed through ratifying the Convention go hand in hand with the duty to perform and observe them. Jurisdiction arises from the mere fact of having assumed those obligations and from having the capability to fulfil them (or not to fulfil them)*'*

Such a functionalist test may mean that the signing of treaties or MOUs by a contracting state with third countries, a necessary part of establishing offshore processing centres, may allow the Court jurisdiction over the contracting state. This would give it the capability to protect asylum seekers through the operation of those agreements. Regardless, scholars have noted that the recent developments in ECtHR case law suggest that the Court is more willing to allow extraterritorial jurisdiction for contracting state

[223] Judgement of 16 Nov 2004, *Issa and Others v Turkey*, application no. 31821/96, ECHR 2004, [71].

behaviours and that future cases will likely expand and further define the concept of jurisdiction under the ECHR.[224]

Assuming the ECtHR's willingness to give itself jurisdiction,[225] the presence of a European human rights regime means that one of the key issues for Europe in seeking to introduce offshore processing is whether it would be compliant with Article 5 of the ECHR. As discussed above, the offshore processing system is characterised by several key elements. However, the key issue in assessing Article 5 compliance, is the detention of asylum seekers in specific processing centres waiting to be processed and eventually resettled. Article 5 compliance requires, first, asking what the concept of detention means and, consequently, what constitutes unlawful detention. Two cases delivered by the PNG Supreme Court and the Nauru Supreme Court are relevant in this discussion. They concern the constitutionality of offshore processing and apply principles that may be relevant in exploring the possible application of the system to Europe. Namely. the principles analysed by the PNG and the Nauru Supreme Court could be taken into consideration also by the ECtHR in case of the application of an European offshore processing system.

3.6.3. Defining Detention-PNG, Nauru and ECHR

In seeking to understand the potential compliance of an offshore processing system in Europe with Article 5 of the ECHR, the ECtHR will first examine whether the system includes an element of detention. In conducting this analysis, the Court would rely on previous ECHR jurisprudence. The PNG and Nauru cases are useful in this context as they partly relied upon ECHR case law in reaching their decisions, and they grappled with the concept of

[224] Rainey, Wicks and Ovey, *Op.cit*, p. 92.

[225] Article 32(2) of the ECHR provides that 'In the event of dispute as to whether the Court has jurisdiction, the Court shall decide'.

detention and its legality in offshore processing.[226] The case of *AG v Secretary of Justice* was decided by the Supreme Court of Nauru in June 2013. The case dealt with the situation of the applicants in processing centres on the island of Nauru, who claimed they had been unlawfully detained, contrary to the right to liberty. Both the Australian and the Nauru governments challenged this claim. In carrying out its analysis of offshore processing, the Court broke the test into two limbs: first as to whether detention occurred, then as to whether it was legal. This is consistent with the ECtHR's approach and the structure of Art.5. Likewise, the *Namah v Pato (2016)* case concerned whether the forced transfer and detention of asylum seekers in PNG by the Australian government complied with the right to liberty in the PNG Constitution.[227] Importantly, the provisions in the Nauru constitution[228] and the PNG constitution[229] are very similar to the Article 5 right to liberty in the ECHR.[230] Moreover, both the judgments

[226] *AG v Secretary of Justice* [2013] NRSC 10 (18 June 2013), [44]; *Namah v Pato* [2016] PJSC 13 (Apr 26 2016), [30].

For an analysis of Namah v Pato [2016] and its political consequences: Lancet, '*Australia's offshore refugee policy in disarray*', Lancet (London, England), vol. 387, no. 10031, 2016 p. 1880.

For a political analysis: RAMZY, '*Papua New Guinea Finds Australian Offshore Detention Center Illegal'*, New York Times Company, New York, 2016.

For a political analysis of AG v Secretary of Justice, Rintoul,, '*Nauru court dismisses Burnside challenge but leaves door open - ELECTION 2013'*, News Limited, Canberra, A.C.T,2013.

[227] *Namah v Pato* [2016] PJSC 13 (Apr 26 2016)

[228] Art 5 of Nauru Constitution

[229] Art 42 PNG Constitution

[230] Art 5 ECHR

refer to ECHR jurisprudence to define the concept of detention.[231] Both cases will be central in the following discussion and, combined with ECHR case law, will allow for a detailed and predictive analysis of the legality of an offshore processing system in Europe.

The Nauruan case *AG v Secretary of Justice* applies the key ECtHR case of *Guzzardi v Italy* (1980)[232] to the Australian offshore processing system, and its analysis provides a useful insight into how the ECtHR may approach a European offshore system. The case is used for assessing the existence of a situation amounting to detention. Article 5 of the Nauru Constitution states that no one shall be deprived of his right to liberty. Interestingly, despite considering the jurisprudence of the ECtHR, the Nauru Court interpreted this provision narrowly, limiting the right to liberty to freedom from 'detention'.[233] It thus excludes restrictions on liberty, and set a high threshold for proving a breach of the right to liberty.[234] To distinguish between deprivation and restriction under the Nauru Court's jurisprudence, it is necessary to evaluate the concrete situation of the individual which is assessed on multiple criteria. The difference between the two 'is a matter of degree and not a matter of substance.'[235] This focus on 'degree' and the 'concrete situation' follows the *Guzzardi* decision, which pioneered this approach for assessing borderline detention cases. In the case, Mr Guzzardi, a suspected Mafia member, was ordered to remain on a small island for sixteen years. Despite no physical fences, he was not allowed to leave a

[231] *Namah v Pato* [30]; *AG v Secretary of Justice* [40].

[232] Judgement of 6 November 1980, *Guzzardi v. Italy*, application no. 7367/76, ECHR 1980.

[233] Ibid, [40]

[234] Ibid, [41]

[235] Ibid, [41]

village of 2.5 kilometres squared, populated only by people subject to the same order. Although his son and his wife were allowed to live with him, the provided accommodation was unsuitable for a family. He was not prevented from looking for jobs but there were few employers on the island and this made it impossible to find employment. Moreover, he was constantly controlled by the police to whom he had to ask permission for any phone calls or any outside visitors. The Court found a violation of Article 5, stating that a deprivation of the right to liberty must be assessed on the base of the 'concrete situation' which is composed of different criteria such us 'the type, duration, effects and manner of implementation of the measure in question'. Despite Mr Guzzardi not being detained in a prison, the deprivation of liberty occurred due to an analysis of his situation. Importantly, the Court noted that the different measures adopted against him would not have constituted a violation of article 5 in isolation. Instead, they constituted a breach of Article 5 when taken 'cumulatively and in combination'.[236] This is the relevant test for assessing whether the presence of asylum seekers in offshore processing centres amounts to detention.
In applying this test, of whether the concrete situation and the combination of factors amounts to a detention, the Nauruan Court found that the Australian offshore processing system amounted to detention. In its submissions, the Government of Nauru argued that the asylum seekers in the processing centre on Nauru were not detained since they could do many different types of activities 'outside the confines of the camp' and could have contact with the outside world through phone and internet access.[237] In making this case, the Government sought to argue that the restrictions on liberty did not amount to detention, which under Nauruan law was a higher

[236] Judgement of 6 November 1980, *Guzzardi v. Italy*, application no. 7367/76, p. 21.

[237] Ibid, [53]

threshold than the ECHR. Despite this higher threshold, the Court, relying on an analysis of the concrete situation of the asylum seekers, found that those in the processing centre were detained. The judges reasoned this on the basis that the asylum seekers:

*'[*A]re required to live in a location that effectively confines them in a limited and finite area that is isolated from the residential and urban areas of Nauru, and their lives are closely regulated and monitored 24 hours of each day. At all times they are effectively being guarded and watched to prevent their escape. Whilst the restrictions fall short of those to be found in the close confinement of a prison, they are very extensive in their impact on the daily lives and movement of the applicants'.[238]

Thus, the cumulative effect of the factors in the case, as in *Guzzardi*, amounted to detention. Other facts that led to the Court's decision included that the centre is surrounded by a 2-metre-high fence which is constantly controlled, though not electrified. Furthermore, the centre is enclosed by dangerous, difficult, and barren landscape,[239] and thus the centre is geographically isolated from the rest of the community.[240] Its only entrance is through a constantly monitored gate.[241] The Nauruan Court's application of *Guzzardi* to the Australian offshore processing system offers a useful insight into how the ECtHR would examine a potential European offshore system.

The PNG case of *Namah v Pato* also dealt briefly with whether the situation of asylum seekers in offshore processing centres constituted detention. The Supreme Court adopted an approach that seems to make it easier to establish

[238] *AG v Secretary of Justice*, [54]

[239] Ibid.[28]

[240] Ibid.[29]

[241] Ibid.[30]

a legal situation of detention. Indeed, the Court dealt little with this question and largely implicitly accepted the existence of detention. [242] The Court seemed to utilise an approach of assuming detention and focusing instead on the question of legality.[243] This assumption of detention approach is an interesting one, and made proving detention in offshore centres substantially easier than in the Nauruan case. In contrast, the Nauruan Court's focus was equally concentrated on both limbs of the right to liberty test. Regardless, both cases found detention, each with differing juridical approaches, suggesting proving detention would likely be probable in a potential European processing centre.

Aside these two analogous cases and their use of ECtHR case law, other European cases support an argument in favour of processing centres constituting detention centres. In *Khlaifia and others v Italy*,[244] the ECtHR confirmed the Court's broad approach to defining detention, emphasising that the circumstances of the alleged detainee are most important. The Court confirmed it will ignore the names by which detention centres are designated, and instead will focus on the facts and the factors of the alleged detention. This is relevant for offshore processing systems, as governments often argue that they are designated as temporary transition centres or other names and thus cannot constitute detention centres. *Khlaifia* underlines the Court's emphasis on substance over form for noting detention. In *Amuur v France (1996)*[245], the ECtHR found that the ability of an asylum seeker to

[242] *Namah v Pato*, [33]

[243] For an analysis of the judgment: Tully, *'International law: Manus island regional processing centre illegal under PNG law*', LSJ: Law Society of NSW Journal, no. 23, 2016, p.84-85.

[244] Judgement of 15 December 2016 *Khlaifia And Others v Italy*, application no. 16483/12.

[245] Judgement of 25 JUN 1996,AMUUR V FRANCE, application no. 19776/92, ECHR 1996.

return to their home country or another third-country has no bearing on whether they are being detained. The Nauruan Supreme Court followed this principle in *AG v Secretary of Justice* finding that the processing centres on the island constituted detention centres despite detainees' ability to return home.[246] This is relevant because the Australian offshore system includes the concept of voluntary return. The Australian government has emphasised this element, assuring the community that all asylum seekers in Nauru are not prevented from going back to their country of origins, facilitated through a simple procedure agreed with UNHCR and IOM. Since the global approach to refugees is premised on the concept of voluntary return, a possible European application of the offshore process will likely include a similar policy. Lastly, detention must be used as a measure of last resort only when other less coercive measures are insufficient to protect the private or public interest concerned.[247] European governments seeking to establish processing centres in third countries will need to demonstrate that such detention is necessary and justifiable.

Based on the above analysis, it seems probable that an offshore processing system like that of Australia, in small and controlled camps, would satisfy the first limb of the ECHR's right to liberty test and constitute detention. However, if a European offshore processing system were implemented with different characteristics, the strict approach of the ECtHR may be avoided. Such different characteristics may include larger processing camps, or even open ones, where asylum seekers have access to job opportunities and safe environments. Indeed, it seems probable that a European offshore processing centre would seek to avoid the more criticised elements of Australian refugee policy, putting in stronger safeguards for human rights.

[246] *AG v Secretary of Justice*, [30]

[247] Judgement of 29 January 2008 *Saadi v United Kingdom*, application No. 13229/03, ECHR 2008, [70].

Such an attempt may reflect form over substance, but it will nonetheless potentially be significantly better than the Australian system. However, even with such changes, the above cases indicate that the ECtHR's case law has focused on the 'concrete situation' of those whose liberty has been limited. The consequence of this is that even with significant changes to processing centres to make them more open, hospitable, and formally more human-rights compliant, it will be difficult for centres to avoid designations as places of detention. Overall, on similar facts, or with facts that cumulatively suggest a concrete situation of restriction or deprivation amounting to detention, it is probable that the ECtHR would find offshore processing in Europe to include detention.

Having likely satisfied the first limb of the Article 5 right to liberty test, the ECtHR would be required, by the two-step nature of Article 5, to proceed to the second limb of the Article: the lawfulness of detention.

3.6.4. Lawfulness of Detention

Article 5 includes derogations that make detention lawful. The relevant one for the potential application of offshore processing in Europe is 5(f):

'[T]he lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'

This derogation contemplates two circumstances in which detention would be lawful. First, where migrants are detained for the purpose of avoiding an illegal entry into the contracting party state. Secondly, the detention is allowed for those who are to be deported or extradited from of the contracting states. This section first deals with the illegal entry exception, and then the deportation exception.

3.6.5. 5(f) illegal entry exception

The PNG Supreme Court, in the *Namah* case handed down on 26 April 2016, grappled with the application of exceptions to the right to liberty in

offshore processing. The PNG Constitution contains a similar right to liberty, and a similar list of exceptions in which the deprivation of liberty is permitted. Among the exceptions is one analogous to 5(f), with the two alternative bases for lawful detention. The Court questioned the application of the 'prevention of unauthorised entry' derogation. The PNG Government had argued that the exception applied as asylum seekers were illegal arrivals who needed to be detained to prevent their unlawful entry into the country. However, the Supreme Court held that the first exception in the Article cannot apply for two reasons. First, by the system's very nature the asylum seekers have no choice as to the location of the processing centre to which they are relocated. The Court noted that the asylum seekers' intention was always to reach Australia, but they were transported and detained on Manus Island against their own will.[248] More importantly though, the Court also noted that the Minister for Foreign Affairs had issued permits (visas) that made the entry of the asylum seekers lawful, to ensure the functioning of the system. Prior to the issuing of these permits, the Court's implication was that the system may have been unlawful because it may have been illegal under domestic migration law. This is because the PNG Government, under the processing system, brought non-visa holders into the country. Even with the permits, the Court found detention unlawful because the permits made the asylum seekers' entry authorised, and thus outside the scope of the illegal entry derogation. The PNG Court thus concluded that the first derogation did not apply to the offshore processing system, either because people were forced to go to the third country or because they were granted visas that made their entry lawful. The Nauruan Supreme Court in AG v Secretary of Justice also struck down the exception on the basis that visas were provided to asylum seekers. Overall, both Courts adopted an approach

[248] *Namah v Pato,* [37].

that emphasised the substance rather than the form of the lawfulness of detention, and sought to substantively uphold the human rights of asylum seekers.[249]

Such an interpretation has important consequences for a European offshore processing system legally justified on the first exception in Article 5(f) of the ECHR. Similar issues to those that arose in the PNG and Nauru systems would be replicated in any European system, and the ECtHR would have to ask whether they acted to render the illegal arrival exception inapplicable. An offshore processing system in Europe would require a forced transfer of asylum seekers to third countries, either by diverting them at sea or by removing those who had arrived on the European mainland. The ECtHR would likely adopt a similar view to that of the PNG Court in finding that asylum seekers had not chosen to go to a third country, and that their arrival there could thus not be illegal. Alternatively, asylum seekers are not illegal if they have been granted a visa. The granting of such visas or permits seems to be a necessary requirement to make the system function in the domestic law of third countries, as the situation in Nauru and PNG demonstrates. If the states that were to function as third countries followed the Australian model, they too would have to provide visas, thus precluding the illegal arrival exclusion. Regardless, it is difficult to foresee a situation in which the ECtHR would allow the application of the illegal arrival exception to offshore processing detention. This is because it is clear that the asylum seekers' destination was Europe. The ECtHR, as discussed above, emphasises substance over form in the protection of human rights, and clever legal tricks that would seem to make an arrival 'illegal' would likely be recognised a such and set aside by the Court. As is clear from Article 5 and the ECHR generally, it is not sufficient that domestic law

[249] *Namah v Pato*, [56].

assesses an arrival as illegal.[250] The Court will carry its own assessment of whether the arrival was substantively illegal, and the forced transfer of asylum seekers to the third country would likely be key in its decision making. Overall, emphasising the lack of autonomy on the asylum seekers' part, the Court would likely find the illegal arrival exception inapplicable to third country offshore processing detention centres.

3.6.6. Deportation or extradition

Both the second limb of article 5(1)(h) of the Nauruan constitution and the second limb of article 5(f) of ECHR contain a provision that allows detention for reasons of removal from a country. Under both provisions, legality hinges upon asylum seekers being removed from the country that has control over the detention centre. Thus, were an ECHR contracting state to introduce an offshore processing system in a third country, the contracting state would be precluded from accepting refugees from that detention centre. This was illustrated by the Nauruan case *AG v Secretary of Justice*, in which the Supreme Court found that the detention of asylum seekers in Nauru fell within second limb of Article 5(1)(h). This was because, under the agreement signed by Australia and Nauru in 2012, the asylum seekers detained in Nauru would not be relocated in Nauru. This satisfied the Nauruan constitution, in that they would be 'removed' from Nauru regardless of whether their asylum was successful and the purpose of their detention is at all times for deportation from Nauru. They would either be returned to their home country if unsuccessful, or relocated to another country if successful.[251] Were the ECtHR to adopt similar reasoning, the introduction of offshore processing by an ECHR contracting state would be

[250] Council of Europe, *Guide on Article 5 of the Convention*, June 2014, http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf (last accessed 12 January 2017).

[251] *AG v Secretary of Justice*, [72]

lawful under Article 5(1)(f) of the ECHR only if asylum seekers are detained in a third country for the sole purpose of facilitating their removal from the contracting party. This means that they must be relocated to a state other than that of the contracting party both if they are recognised as asylum seekers and if they are not entitled to refugee status. Thus, the deportation exception in the ECHR would apply where it was clear they were being detained for the sole purpose of removal, and where the asylum seeker will not be permitted to return to the contracting party as an accepted refugee, as this would suggest their detention was for assessing the validity of their claim.

Recent developments in the Australian offshore processing system have underlined this argument. In particular, under a 2013 Memorandum of Understanding between Australia and Nauru, asylum seekers are now relocated in Nauru after the recognition of their asylum status. Professor Azadeh Dastyari has argued that this change renders the detention of asylum seekers unlawful.[252] The MOU contemplates a temporary relocation into the Nauruan community of those detained in the processing centre. Recognised refugees are relocated in Nauru for a period that can last up to 10 years, before being transferred to Cambodia. Dastyrari suggests that the relocation of refugees into the Nauruan community makes their detention unconstitutional under Article 5(1)(h) because the detention is no longer solely for the purpose of removal. This change came about because of practical constraints, mainly the difficulty of finding third countries willing to take refugees recognised in Nauru. Furthermore, refugees are not always willing to go to the third countries that have been selected. For example, Cambodia has taken just five refugees since the 2013 agreement, two of

[252] Dastyari, Detention of Australia's Asylum Seekers in Nauru: Is Detention by Any Other Name Just As Unlawful? University of New South Wales Law Journal, Vol. 39, No. 2, 2016, p 669-694, p 683.

whom have returned to their home country citing the lack of employment opportunities and poor conditions. This situation also led to many complaints from the national and international community.[253] This situation demonstrates another difficulty regarding offshore processing in Europe. ECHR contracting states not only have to find a third country willing to detain asylum seekers for a temporary period but also find countries that are willing to accept recognised refugees. The scale of these agreements would be significant if the recent number of refugees entering Europe is any indication. The failure of the Cambodia agreement is a warning about the difficulty of finding another country where refugees will be willing to settle. The principle in offshore processing is that refugees retain the right to decide whether to be resettled in a proposed country, and they can select to either return home or stay in the local community or remain in detention. The unwillingness of refugees to be resettled will be a particular problem if, as would likely be the case, third countries include poorer nations.

Based on the above analysis, it is possible that the ECtHR will find Article 5(1)(f)'s 'deportation and removal' exception will apply. However, offshore processing must be carried out in a specific way, that results in deportation for all asylum seekers and precludes their ability to be resettled in the contracting state. Though this reasoning is perhaps the most likely that the ECtHR would adopt, the Court may also adopt more innovative or unusual approaches in reading the 'removal' exclusion. Perhaps the simplest of these would be the argument that asylum seekers had already been deported from

[253] Kaldor Centre for International Refugee Law, *Agreement between Australia and Cambodia for the relocation of refugees from Nauru to Cambodia*, January 2017, http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Cambodia-agreement_0117.pdf (last accessed 17 January 2017).

Gleeson: '*Offshore: behind the wire on Manus and Nauru*',New South Publishing,Sydney, 2016. p. 292-304. The agreement between Australia and Cambodia arose many international warnings and only 5 people have been resettled to Cambodia. 2 of them decided to return to their country of origins.

the ECHR contracting state once they were removed from their country of arrival. After this they may be move to a third country housing a processing centre, but they have been 'deported' from the first country of arrival. Thus, their detention in a third country would be unlawful, as deportation had already occurred. This argument would have a strong precedent in the Court's previous interpretations of 'deportation', which have held it to be a physical act that encompasses the removal of a person. [254]Such an argument could render offshore processing, operating on the basis of the removal exception, unlawful.

3.6.7. Prolonged detention

Even were the ECtHR to find that detention in processing centres was justified on one of the two exceptions in Article 5(1)(f), the detention of an asylum seeker may become subsequently illegal. In this, the ECtHR has focused on detention times, which are an issue in the Australian offshore processing system. Excessive detention occurs where a person is detained longer than is necessary for the execution of the purposes of their detention. This issue arose in *AG v Secretary of Justice*, which explored the concept of excessive detention. The applicant in that case argued that a 'long and unreasonable delay' in processing asylum claims of those detained in the Nauru Centre amounted to an arbitrary detention because it makes the detention 'not authorised by law.'[255] The Court did not accept this claim because, at that time, the period in detention had not became excessive. However, this issue may arise if time spent in detention by asylum seekers becomes excessive according to a court. In assessing whether a period in detention is excessive, the Nauru Court observed it would examine the

[254] Jacobs, Wicks, Ovey,Op.cit, p 238.

[255] *AG v Secretary of Justice* [79]

duration of detention and the status of the asylum seeker.[256] Scholars have argued recently that the period spent in detention on Nauru, being around two and a half years for some, now amounts to prolonged detention. Dastyari points to unreasonable delays and the lack of a clear date for removal as evidence of this.[257] Thus, it is now probable that at least some asylum seekers have been subjected to unlawful prolonged detention in Nauru.

Excessive lengths of detention are thus relevant for the application of an offshore process in Europe, particularly because of ECtHR case law that emphasises the need for reasonable detention times. There are two bases upon which the Court may find a detention has become unlawful: it is no longer for the purpose originally intended; or the purpose has not been carried out with 'due diligence' by the authorities.[258] Lawful detention for reasons of removal under the ECHR requires an actual and consistently present intention to remove a person. This can be contrasted with the Nauru Constitution, under which the mere expressed purpose of eventually removing a person from Nauru is sufficient. This allows us to distinguish the decision in *AG v Secretary of Justice*, because the ECtHR requires a higher threshold to justify detention for removal. *In Saadi v United Kingdom* the Court commented that the detention must at all times be 'closely connected' with the purpose for which it initially occurred. [259] Thus, the Court will, on application from an asylum seeker, ask whether the detention is still for the purpose of either preventing illegal entry or removing the person. If it is not, the detention will be unlawful. The other

[256] Ibid, [79]

[257] Dastyari, *Op. cit*, p 685.

[258] Judgement of 19 Feb 2009, *A and Others v United Kingdom*, application no. 3455/05.

[259] Judgement of 29 January 2008 *Saadi v United Kingdom*, application No. 13229/03.

possible basis for illegal detention is where it has been unnecessarily prolonged due to failures on the part of the authorities. This is also linked somewhat to purpose, though it is a separate argument. This link was demonstrated in *Saadi,* where the Court commented that the length of detention should not exceed that reasonably required for the purpose pursued.[260] It must be shown that the delays in detention are attributable to the authorities, and that they were unreasonable. There is thus no specific time period after which a delay is unreasonable, and an analysis requires looking at an applicant's specific circumstances. For example, in *Chalal v United Kingdom*[261], the Court accepted the prolonged detention of the applicant, which lasted six and a half years, because the authorities were always aiming to end procedures for removal with 'due diligence throughout all the deportation proceedings.'[262] The delay was attributable to the necessity of ongoing appeals and administrative decisions, that the ECtHR concluded were necessary in light of the seriousness of the case. In total, the British Home Office spent 13 months examining Chalal's refugee application, but the Court found the authorities' delays were justifiable due to the complexity of the case and the national security issues raised if he were a terrorist. However, scholars have noted that the applicant was detained this long despite never having been convicted of a crime, and that a particularly 'high standard of speed and diligence' should have been adopted by the authorities, which the Court seemed not to have required. [263]Offshore processing in Europe would have to ensure that the processing

[260] *Saadi v United Kingdom,* application No. 13229/03 [74.]

[261] Judgement of 15 November 1996, *Chalal v United Kingdom,* application no. 22414/93, ECHR 1996.

[262] *Chalal v United Kingdom,* application no.22414/93 [123]

[263] Jacobs, Whicks, Ovey, *Op cit*, p 239.

of asylum seekers for deportation, under either exception in Article 5(1)(f), occurs expediently and is always about the removal of the person.[264]

3.7. Conclusion

This chapter has explored the similarities between the process of securitization which occurred in Australia, just before the adoption of the offshore processing system, and the comparable process that is currently happening in Europe. As the Tampa crisis in Australia illustrates, the threat represented by a 'migration crisis' can be the trigger for the adoption of unprecedented asylum policies. The language used by Prime Minister Howard during the Tampa Crisis is similar, or even identical, to the language used by some European leaders and media. Moreover, the language of the EU Agenda recalls metaphors of war that are strategic to draw lines between 'them' and 'us' and to individuate enemies to fight. As a consequence, specific policies are taking place in Europe.

Unlike Australia, Europe has important human rights treaties, such the ECHR, which constitutes a barrier to political choices. In light of this rule of the court, I analysed the right to liberty that is going to be explored, among

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[264] It is not possible to analyse the compliance of the Australian Offshore processing system with International Law but the literature is extremely broad, here just few readings:

Morales, '*Australia's Guantanamo Bay: how Australian migration laws violate the United Nations Convention Against Torture*', American University International Law Review, vol. 31, no. 2, 2016, p. 327-350.

Saul, 'Dark justice: *Australia's indefinite detention of refugees on security grounds under international human rights law'*, Melbourne Journal of International Law, vol. 13, no. 2, 2012, p. 685-731.

White, Thornton, Hunsberger, Meier, Curran, 'International Refugee Law", The International Lawyer', vol. 47, no. 4, 2013, p.. 349-354.

other fundamental rights, if the court will eventually have to deal with the possible offshore processing system.

Conclusion

After a general description of the answers that the EU Agenda sought to provide to the 'migration crisis', a deep analysis of the implementation of the hotspot system in Italy followed. The second chapter demonstrated that the Italian implementation was fast and disorganised, through a series of decrees that did not explain what the hotspots are until the SOP in June 2016. The registration and identification procedures varied among hotspots and it is still not clear which type of facilities the hotspots are. This ambiguity regarding the legal status of hotspots does not clarify if they have to be seen as first aid centres or as identification and expulsion centres. This lack of clarity raises issues of legality under Italian law, because if they are first aid centres, domestic law does not allow any type of detention in these centres.

Moreover, several NGOs reported a situation of prolonged detention in the centres, a situation that seems to be caused by overcrowding and by asylum seekers' reluctance to be fingerprinted.

Other problems concern the right to asylum, a core principle of EU law. The clear violation of the principle is the topic of various NGOs reports. This overall situation shows that the hotspot approach has been adopted at the EU level without considering the practical consequences of its adoption and little regard for human rights. Consequently, the hotspot approach created centres in which people are detained in awful conditions without proper access to asylum. A policy with these features seems to focus more on control of people and borders than on the respect of human rights of those escaping wars. This focus on control of people and borders has some similarities with the Australian model that brings these concepts to their extreme, to the extent that people are processed in third countries.

Consequently, the third chapter showed that the process of securitization that characterised Australia before the adoption of the Offshore Processing System is comparable to the securitization process that is happening in Europe after the explosion of the 'migration' or 'refugee' crisis. The language of war is the key language of media and political leaders. An external issue, such as the Tampa crisis in Australia, can justify the adoption of policies that have not been considered before. An offshore processing system, thus, becomes a possible, and explicable, option for Europe. The ECHR, however, puts some boundaries to its application. The recent judgments of the Nauru and Papua New Guinea Supreme Courts have, for different reasons, struck the offshore processing system down. When making these decisions, the two courts integrated the jurisprudence of the ECtHR and took into consideration Art 5 of ECHR. They also analysed Articles in their respective constitutions that are analogous, even identical, to Article 5 of the ECHR. Chapter three demonstrated, with further analysis of the ECtHR, that the adoption of an offshore processing system in Europe would likely be in contravention of an ECHR contracting state's duties under the Convention. This is aside from being problematic for practical reasons.

The paper has demonstrated that EU refugee and migration policies are undergoing rapid and unprecedented change. Driven by external and internal issues, policies are being rewritten with little thought to their practical implementation or their legal, let alone ethical, underpinnings. This change, as the discussion around an Australian offshore processing system illustrates, is not a surprise. It has been foreshadowed by steady changes in language, as refugees become irregular migrants, the 'other' who is 'invading, and first aid centres become hotpots. Perhaps soon they will become offshore processing centres, another euphemistic term that obscures their nature as places of extended, often indefinite, detention. However, if

European states do introduce such a policy, it will again be with little thought to its legality or practicality in the EU context.

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