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Humanitarian visas versus the Dublin system. Exploring (im)possible legal pathways.

Supervisor
Ch. Prof. Sara De Vido

Assistant supervisor
Ch. Prof. Pierre-François Laval

Graduand
Alessandra Biscaro
854809

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A mia nonna Claudia,

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ABSTRACT

Il diritto di asilo vanta una lunga storia che risale ai tempi antichi. Inizialmente il termine "asilo" aveva un significato religioso, infatti numerosi templi in Grecia venivano utilizzati dalle persone in cerca di rifugio. La storia del diritto di asilo venne poi segnata dalla tradizione religiosa, poiché le chiese cristiane divennero luogo di rifugio e protezione dei richiedenti asilo.

All'inizio del XX secolo, i movimenti di persone diventarono più consistenti in seguito alla fine dei due conflitti mondiali. Per far fronte al crescente numero di persone richiedenti asilo, vengono creati i primi strumenti di protezione internazionale, come l'Alto Commissariato delle Nazioni Unite per i Rifugiati.

Il diritto d'asilo venne riconosciuto per la prima volta dal diritto internazionale dalla Convenzione relativa allo statuto dei rifugiati del 1951 e dal Protocollo di New York del 1967. La Convenzione è spesso definita come il pilastro della protezione dei rifugiati, in quanto essa definisce il termine rifugiato ha cercato per la prima volta di stabilire un codice dei diritti dei migranti. Vengono riconosciuti i diritti alla sicurezza sociale, all'assistenza sociale e all'istruzione nel tentativo di garantire ai rifugiati gli stessi diritti concessi agli stranieri legalmente residenti nel paese di asilo. La Convenzione sancisce un principio fondamentale: il principio di non respingimento (*non-refoulement*). Tuttavia la definizione fornita dalla Convenzione di Ginevra risulta molto generica. Inoltre è importante sottolineare che anche se il diritto di asilo è riconosciuto dal diritto internazionale, tale diritto non corrisponde ad un obbligo in capo agli Stati.

L'Unione Europea ha cercato di colmare queste lacune nella protezione dei rifugiati attraverso una progressiva comunitarizzazione del diritto di asilo. Con l'entrata in vigore del Trattato di Amsterdam le materie di asilo e immigrazione sono entrate a far parte delle competenze dell'Unione Europea, conferendo così alle istituzioni un ruolo maggiore. Successivamente, il Consiglio Europeo di Tampere del 1999 ha segnato una svolta nell'impegno degli Stati Membri nella politica estera. Più recentemente, gli Stati Membri si sono impegnati nel sviluppare un quadro legislativo comune: il sistema europeo comune di asilo (CEAS). Diverse direttive e regolamenti sono stati adottati al fine di armonizzare la legislazione di ogni stato a quella europea. Le più importanti sono la direttiva procedure che disciplina il procedimento delle domande di asilo, la direttiva sulle condizioni di

accoglienza che garantisce adeguate condizioni di accoglienza ai richiedenti asilo, la direttiva qualifiche che stabilisce le condizioni per la concessione della protezione internazionale. Inoltre grazie al regolamento EURODAC è stata istituita una banca dati per le impronte digitali dei richiedenti asilo a livello europeo.

Il regolamento di Dublino stabilisce i criteri per l'identificazione dello stato responsabile per l'esame della domanda di asilo. Il sistema presenta numerose problematiche. Fra le altre, la più importante è che il regolamento prevede che lo stato responsabile è lo stato di ingresso della persona, ciò significa che la responsabilità di molte domande incombe su un numero limitato di paesi.

La libera circolazione delle persone all'interno del territorio degli Stati Membri è uno dei principi fondamentali dell'Unione Europea. I trattati di Roma prevedevano le cosiddette "quattro libertà", ovvero la libera circolazione delle persone, delle merci, dei servizi e dei capitali. L'accordo Schengen fu firmato nel 1985 al fine di favorire la libera circolazione delle persone nella cosiddetta "area Schengen" ma allo stesso tempo di garantire una gestione più sicura dei flussi migratori.

Negli ultimi anni un numero crescente e apparentemente inarrestabile di persone ha cercato di fuggire dal loro paese di origine e dalle violenze cui erano soggetti con l'obiettivo di raggiungere l'Europa e cercare protezione. Secondo le statistiche pubblicate da Eurostat per il 2019, questi flussi migratori hanno interessato prevalentemente Germania, Svezia, Francia, Italia e Regno Unito.

Purtroppo però, le statistiche mostrano che dal 2012 il numero di domande di asilo è costantemente aumentato, raggiungendo un picco di 1,3 milioni nel biennio 2015-2016, durante la cosiddetta "crisi dei rifugiati". Inoltre, i dati mostrano che nel 2019 più di 600 000 persone hanno fatto domanda di asilo, proveniente prevalentemente da Siria, Afghanistan e Venezuela.

Nonostante la politica comune degli Stati Membri, l'Unione Europea ha dovuto affrontare alcuni problemi durante la recente crisi migratoria. Questo ha contribuito a creare forti tensioni fra gli Stati Membri. Se da un lato numerosi sono disposti a cooperare, dall'altro alcuni auspicano soluzioni sempre più radicali come la chiusura delle frontiere o programmi di rimpatrio forzato. Questo dibattito rappresenta purtroppo un tema scottante nel dibattito Europeo, e sono sempre più frequenti le immagini di persone costrette a lasciare il proprio paese e affrontare viaggi pericolosissimi per raggiungere l'Europa.

L’elaborato si interroga quindi, sulla base dello sviluppo a livello europeo del diritto di asilo, sull'esistenza di modalità giuridiche per consentire ai richiedenti asilo di raggiungere il territorio senza mettere a rischio la loro vita.

La tesi si struttura in due parti principali. Ogni capitolo è basato su diverse fonti tra cui libri e articoli, documenti ufficiali delle istituzioni, documenti rilasciati da organizzazioni internazionali e organizzazioni non governative, nonché fonti di diritto internazionale ed europeo.

La prima parte si propone di indagare sull’esistenza del diritto di asilo e sull'efficacia della protezione dei richiedenti asilo, partendo da una panoramica sulla protezione di esso a livello internazionale e a livello europeo. E’ in questa sezione in cui viene svolto lo studio del diritto di asilo come diritto fondamentale e dei diritti ad esso correlati, ovvero del principio di *non-refoulement* e del divieto di tortura e delle pene o trattamenti inumani o degradanti protetti dalla Convenzione Europea dei diritti dell’uomo e dalla Carta dei diritti fondamentali dell’Unione Europea. Particolare attenzione è dedicata inoltre al sistema europeo di accoglienza dei richiedenti asilo. Il lavoro si propone infatti di indagare più approfonditamente sul Trattato di Schengen, in particolare sul Sistema europeo dei visti, e sul Sistema di Dublino, concentrandosi su una analisi degli aspetti positivi e negativi di entrambi.

Il primo capitolo affronta il tema del riconoscimento del diritto di asilo e sottolinea l'importanza della convenzione delle Nazioni Unite sullo status dei rifugiati del 1954 e del suo protocollo aggiuntivo del 1967 per la protezione dei rifugiati e dei richiedenti asilo.

La presente tesi si propone innanzitutto di chiarire il significato delle definizioni di richiedente asilo, migrante e rifugiato. I richiedenti asilo (e di conseguenza i rifugiati), sono definiti dalla Convenzione di Ginevra come le persone che decidono di lasciare il proprio paese a causa di un timore fondato di persecuzione e di richiedere protezione internazionale in un altro paese. Al contrario, sono considerati migranti coloro che si spostano dal paese di origine per motivi legati ad esempio a lavoro, studio o ricongiungimento familiare. Questa distinzione è molto importante perché le tre categorie sono protette da diversi strumenti giuridici.

Il capitolo indaga inoltre l’applicabilità al di fuori del territorio dell’Unione Europea dei due strumenti rilevanti per la protezione dei diritti dei rifugiati: la Convenzione Europea dei diritti dell’uomo e dalla Carta dei diritti fondamentali dell’Unione Europea. Gli strumenti prevedono uno dei principi fondamentali, ovvero il divieto di tortura e

trattamento o pena disumano o degradante rispettivamente all'articolo 3 e all'articolo 4. Viene inoltre sottolineata l'importanza del principio di non respingimento (*non-refoulement*).

Il secondo capitolo offre una panoramica dettagliata dell'evoluzione della politica europea in materia di asilo, descrivendo il processo lento che ha portato dalla cooperazione intergovernativa alla politica comune. Se inizialmente con la nascita Comunità Economica Europea l'interesse riguardava puramente l'aspetto economico, la questione della circolazione delle persone, sia cittadini degli Stati Membri che di paesi terzi è emersa successivamente. L'idea della libera circolazione delle persone è infatti diventata effettiva solo nel corso degli anni 90 con l'adozione dell'accordo Schengen e dell'Atto Unico Europeo. Con l'accordo Schengen, vengono eliminati i controlli alle frontiere per favorire uno spazio di libera circolazione. Tuttavia gli Stati Membri possono reintrodurre i controlli in situazioni particolari, come in caso di grave minaccia all'ordine pubblico oppure per questioni di sicurezza interna.

Il capitolo offre inoltre una analisi dei due pilastri del sistema europeo in materia di asilo, ovvero il Codice dei Visti e il Regolamento di Dublino. Se il regolamento del 2009 sul Codice dei Visti stabilisce le linee guida per il rilascio dei visti di breve durata, è interessante sottolineare che i visti a lungo termine dipendono ancora dalla legislazione nazionale degli Stati Membri. Il capitolo cerca di rispondere a una domanda molto specifica, ovvero se i visti a validità territoriale limitata (VTL) potrebbero costituire un mezzo alternativo per le persone per raggiungere il territorio dell'Unione europea. Questi tipi di visti possono essere rilasciati in alcune condizioni, ad esempio per motivi umanitari. Tuttavia, la nozione di motivi umanitari è ambigua e gli Stati membri dispongono di un ampio margine di discrezionalità.

Il capitolo evidenzia successivamente i punti forti e le debolezze del sistema di Dublino. Il capitolo esamina uno dei principi fondamentali del sistema di Dublino, vale a dire il principio della fiducia reciproca.

Nel terzo capitolo viene trattata in modo più dettagliato la politica europea in materia di visti e la competenza degli Stati membri. Inoltre, la controversa sentenza della Corte di Giustizia sul caso X e X c. Belgio del 2017 (C-638/16 PPU) e le conseguenze di essa nell'attuale politica europea vengono analizzate al fine di poter osservare gli elementi identificati nei primi capitoli in un esempio più concreto.

Il quarto capitolo di questo lavoro si concentra sui recenti sviluppi della politica europea in materia di immigrazione. A tal fine, l'analisi si concentra su due dimensioni: quella interna e quella esterna. Nonostante gli sforzi degli Stati Membri per la creazione di un quadro giuridico comunitario, l'armonizzazione nella politica interna sembra non essere ancora stata realizzata. Infatti anche se gli Stati Membri si sono impegnati a promuovere criteri comuni per i rifugiati e a lottare contro l'immigrazione illegale, essi sembrano non essere così disposti a cedere la loro sovranità sulla questione della sicurezza e dei controlli sui flussi di persone che entrano nel loro territorio. Dall'altro lato, gli Stati membri sembrano essere più unanimi in materia di politica estera. L'Unione europea si è impegnata nella questione migratoria attraverso la prevenzione e la cooperazione con i paesi terzi. L'attività di prevenzione riguarda la messa in atto di programmi come il reinsediamento e la delocalizzazione, l'ammissione umanitaria e la protezione regionale. Allo stesso tempo l'Unione Europea si è concentrata sulla cosiddetta "esternalizzazione", ovvero alla firma di accordi con paesi terzi al fine di impedire alle persone di raggiungere il territorio europeo. Questi tipi di accordi hanno numerosi vantaggi, come quello di permettere agli Stati di spostare l'onere della questione e allo stesso tempo eludere gli obblighi previsti dagli strumenti internazionali in materia di diritti umani.

Particolare attenzione è rivolta alla dichiarazione UE-Turchia e all'accordo Italia-Libia. Anche se gli accordi bilaterali si sono dimostrati efficaci, sono stati oggetto di forti critiche e la loro legalità è stata messa in discussione. Inoltre, il capitolo esamina le opzioni e gli strumenti forniti dall'Unione europea per entrare nel territorio in modo legale. Infine, il capitolo terrà conto dei vantaggi derivanti dall'apertura di nuovi percorsi legali verso l'Unione europea.

LIST OF ABBREVIATIONS

AG	Advocate General
AIDA	Asylum Information Database
CCV	Community Code on Visa
CFR	EU Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CoE	Council of Europe
FRA	Fundamental Rights Agency
EASO	European Asylum Support Office
EC	European Community
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
EUTF	EU Emergency Trust Fund for Africa
ICJ	International Court of Justice
IOM	International Organisation for Migration
LIBE	Committee on Civil Liberties, Justice and Home Affairs
LTV	Limited territorial validity

MEP	Member of the European Parliament
OAU	Organisation of African Unity
RDPR	Regional Development and Protection Programme
RPPs	Regional Protection Programmes
SEA	Single European Act
SIS	Schengen Information System
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TFM	Task Force Mediterranean
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
VIS	Visa Information System

INTRODUCTION

The right to asylum is not recent but has a long history. At the beginning this term had a religious meaning because numerous temples in Greece were used as a refuge for those who tried to escape from the abuses of power. The history of asylum was then marked by religious traditions because asylum could be sought in Christian churches. During the first part of the 20th century, above all in the aftermath of the two global conflicts, the movement of persons seeking asylum became more substantial. The first instruments for the protection of those fleeing from their country of origin started to be developed, for instance the UN High Commissioner for Refugees[1].

The right to asylum was recognised by the International law for the first time by the UN Geneva Convention on the Protection of Refugees in 1951 and its New York Protocol of 1967. The Convention is often defined as the pillar of the refugee law. In fact, it tried for the first time to establish a code of the refugees' rights covering all the aspects. Moreover, it provided for the definition of refugee, mainly focusing on the concept of fear of persecution and enshrines a core principle: the principle of *non-refoulement.* Furthermore, the Convention can be considered the first attempt to guarantee refugees the rights granted to foreigners legally resident in the country of asylum. The definition provided by the UN Geneva Convention was however very general. It is important, nevertheless, to underline that, even if the right to asylum is recognized by International law by several other Conventions, this right does not correspond to an obligation for States to grant it.

The right to asylum has followed the various stages of European integration. The Maastricht Treaty promoted cooperation for the migration policy, but it was not until the entry into force of the Treaty of Amsterdam that immigration and asylum became part of the competences of the European Union, thus giving the European Institutions a greater role on the issue. The Tampere Council of 1999 marked a turning point for the commitment of the States to integrate migration into EU foreign policy.

More recently the EU Member States have engaged in developing a common framework for the right to asylum as well as the flux of people circulating within the territory: the

[1] E. Benedetti, *Il diritto di asilo e la protezione dei rifugiati nell'ordinamento comunitario dopo l'entrata in vigore del Trattato di Lisbona,* CEDAM, Milano, 2010, pp. 43-48.

Common European Asylum System. Several Directives and Regulations have been adopted in order to harmonise the national legislation of the EU Member States. Among the others, the Temporary Protection Directive, the Family Reunification Directive, the Qualification Directive, and the Dublin System[2]. These instruments represent a step forward as regards the protection of the rights of asylum seekers. However, their provisions are not very restrictive and leave the door open to many exceptions and different interpretations.

The Dublin system (which firstly was the Dublin Convention, then became the Dublin II Regulation and nowadays the Dublin III Regulation) provides for the criteria to identify the State responsible for examining the application. The main objectives of the Dublin Regulation are to avoid the so-called phenomena of asylum shopping and orbiting. However, the system presents numerous problems. Among others, the most important is that the regulation provides that the state responsible is, according to some pre-established criteria, the state of entry of the person. This means that the responsibility is not fairly distributed between all the EU States. According to this principle, the vast majority of the applications are indeed under the responsibility of a few Member States which, primarily because of their geographical position, find themselves under greater pressure[3].

On the other side, the freedom of movement of persons is one of the core principles of the European Union. The Treaty of Rome provided for the so-called "four freedoms": the freedom of movement of persons, goods, services, and capitals. In addition to this, the Schengen agreement gave effect to the freedom of movement of individuals but at the same time provided for safer management of migration to guarantee internal freedom.

In recent years a growing and apparently unstoppable number of people have tried to flee their country of origin with the aim of reaching Europe and seeking for help, protection, and protection of fundamental rights.

According to Eurostat, the countries receiving the greatest amounts of applications are Germany, Sweden, France, Italy, and the United Kingdom. Reports and data describe a worrying situation. Since 2012, the number of applications has constantly increased,

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[2] European Commission, *the Common European Asylum System*: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en

[3] B. Garcés-Mascareñas, *Why Dublin "doesn't work*", Notes Internacionales CIDOB 135, November 2015, pp. 1-3.

reaching a peak of 1.3 million in 2015 and in 2016 during the so-called "refugee crisis"[4]. The latest asylum trends show that in 2019 more than 600 000 persons applied for asylum in the European Union. The countries producing the greatest numbers of asylum seekers are Syria and Afghanistan, with more than 7000 applications each, and Venezuela. In addition to this, around 850 000 cases are pending before the national authorities[5].

It is also important to stress the fact that the routes chosen by migrants and asylum seekers are continuously evolving. As a matter of fact, a great number of persons flee from Libya and Tunisia towards Italy or Malta, choosing the Central Mediterranean Route. Another possible route is the Eastern Mediterranean route between Turkey and Greece, which has been privileged by persons fleeing from the Syrian conflict. As it will be analysed later, the European Union has put a lot of effort into trying to stop the flux from these routes by signing bilateral agreements, such as the EU-Turkey Statement. This has resulted in an increase in the number of persons choosing the Western Mediterranean route from Morocco to Spain[6]. The continuous evolution of the migratory flux makes it more difficult for the EU policymakers to tackle the issue.

Despite the Common European Asylum System, the European Union has faced some obstacles during the current increasing migration flux. Migrants try to reach Europe expecting protection from European states. This has contributed to creating strong tensions and divisions between the Member States. Indeed, some of them have appeared to be willing to cooperate, whereas others wanted increasingly radical solutions such as the closure of borders or forced returns programmes.

The current refugee crisis represents a hot topic in Europe and the images of people forced to leave their country to save their lives appear more and more often on our televisions and newspapers. The issue is being used by many politicians to fuel their campaigns to maintain national identity, thus creating in citizens the idea that immigration is a challenge or a threat for the EU and its Member States. This thesis is the result of personal interest in the protection of fundamental rights at the European level. This work is furthermore the result of an interest developed during my Master's degree. Thanks to professor Laval, I had the opportunity during my Erasmus experience to visit the Cour nationale du droit d'asile

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[4] Data from https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics

[5] EASO 2019 asylum trends, available at https://www.easo.europa.eu/latest-asylum-trends

[6] M. MacGregor, *Changing Journeys: Migrants routes to Europe,* infomigrants.net, 13 February 2019. Available at https://www.infomigrants.net/en/post/15005/changing-journeys-migrant-routes-to-europe

in Paris (namely the French national court of appeal) in which he serves as a judge. This allowed me to have a more concrete view of the issue.

The choice of this topic was guided by questions relating to the development at the European level of a right to asylum and the existence of legal ways for asylum seekers to reach the territory without putting their lives at risk.

After having briefly introduced the context of the current European migration crisis, I would like to provide a brief description of the structure. This present dissertation is organised in two main parts. The first part aims at investigating the existence of the right to asylum and the effectiveness of the system for the protection of asylum seekers, starting with an overview of the international and European framework. The right of asylum as a fundamental right and the relative rights, namely the principle of *non-refoulement* and the prohibition of torture and inhuman or degrading treatment or punishment protected by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, will be analysed in this section. In addition to this, the analysis focuses on the European asylum system. The aim of the work is to investigate more closely the Schengen Treaty, in particular the European Visa System, and the Dublin system, focusing on the positive and negative aspects of the two.

The first chapter will be dedicated to the recognition of the right to seek and enjoy asylum. Firstly, it will clarify the meaning of the definitions of asylum seeker, migrant, and refugee. Asylum seekers (and therefore refugees) are defined as individuals applying for international protection because of a "well-founded fear of being persecuted[7]". On the contrary, migrants are persons moving from their country of origin for reasons of work, study, family reunification or others. As it will be highlighted, this clarification is very important because the three categories are protected by different legal instruments. The chapter will underline the importance of the UN Convention on the Status of Refugees of 1954, and its Additional Protocol of 1967, as one of the core instruments for the protection of refugees and asylum seekers. In addition, the chapter will question the applicability outside the territory of the European Union of the two most relevant instruments as concerns the protection of refugees' rights, namely the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. These two instruments are important because they provide a core principles: the prohibition of torture

[7] Article 1, UN General Assembly, *Convention Relating to the Status of Refugees*, Geneva, 28 July 1951.

and inhuman or degrading treatment or punishment. Furthermore, the chapter will try to highlight the importance of the principle of *non-refoulement* in international refugee protection.

The second chapter will offer a detailed overview of the evolution from intergovernmental cooperation to a common policy. This process was slow and was the result of multiple contradictions. Starting from the creation of the European Economic Community, I will try to underline how the attention on the movement of persons, both European nationals and third-country nationals, rouse later as States firstly focused only on the economic dimension. Indeed, the idea of the freedom of movement started earlier but became effective only in the 1990s with the adoption of the Schengen Agreement and the Single European Act. Furthermore, the chapter will provide an analysis of the two pillars of the European Asylum system, namely the complex systems provided by the Common Visa Code and by the Dublin Regulation. On the one hand, the Schengen Agreement entered into force in 1995 with the aim of eliminating borders controls and creating an area of freedom of movement within the territory of the EU, and the Schengen Borders Code of 2006 establishes the guidelines for the control of external borders. The chapter will show, however, that Member States can temporarily reintroduce borders controls under particular situations, namely in the event of a serious threat to public order and for internal security issues. The visa policy remains a shared competence between the European Union and the Member States. The Visa Code Regulation of 2009 sets up the guidelines for the issuance of short-term visas, whereas long term visas still depend on the national legislation. The chapter will try to answer a very specific question: namely, whether visas limited territorial validity could constitute an alternative mean for individuals seeking international protection to reach the territory of the European Union. As a matter of fact, these types of visas can be in some cases issued, such as on humanitarian grounds. However, the notion of humanitarian grounds is ambiguous and Member States have a great margin of discretion. On the other hand, the chapter will highlight the strong points and the weaknesses of the Dublin system. One of the core principles of the Dublin system, namely the principle of mutual trust will be taken into account. Afterward, the proposal for the Dublin IV will be shortly presented.

The second part of this work will be focused on exploring the possible legal pathways for asylum seekers provided by the EU law, and the position of the European Institutions on the topic.

The third chapter will be dealing more specifically with the visa policy and the residual competence of the EU Member States. Afterwards, the jurisprudence of the CJEU, as well as the one of the ECtHR, plays an important role in the European law on asylum and migration, especially regarding the protection of the fundamental rights. The third chapter of this work will aim at investigating the territorial application of the provisions of the CFR and the ECHR within the territory of the European Union but also outside its borders. In order to be able to observe the elements identified in the first chapters in a more concrete way, the chapter will focus on the controversial case of *X and X v. Belgium* of 2017 and the so-called "missed opportunity". The analysis will be conducted in the light of the judgment of the Court and the opposite comment given by the AG Mengozzi. In order to provide an overview of the jurisprudence of the courts on the topic, other similar cases, such as *Hirsi and Jamaa* or *Al Chodor* will be taken into account.

The European Union has always been throughout the history subject to migration. In recent years, Europe has been challenged by the incoming flux of migrants and asylum seekers, especially from the African continent. The fourth chapter of this work will be focused on the recent developments in the EU migration policy. In order to do so, the analysis will be based on two dimensions: the internal and the external one. On the one hand, although the efforts for the creation of the EU legal framework, harmonisation in the internal policy has still not been achieved. As a matter of fact, even if the EU Member States have engaged themselves in promoting common criteria for refugees as well as fighting against illegal immigration, they appear to be not so willing to cede their sovereignty on the matter of security and controls on people entering their territory. On the other hand, Member States appear to be more unanimous on the external policy. The European Union has engaged in the migratory question through prevention and cooperation with non-European countries. On the one side, prevention regards the attempt to tackle the causes of the flow of migrants through realistic programmes such as resettlement and relocation, humanitarian admission, and regional protection. On the other side, the EU has focused on an "externalisation" by promoting cooperation with third countries. This has resulted in the sign of agreements with third countries with the aim of preventing people from reaching the territory of the European Union, thus shifting the burden of migration and circumventing the obligations provided by the ECHR and the CFR.

Particular attention will be given to the EU-Turkey Statement and the Italy-Libya Agreement, representing two emblematic examples of the European present externalisation strategy. Even if the bilateral agreements have proven to be effective, they have been subject to strong criticism and their legality has been questioned. In addition, the chapter will examine the legal pathways provided by the European Union to enter the territory. Lastly, the chapter will take into account the advantages of opening new legal pathways towards the European Union.

To conclude, each chapter of this thesis will be based on several sources including books and articles, institutions' official papers and reports, documents released by international organisations and non-governmental organisations, as well as sources of International law.

CHAPTER 1
THE EVOLUTION OF THE EUROPEAN LAW ON THE TOPIC OF MIGRATION AND ASYLUM

1. Overview of the different definitions of the terms refugee, migrant and asylum seeker

Before engaging into a deeper analysis of the European system regarding refugees and asylum seekers, it is important to have an overview of the different concepts that will be used in this thesis. The words migrant, refugee and asylum seeker are often confused or used as synonyms, as all three designate people who have left their country of origin because of different reasons. It is important, however, to stress the difference between a migrant, a refugee and an asylum seeker as they have a completely distinct meaning from a legal point of view.

The United Nations High Commissioner for Refugees (UNHCR) highlighted the importance of discerning the terms as the migrants and refugees are protected by different International law instruments and, according to these instruments, they are granted different rights and obligations. The UNHCR also claimed that the difference must be clear also from a political point of view because politics can have an important role in shaping the public opinion. Therefore, conflating the terms could undermine the lives and safety of these persons[8].

1.1 Refugee

The early legal instruments for the protection of people moving from other countries date back to the beginning of the 20th century, when the International Community began to be

[8] UNHCR, *UNHCR viewpoint: 'Refugee' or 'migrant' – Which is right?*,11 July 2016. Available at https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html.

concerned about the question of migration and decided to take some actions that led to the adoption of several agreements. As a result, the Convention relating to the Status of Refugee was signed in Geneva in 1951 and entered into force in 1954. The Convention is considered an important legal instrument as it was the first instrument providing several provisions on the definition, the legal status, the duties and the obligations of refugees as well as some measures for the implementation of the legal instrument[9].

In general terms, a refugee is a person who decides to flee his/her country because his/her life and safety is at risk, he/she is threatened to be victim of violence or persecution, and his own state could not or would not protect him/her.

The Geneva Refugee Convention, along with its Additional Protocol of 1967 which introduced the element of the temporal and geographical limitation to the definition, is the first legal instrument that provides the definition of the term refugee as:

> "someone owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[10]

Besides, not only does the Convention provide some provisions regarding the general minimum standard for the treatment, some rights such as the right to work, freedom of movement, welfare, etc.,[11] but it also implies several conditions in order for a refugee to be recognised as such. Firstly, the existence of a home country from which the person flees, the unwillingness to return to the home country and the incapacity to enjoy the protection

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[9] UNHCR, *Handbook on Procedures and Criterias for Determining Refugee Status and Guidelines on International Protection, under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, February 2019, pp. 12-14.

[10] Article 1, UN General Assembly, *Convention Relating to the Status of Refugees*, Geneva, 28 July 1951, United Nations.

[11] R.R.A. Janik*, The Right to Asylum in International Law: One Step Forward, Two Steps Back?,* University of Vienna and Webster University Vienna, 24 November 2017, p. 6.

in the own state. Secondly, the risk of persecution which must be well-founded and the necessity to find some objective elements that can confirm it[12]. The concept of persecution has been subject of disagreement among scholars as there is a margin of appreciation in certifying it. In fact, according to the Convention the persecution must consist in an infringement of the right to life, of the right to personal freedom or other serious violation of human rights and it must be based on at least one of the reasons in the article: race, religious belief, nationality, political opinion or belonging to a specific social group.

Persons who are displaced for reasons different from the above mentioned cannot be considered refugees under the Geneva Refugee Convention and are classified as migrants. However, based on Article 33.3 of the Vienna Convention on the Law of the Treaties[13], scholars agree towards an extensive interpretation of the Geneva Convention, claiming that the provisions must be read taking into account the circumstances, the personal background of every person, and also other categories that are not expressively cited in the text such as women, children and the LGBTQ+ community that are often victims of violence[14].

Another element of the evolutionary interpretation of the Convention is its link with the United Nations, which monitors the implementation of it through the UN High Commissioner for Refugees[15].

There are other regional instruments that protect the rights of the refugees such as the 1966 Bangkok Principles on the Status and Treatment of Refugees adopted in 2011 by the Asian African Legal Consultative Organisation, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969, the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama of 1984. All these instruments are complementary to the Geneva Convention, giving to it the title of "regime-treaty"[16]. Regarding the European level, the European

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[12] M. Pedrazzi, *Il diritto d'asilo nell'ordinamento internazionale agli albori del terzo millennio*, in L. Zagato (a cura di), Verso una disciplina comune europea del diritto d'asilo, Padova, 2006, p. 16.

[13] Article 31 of the Vienna Convention on the Law of the Treaties adopted in 1969 states: "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.".

[14] F. Salerno, *L'obbligo internazionale di non-refoulement*, in C. Favilli, Procedure e garanzie del diritto di asilo, Casa Editrice Dott. Antonio Milani, Crotone, 2011, p. 5.

[15] *Ibid*, p. 6.

[16] *Ibid*, p. 5.

Union acknowledged the importance of the Geneva Convention at Article 78 par. 1 of the TFEU[17].

1.2 Migrant

If on the one hand the Geneva Convention provides with a quite complete definition of the term refugee, there is no universal definition of the term migrant in International law. The most important international organisations, such as Amnesty International or the Red Cross, agree to define migrants as people who move from their country of origin to another country for different reasons but that cannot be considered refugees or asylum seekers[18].
The reasons why people decide to migrate to another country can be multiples. Not only do people decide to leave their country for improving their standards of living, for educational purposes, for finding better work conditions or for family reasons, but also for escaping from poverty, political turmoil, violence or weather-related calamites[19].
Generally speaking, the term migrant is seen in a negative way and is commonly associated to persons entering illegally the territory of a country, acting illegally or committing many crimes. For this reason, the Council of Europe stressed the importance of using a neutral terms such as "irregular migrant" rather than illegal migrant or migrant without papers[20] so as to avoid the stigmatisation.

1.3 Asylum seeker

[17]CJEU, 23 March 2010, *Salahadin Abdulla*, C-175/08.

[18] Amnesty International website, https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/.

[19] *Ibid.*

[20] Commissioner for Human Rights of the Council of Europe, *Criminalisation of Migration in Europe, Human Rights Implications*, Issue Paper, 2010, pp. 4-5.

With regard to asylum seekers, this phenomenon historically refers to individuals seeking refuge in a state other than their country of origin and escaping from persecution of a mainly political nature[21].
The United Nations High Commissioner for Refugees provides the definition of asylum seeker as:

> "An individual who is seeking international protection. In countries with individualized procedures, an asylum-seeker is someone whose claim has not yet been finally decided on by the country in which the claim is submitted. Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee was initially an asylum-seeker."[22]

From the definition given by the UNHCR it is possible to see that what differentiates an asylum seeker from the other two above mentioned categories: asylum seekers are persons who have fled their own country and are seeking international protection from persecutions and serious human rights violations, but whose status as refugee has not yet been legally recognized.
The application of the UN Refugee Convention and the consequent recognition of the status of refugee requires that the individual finds himself/herself outside the territory of his/her country of origin. However, the determination of the status of refugee is *erga omnes partes*, meaning that the international protection determined by one state is relevant for the other states that are part of the Convention, according to the principle of solidarity[23].
The International law provides individuals with a system of international protection but it does not oblige states to grant it. As a matter of fact, states have a certain degree of discretion in deciding which persons can have access to the system of international protection and it traditionally depends on the provisions of the national constitutions and

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[21] L. Barnett, *Global Governance and the Evolution of the International Refugee Regime*, in IJRL, 2002, p. 238.

[22] UNHCR *Global Report 2005*, available at https://www.unhcr.org/449267670.pdf.

[23] F. Salerno, *L'obbligo internazionale di non-refoulement*, in C. Favilli, Procedure e garanzie del diritto di asilo, Casa Editrice Dott. Antonio Milani, Crotone, 2011, p. 4.

the decision-making power of the governments[24]. Moreover, there is no state practice or *opinio juris* regarding the right to seek asylum[25].

It is important to stress that, according to International law, every person should have the right to be allowed to enter the territory of another country in order to seek and enjoy asylum and the asylum procedures should be fairly and efficiently applicable. On arrival, the asylum seeker has the right to be informed about all the necessary procedures and legal assistance in a language that he/she can understand, as well as the right to be given a hearing or the right to open a file within a reasonable deadline[26]. As I will discuss in the following chapters, the question if the right to asylum can be considered a fundamental right is nonetheless still open.

At European level, asylum seekers are protected by the legal system called EU Asylum *acquis*[27] that have been developed since 1999. For example, the Asylum Procedures Directive of the European Parliament sets out the rules applied by the European Union regarding international protection such as the right to be given a personal interview in an appropriate manner (with the presence of an interpreter, taking into account the origins and the status of the person, etc.) Besides, the Directive stipulates that asylum seekers are entitled to remain in the territory of the State until the authority has not made a decision regarding the case, and also presents some exceptions to this provision[28] . The Reception Conditions Directive sets down standards for the reception of applicants for international protection and imposes the obligation for Member States to provide asylum seekers, within three days of the starting of the application procedure, all the necessary documents that can certify the status of the application and granting the right to stay in the territory of the Member State.[29]

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[24] M. Pedrazzi, *Il diritto d'asilo nell'ordinamento internazionale agli albori del terzo millennio*, in L. Zagato (a cura di), Verso una disciplina comune europea del diritto d'asilo, Padova, 2006, pp. 15-16.

[25] G. Noll, J. Fagerlund, F. Liebaut, *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure*, Final Report, European Community, 2002 p.35.

[26] Council of Europe, *Positions on the Right to Seek and Enjoy Asylum, Strasbourg*, Commissioner for Human Rights, 24 June 2010, p. 3-4.

[27]European Commission website: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.

[28] Article 9, European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast),* 23 June 2013.

[29] Article 6, European Union, *Directive 2013/33/EU of the European Parliament and of the Council, laying down standards for the reception of applicants for international protection (recast),* 26 June 2013.

2. The territorial question of the reconnaissance of the status of refugee and asylum seeker

The concept of jurisdiction is one of the key questions as concern the problem of migration. According to International law, jurisdiction generally coincides with the concept of territoriality. However, in exceptional cases, States may be entitled to act outside their territory. As a result, in these cases they may have duties outside their borders, especially regarding human rights obligations[30].

The concept of the exercise of effective control, either *de jure* or *de facto*, over an area in foreign territory[31] or on persons abroad[32] is triggered by international human rights bodies. consequently, Member States should engage in finding a balance between border controls and the protection of the rights of refugees and asylum seekers[33].

The acknowledgement of the status of refugee is the result of the provisions of the Geneva Refugees Convention. On the one hand, the Convention grants the freedom of the asylum seeker to leave his/her country, to enter in an illegal way in another country whose government has the obligation to provide him/her with international protection without infringing the prerogatives of the country of origin. The practice of predetermining the status of refugee is more and more common, especially in the cases of people coming from countries in which the civil and political rights are not granted to a minority or to the whole population[34].

On the other hand, International law does not recognise illegal migrants as having the right to leave their country and ask for international protection. The UN Convention Against

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[30] ECtHR, 23 February 2012, *Hirsi Jamaa and Other v. Italy*, Application No. 27765/09.

[31] ECtHR, 23 march 1995, *Loizidou v. Turkey*, Application No. 15318/89; ECtHR, 10 May 2001, *Cyprus v Turkey*, Application No. 25781/94.

[32] ECHR, 23 march 1995, *Loizidou v Turkey*, Application No. 15318/89.

[33] European Parliament, *Current Challenges for International Refugee Law, With a Focus on EU policies and EU Co-operation with the UNCHR*, Directorate General for External Policies of the Union,Directorate B, Policy Department, 2013, p. 13.

[34] F. Salerno, *L'obbligo internazionale di non-refoulement*, in C. Favilli, Procedure e garanzie del diritto di asilo, Casa Editrice Dott. Antonio Milani, Crotone, 2011, pp. 10-18.

Transnational Organized Crime of 2004 states that all States parties to the Convention have an obligation one to another to prevent migration flows, trafficking in human beings and poverty, according to the principle of solidarity[35]. The solidarity in extended also to the case in which the state of origin omits its due diligence in preventing these flows to take place. Besides, according to the Protocol Against the Smuggling of Migrants of 2000[36], States are obliged to accept the return of every person having the nationality of the country or having the right of permanent residence and who has been subject of conduct set forth in Article 6[37]. At the same time, the United Nations has stated that the receiving State can expel the illegal immigrant in full respect for their human rights and dignity to the country of origin, which is obliged to accept.

In 2008 the UNHCR stressed the key role of active international solidarity among countries[38]. However, it often happens that the first receiving countries - Italy, Malta, Spain and Greece in the case of the current migration crisis - are not able to withstand the pressure of the migratory flows and the number of asylum seekers. States are thus allowed to conclude bilateral agreements or resettlement programs with other states as for example the bilateral agreement between the European Union and Turkey that will be analysed later. It is important nonetheless to emphasise that on the one hand, the obligation of solidarity among states has no territorial limitation, but on the other hand that resettlement programs are considered legitimate only if the third state can grant United Nations Convention Against Transnational Organised Crime and the Protocols Thereto, 2004.individuals the right to seek and enjoy asylum.

With regard to the European Union, the Dublin Regulation establishes the competences of the Member States, as we will see in chapter 4.

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[35] UN General Assembly, *United Nations Convention Against Transnational Organised Crime and the Protocols Thereto*, 15 November 2000.

[36] Article 18, UN General Assembly, *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000.

[37] Article 6 states that states parties to the Convention shall adopt measures to establish criminal offences in the case of the smuggling of migrants and other related actions, such as the production and procuring of fraudulent documents.

[38] UN General Assembly, *Resolution 63/148*, 27 January 2009.

3. The right to seek and enjoy asylum as a fundamental human right

The right to asylum boasts a long history that dates back to the Egyptian times. Indeed, this right was recognized for the first time by the Egyptians, followed by the Greeks who are considered the founders of the " modern" concept of asylum, it reached its affirmation in the French Constitution of 1973. The right of asylum has established itself in International law as the result of a complex of written and unwritten rules or of occasional behaviours, according to which States or other bodies may grant permanent or temporary protection to individuals who are seeking to escape from an actual or a potential persecution of political nature, from war events or for other reasons and have found refuge in the territory of the state or other areas under the control of it. From the definition, we can see that the right of asylum does not exist as a specific institution of general International law because it depends on the territorial sovereignty of the States. Nonetheless, States can decide within certain limits their policy regarding asylum[39].

Especially in recent decades, the international community has recognised the importance of the concept of asylum as a right that must be protected at international level by giving it importance within the system for the protection of human rights[40]. Besides, in order to avoid discriminatory treatment and extending the protection of refugees also to situations that are not expressly included in the above mentioned instruments, the extensive interpretation of refugee status has been more and more encouraged[41].

If on the one hand the Geneva Convention of 1951 represents the first legal instrument providing protection for the refugees, there are other legal instruments such as the United Nations Convention against Torture signed in 1987, the 1948 Universal Declaration of Human Rights (UDHR), the UN Declaration on Territorial Asylum of 1967, as well as other regional instruments[42].

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[39] E. Benedetti, *Il diritto di asilo e la protezione dei rifugiati nell'ordinamento comunitario dopo l'entrata in vigore del Trattato di Lisbona,* CEDAM, Milano, 2010, pp. 43-48.

[40] *Ibid*, p. 60.

[41] *Ibid*, pp. 67-68.

[42] J. Lenart*, 'Fortress Europe': Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Utrecht Journal of International and European Law, Igitur, s.l., 2012, p. 5, available at https://doi.org/10.5334/ujiel.bd

The UDHR represents the most important instrument stating that "Everyone has the right to seek and to enjoy in other countries asylum from persecution.[43]". The UN Convention incorporates concepts already established in the Geneva Refugee Convention and introduces the concept of international solidarity[44]. However, the Declaration is not a legally binding instrument, therefore its provisions do not give asylum seekers some guarantees once in the territory of a third country or during the visas application process, neither does it provide a basis to argue that States have some obligations[45]. The only limit of application is set at paragraph 2 where it said that the right to seek and enjoy asylum in other countries cannot be granted to those guilty of crimes or actions in contrast with the aims and principles of the United Nations, thus stressing the importance of preventing the individuals to use asylum as a mean to escape from their national or international justice[46].

Before engaging in a deeper analysis of the European instruments, which will be dealt with in the next paragraphs, I would like to focus the attention on a very important issue. It is quite clear so far, that the existing instruments of International law mentioned above are not always sufficient to effectively protect the fundamental rights of asylum seekers and refugees as the protection of the right asylum is not granted at the same level in the system of International law.

At European level, the European Convention on Human Rights (ECHR) and in the Charter of Fundamental Rights (CFR) provide - even if with some limits as we will see later - some provisions regarding the right to asylum. However, the European Community was built to create a common market among Member States and the protection of fundamental rights was not among the aims and therefore, the Court of Justice initially established through the jurisprudence a system for the protection of human rights[47].

As repeatedly remarked by the Council of Europe in their recommendations, the ECHR does not provide any provision relating the protection of the right to asylum. The European

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[43] Article 14, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948.

[44] UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967.

[45] G. Noll, J. Fagerlund, F. Liebaut, *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure,* Final Report, European Community, 2002 p.35.

[46] M. Pedrazzi, *Il diritto d'asilo nell'ordinamento internazionale agli albori del terzo millennio*, in L. Zagato (a cura di), Verso una disciplina comune europea del diritto d'asilo, Padova, 2006, p.18.

[47] V. Zagrebelsky, R. Chenal, L. Tomasi, *Manuale dei diritti fondamentali in Europa*, il Mulino, Bologna, 2016, pp. 30-31.

Court of Human Rights (ECtHR) has consistently claimed in its judgments that this right is not guaranteed as such by the Convention or its additional protocols. As a result, the ECtHR has developed a system of protection for asylum seekers and refugees, which currently represents the highest level of protection granted at European level, thanks to a functional interpretation approach that considered the ECHR as an instrument protecting concrete rights and not theoretical ones[48]. The EU law aligned to this system recognising the right to asylum and the principle of *non-refoulement* in the Charter of Fundamental Rights of the European Union (CFR). In addition, the Charter provides the right to effective remedies, establishes the principles of fair trial, States the protection granted by the ECHR as the minimum standard of protection for asylum seekers[49].

To conclude, the right of asylum is a matter which falls under the competence of the States for the admission and expulsion of foreigners. Therefore, scholars agree to define the right to asylum not as an international obligation customary accepted and applied by the states themselves, but as a right of the territorial state[50]. Nonetheless, Member States, as well as the European Union, are committed to undertake measures in order to respect their human rights obligations.

Furthermore, the Court of Justice of the EU has recognised the respect of human rights as general principles of EU law which include the European Convention, the constitutional traditions of the Member States and the UN human rights treaties. Besides the CJEU has set up the respect of human rights as a condition of legality of EU law[51].

3.1 The principle of *non-refoulement*

[48] A. Saccucci*, Diritto di asilo e Convenzione europea dei diritti umani*, in C. Favilli, Procedure e Garanzie del Diritto di Asilo, CEDAM, Milano, 2011, pp. 147-149.

[49] Agenzia dell'Unione europea per i diritti fondamentali, Consiglio d'Europa, *Manuale sul diritto europeo in materia di asilo, frontiere e immigrazione*, Bruxelles, 2014, p. 24.

[50] E. Benedetti, *Il diritto di asilo e la protezione dei rifugiati nell'ordinamento comunitario dopo l'entrata in vigore del Trattato di Lisbona*, CEDAM, Milano, 2010, pp. 42-43.

[51] OHCHR, *The European Union and International Human Rights Law,* Office of the High Commissioner, Europe Regional Office, n.d., p.9.

As I have said previously, each state have a margin of discretion in deciding whether or not to admit third country nationals in its territory. However, the Geneva Refugee Convention sets out at Article 33 the principle of prohibition of expulsion or return, namely *non-refoulement*.
According to this article:

> "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[52]

The legal principle of *non-refoulement* is part of customary International law and it means that no one should be force to return to a country where his/her life is likely to be threatened.
According to Article 42 of the Geneva Convention, States parties cannot put a reservation on the clauses of the text. The Convention nonetheless presents some exception to the prohibition of *refoulemen*t under two conditions. On the one hand, Article 33 excludes the application of the principle the case in which a person is considered to be a threat to the security of a community or of a country as he/she is somehow related to crimes such as terrorism, sabotage, treason or espionage. On the other hand, Article 1F states that if a person is considered responsible for serious war crimes or serious criminal acts of non-political nature such as homicide, rape, child molesting, drug trafficking and others, this can constitute another exception[53]. However, this principle does not prevent individuals to be transferred at all, as states can decide to transfer refugee in another country considered

[52] Article 33, UN General Assembly, *Convention Relating to the Status of Refugees*, Geneva, 28 July 1951.

[53] P. Wenholz, A. Zimmermann, *The 1951 Convention Relating to the Status of Refugee and its 19577 Protocol: A Commentary*, Oxford University Press, 2011, pp. 14-15.

safe or can decide to create camps on foreign territory[54]. In contrast to the Geneva Convention, the ECHR has underlined that the prohibition of expulsion to countries at risk under Article 3 applies regardless to the conduct and the seriousness of the crimes committed by a person[55], thus offering absolute protection[56].

Although the principle of *non-refoulement* is a core principle of International law, it has been subject to limits and conflicting interpretations. First of all, this right concerns only the definition of the category of persons who can boast the status of refugee. Secondly, this principle also includes the *non-refoulement* of any person not only present in the territory of a country, but also at the borders and in the seas. Nonetheless, this doctrine is not accepted by some governments and scholars[57]. Moreover, not only does the prohibition of *refoulement* regard the direct *refoulement* towards the persecution country, but it also includes the indirect *refoulement* towards another country in which the person could be threaten to be sent back to the country of origin[58]. Another controversial question concerns the hypothesis whether the principle of *non-refoulement* can be extended to extradition. Scholars agree that it was not included in the original idea of the editor but it can be included through a literal interpretation of Article 33. Pursuant to Article 31 of the Vienna Convention on the law of the treaties, the interpretation of a treaty may rely on subsequent element of state practice or any other relevant international rule. There is a tendency towards a broad interpretation of the Geneva Convention, that is willing to include also persons in situations that are not formally covered by the initial definition in the status of refugee, such as the case of persons fleeing from internal conflicts or bankrupted states. The scope of the *non-refoulement* principle also varies however according to the situation

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[54]UNHCR, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004. Available at https://www.refworld.org/docid/478b26ae2.html

[55] ECtHR, 28 February 2008, *Saadi v. Italy*, Application no. 37201/06..

[56] A. Saccucci, *Diritto di asilo e Convenzione europea dei diritti umani*, in C. Favilli, Procedure e garanzie del diritto di asilo, CEDAM, Milano, 2011, pp.178-179.

[57] K. Hailbronner, Comments *on: The Right to Leave, the Right to Return and the Question of a Right to Remain*, in V. Gowland-Debbas, The Problem of Refugees in the Light of Contemporary International Law Issues, The Hague, 1996, pp. 109-114.

[58] D. Dubolino, *L'identificazione dello Stato Competente*, in L. Zagato (a cura di), Verso una disciplina comune europea del diritto d'asilo, Padova, 2006, pp. 841.

and to the type of actor and his status. Therefore, it is important to identify the status of the individual[59].

The principle of *non-refoulement* boasts an extra-territorial validity, this means that it is applicable to all those persons who are under jurisdiction or anyone who appears to be under the authority of the State or in the territory where the State exercises effective control. It does not apply only in relation to the country of origin or country of habitual residence if the person is stateless, but to any place where the person has the justified fear of being threatened for his/her life or liberty[60].

All Member States of the EU as well as the members of the Council of Europe have ratified the Geneva Convention. The only exception is Turkey that has put a reservation and applies the Convention only to the refugees from Europe[61].

At European level, the TFEU states at Article 78 that "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*."[62]

The principle of *non-refoulement* is also transposed in the Qualification Directive 2011/95/EU. The directive sets out the common standards for the qualification of the status of refugee, their rights and their obligations and foresees the possibility of the removal of a refugee under some circumstances, that are the same as the Geneva Convention. It does not prohibit the *refoulement*[63].

Besides, the Directive 2008/115/CE of the Council and Parliament reaffirms the importance of the respect of dignity and human rights in the European Union, as well as the application of the principle of *non-refoulement* and the prohibition of expulsion of

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[59] F. Salerno, *L'obbligo internazionale di non-refoulement dei richiedenti asilo*, in C. Favilli, Procedure e Garanzie del Diritto D'asilo, Fondazione Gaetano Morelli, CEDAM, 2011, pp. 5-9.

[60] UNHCR, *Parere consultivo sull'applicazione extraterritoriale degli obblighi di non-refoulement derivanti dalla Convenzione relativa allo status dei rifugiati del 1951 e dal suo Protocollo del 1967*, 2007.

[61] UNHCR, *Handbook on Procedures and Criterias for Determining Refugee Status and Guidelines on International Protection, under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, February 2019, p. 64.

[62] Article 78, Part three: Union Policies and Internal Actions, Title V: Area of Freedom, Security and Justice, *Treaty on the Functioning of the European Union*, Official Journal of the European Union, C 115, 09 May 2008.

[63] UNHCR, *Handbook on Procedures and Criterias for Determining Refugee Status and Guidelines on International Protection, under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, February 2019, p. 65.

refugees towards countries where their lives or freedom is endangered. Article 1[64] of the directive includes common laws for the respect of the fundamental rights of refugees and asylum seekers as general principles of law. It also sets up the conditions for the issuance of residence permits to irregular persons for humanitarian and charity matters.

The principle of *non-refoulement* is reaffirmed in Article 14 of the Universal Declaration of Human Rights of 1948 and in Article 3 of the European Convention on Human Rights that forbids the return of an individual to states in which he/she could be subject to persecution, death penalty, torture or inhuman or degrading treatment or punishment. However, the ECHR does not guarantee the right of asylum, but on the contrary it provides the States Parties the right to control the entry, residence and removal of foreigners[65]. Despite this, the technique of the so called protection *par ricochet* has more and more established in European jurisprudence.

The European Commission stated that, despite the right to remain in the territory of the States and the right to asylum not being guaranteed by the ECHR, the States have agreed to limit the free exercise of their powers under International law by ratifying the Convention. Besides, the European Court of Human Rights stated that the State has responsibility in cases where extradition has consequences which adversely affect the enjoyment of a right expressly provided for by the ECHR[66], such as the risk of torture or inhuman or degrading treatment or punishment[67], that will be analysed later, or the risk of suffering a denial to a fair trial.

3.2 The European Convention on Human Rights and the extensive interpretation of Article 3: the prohibition of torture

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[64] European Union, *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*, 24 December 2008.

[65] A. Saccucci, *Diritto di asilo e Convenzione europea dei diritti umani*, in C. Favilli, Procedure e garanzie del diritto di asilo, CEDAM, Milano, 2011, pp.148-149.

[66] ECtHR, 7 July 1989, *Soering v. the United Kingdom*, Application No. 14038/88.

[67] A. Saccucci, *Diritto di asilo e Convenzione europea dei diritti umani*, in C. Favilli, Procedure e garanzie del diritto di asilo, CEDAM, Milano, 2011, pp.150-151.

The European Convention on Human Rights, adopted in 1950 by the Council of Europe, has considerably evolved since its entry into force and it is nowadays considered as the most efficient system for the international protection of human rights for several reasons. Firstly, although the European Union is not part of the Convention, all Member States have ratified it. In addition, the jurisprudence of the Court of Justice of the EU has been inspired by the principles enshrined in the text[68].

Even if the ECHR does not explicitly address the issue of asylum, it guarantees other important rights that are fundamental for asylum seekers, namely the prohibition of torture Article 3, the prohibition of slavery or forced work at Article 4[69].

Article 3 of the Convention firmly states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment.[70]". The prohibition of torture and inhuman or degrading treatment is absolute, as it is part of that hard core of intangible human rights that cannot be limited in the name of any essential interest of the state or of the society; this means that it cannot subject to any limitation or exception, and it is unavoidable in any circumstances, even in the event of war or other public danger threatening the country as set up in Article 14[71]. The protection deriving from this principle is granted also to those who have committed crimes against humanity[72].

The State which would like to expel an individual must ensure that there is not a risk of torture or other treatment not only in his/her country, but also in a third country in which the person may be sent by the country of origin[73]. Moreover, the State is responsible for the behaviour of its organs even when they have acted beyond their internal competence or the violation of prohibitions[74], when it allows on its territory agents of foreign states[75] or tolerates the behaviour of private persons. The state's obligation not to subject a person to

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[68] B. Alomar, S. Daziano, T. Lambert, J. Sorin, *Grandes Questions Européennes*, Armand Colin, Horizon, n.p., 2017, p. 525.

[69] C. Teitgen-Colly, *Le droit d'asile, Que sais-je ?,* Paris, 2019, pp. 36-37.

[70] Article 3, Council of Europe, *European Convention on Human Rights*, as amended by Protocols Nos. 11 and 14, 4 November 1950.

[71] U. Villani, *Dalla Dichiarazione universale alla Convenzione europea dei diritti dell'uomo*, Cacucci Editore, Bari, 2016, pp. 132-133

[72] ECtHR, 2 December 2004, *Farbtuhs v. Latvia*, Application No. 4672/02.

[73] U. Villani, *Dalla Dichiarazione universale alla Convenzione europea dei diritti dell'uomo*, Cacucci Editore, Bari, 2016, pp.139-140.

[74] ECtHR, 18 January 1978, *Ireland v. the United Kingdom*, Application No. 5310/71.

[75] ECtHR, 23 July 2014, *Al Nashiri v. Poland*, Application No. 28761/11.

torture are complemented by other obligations, such as the engagement in a measures necessary to prevent infringements of Article 3[76].

Focusing on the definition of torture, of the text of the article does not precisely define torture, inhuman and degrading treatment and does not make a distinction between these three concepts. It is therefore necessary to refer to other legal instruments or to the interpretation of the ECtHR[77].

The United Nation provides a definition which incorporates these three elements:

> "the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[78]"

The Court's jurisprudence concerning the interpretation of this article have evolved significantly over time. The Court held that in applying Article 3 the growing need for the protection of fundamental rights should be taken into account and that treatment previously seen as inhuman can be qualified as torture. In order to easily judging that the treatment integrates the elements of torture or inhuman treatment, the Court decided to

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[76] A. Di Stasi, *Introduzione alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, CEDAM, Milano, 2016, pp. 16-18.

[77] G. Cataldi, *La tortura è tra noi? La portata dell'art. 3 Cedu nella giurisprudenza della Corte europea dei diritti dell'uomo,* in L. Zagato e S. Pinton, La tortura nel nuovo millennio, La reazione del diritto, CEDAM, Milano, 2010, p. 182.

[78] Article 1, UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 26 June 1987.

lower the minimum threshold of severity of the suffering inflicted on the victim[79]. In the case *Cruz Varas v. Sweden*[80], the Court affirmed the principle of *non-refoulement*, claiming that any State party may not return a person to a country where there is a well-founded suspicion that he could be subjected to torture or inhuman or degrading treatment or punishment, whatever the legal form of the measure (expulsion, extradition or refusal of entry). Differently from the provisions of Article 33 of the Geneva Convention, the grounds on which the individual is threatened to be subject of the violence[81] at Article 3, the source of origin of the violence[82], as well as the possible danger of the person are irrelevant for the jurisprudence European Court of Human Rights[83].

To be considered under the scope of Article 3, the infringements must reach a minimum level of severity in relation to the specificities of the case. This include: the duration of the treatment, its physical and mental effects on the individual, and in some cases the sex, age and state of health of the victim[84]. In the case *Cruz Varas* the Court claimed:

> "Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case.[85]"

The Court relies on the evidence beyond any reasonable doubt, using all the elements that must be sufficiently serious, precise and consistent in order to assess the existence of these elements[86]. As a result, for a treatment to be qualified as inhuman or degrading, the

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[79] V. Zagrebelsky, R. Chenal, L. Tomasi, *Manuale dei diritti fondamentali in Europa*, il Mulino, Bologna, 2016, p. 162.

[80] ECtHR, 20 March 1998, *Cruz Varas and others v. Sweden*, 46/1990/237/307.

[81] ECtHR, 29 April 1997, *H.L.R. v. France*, Application no. 24573/94.

[82] ECtHR, 17 December 1996, *Ahmed v. Austria*, Application No. 25964/94.

[83] U. Villani, *Dalla Dichiarazione universale alla Convenzione europea dei diritti dell'uomo*, Cacucci Editore, Bari, 2016, pp. 132-133.

[84] K. Reid, *A Pratictioner's Guide to the European Convention on Human Rights*, Sweet & Maxwell, London, 2007, p. 572.

[85] ECtHR, 20 March 1998, *Cruz Varas and others v. Sweden*, 46/1990/237/307.

[86] ECtHR, 9 September 2014, *Carrella v. Italy*, Application No. 33055/07.

humiliation in question must in any case exceed the component of suffering or humiliation[87].

Moreover, specific circumstances such as the methods, the context of the punishment, the duration, the effects on health are taken into account by the Court. In particular, the ECtHR considers treatment as inhuman when it is premeditated, is inflicted for hours and causes real physical injury or intense physical or mental suffering. The treatment is considered degrading when it humiliates or demeans an individual, manifesting a lack of respect for his character, or humiliating the person, thus generating feelings of fear, anguish or inferiority. The Court has specified that there is no need for other persons to be present when the victim is humiliated in order for a humiliating treatment to be recognised as such[88].

Torture involves an objective element, namely a particularly serious treatment, and a subjective one, namely the international inflation of such sufferings in order to obtain information, to punish or to intimidate the person. In the case *Ireland v. the United Kingdom* of 18 January 1978, the Court affirmed that torture is a form of inhuman or degrading treatment that causes very serious and cruel suffering to the person[89]. Moreover, Article 3 can also be applied in cases of potential breaches, when the exclusion has not taken place. In this case, the Court releases an hypothetical judgement stating that the expulsion would violate the principle of Article 3[90].

In order to assess the risk of torture or prohibited treatment, the Court may decide to use sources from other states, international organisations, non-governmental organisations, with a reputation and experience in the field of human rights such as Amnesty International, Human Rights Watch, the Red Cross, and does not always require the

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[87]ECtHR, 17 September 2009, *Enea v. Italy*, Application No. 74912/01.

[88] U. Villani, *Dalla Dichiarazione universale alla Convenzione europea dei diritti dell'uomo*, Cacucci Editore, Bari, 2016, pp. 135-138.

[89] G. Cataldi, *La tortura è tra noi? La portata dell'art. 3 Cedu nella giurisprudenza della Corte europea dei diritti dell'uomo*, in L. Zagato e S. Pinton, La tortura nel nuovo millennio, La reazione del diritto, CEDAM, Milano, 2010, p. 182.

[90] ECHR, 28 February 2008, *Saadi v. Italy*, Application no. 37201/06; ECHR, 18 February 2010, *Baysakov v. Ukraine*, Application no. 54131/08

claimant the proof, acting on the assumption that any event affecting the life or the physical health of the individual may constitute a breach of the provisions of the ECHR[91].
According to the fact that the Convention is a living instrument, the Court claimed that "an increasingly high standard was required in the area of human rights and that certain acts classified in the pas as inhuman or degrading treatment as opposed to torture could be classified differently in the future"[9293].
At present the European Union is not bound by the European Convention of Human Rights as it is not part to it. However, the provisions in it are relevant especially for the jurisprudence of the Court of Justice of the European Union. Article 3 does not only imply the forbidding of torture or inhuman or degrading treatment, but it includes some positives obligations for States, in particular in the case of violations towards particularly vulnerable individuals. These positive obligations include: providing in their legislation adequate expressive rules that allow to investigate and punish violations of the prohibition at the Article; conducting effective and prompt investigations to identify and punish those responsible with penalties proportional to the gravity of the breach; establishing effective preventive and compensatory remedies in their law systems so as to avoid or to remedy the violations of the Convention[94].
In order that the person may usefully invoke the protection of Article 3 of the ECHR, he must be able to demonstrate that he/she is personally and individually exposed to the risk of being subjected to treatment prohibited by that Article, as the mere existence of a general situation of human rights violations in the country of destination is not sufficient. Therefore, the claimant has to prove that he/she is exposed to a real risk and provide the Court with all the relevant information[95]; once the proof verified, the States must dispel any doubt about it. In some cases, the court can decide to acquire information *ex officio* from governmental bodies or independent nongovernmental organisations (such as Amnesty International) that must be interpreted in the light of the independence, the

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[91] U. Villani, Dalla *Dichiarazione universale alla Convenzione europea dei diritti dell'uomo*, Cacucci Editore, Bari, 2016, pp. 135-138.

[92] ECHR, 28 July 1999, *Selmouni v. France*, Applciation no. 25803/94.

[93] K. Reid, *A Pratictioner's Guide to the European Convention on Human Rights*, Sweet & Maxwell, London, 2007, p. 574-575.

[94] V. Zagrebelsky, R. Chenal, L. Tomasi, *Manuale dei diritti fondamentali in Europa*, il Mulino, Bologna, 2016, p. 166.

[95] ECHR, 19 June 2008, *Ryabikin v. Russia*, Application no. 8320/04.

reliability and the objectivity of the source[96]. Moreover, the Court has also stated that the adhesion of a State to the international treaties or the existence of a body of laws for the protection of the human rights do not create a proof for claiming the presence of an adequate protection[97] [98].

In order for Article 3 of the Convention to be applied, the person must find himself/herself outside his country of nationality but it can also be apply in cases of extradition of a state's own nationals or of revocation of citizenship followed by expulsion. In the case of *Fadele v. the United Kingdom*, the Commission claimed that that Article 3 could apply to cases where citizen are exiled from their country and where the conditions which they would face on return could amount to inhuman and degrading treatment[99].

3.3 The Charter of Fundamental Rights of the European Union and the prohibition of torture and inhuman or degrading treatment or punishment.

Originally, the treaty of the European Communities made no reference to human rights, nor to their protection. However, the Court of Justice of the European Union[100] recognised fundamental rights as an integral part of the general principles of law and stated that these principles reflect the rights guaranteed by constitutions of Member States and international treaties on the protection of human rights[101].

In order to put the attention on this matter, the Charter of Fundamental Rights of the European Union entered into force in 2000. Through this charter, Member States engaged in the protection of fundamental rights, freedoms and common values. With the entry into

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[96] ECHR, 17 July 2008, *N.A. v. the United Kingdom*, Application no. 25904/07.

[97] ECHR, 11 December 2008, *Muminov v. Russia*, Application no.42502/06.

[98] A. Saccucci, *Diritto di asilo e Convenzione europea dei diritti umani*, in C. Favilli, Procedure e Garanzie del Diritto di Asilo, CEDAM, Milano, 2011, pp. 160-161.

[99] N. Mole, C. Meredith, *Asylum and the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg, 2010, p. 24

[100] CJEU, 13 December 1979*, Liselotte Hauer v. Land Rheinland-Pfalz*, C-44/70.

[101] Consiglio d'Europa, *Manuale sul diritto europeo in materia di asilo, frontiere e immigrazione*, Agenzia dell'Unione europea per i diritti fondamentali, Bruxelles, 2014, pp. 22-23

force of the Treaty of Lisbon in December 2009, the European Union conferred a legally binding power and primary law status to the Charter, thus making the European Institutions obliged to respect it. Despite the fact that the treaty itself does not include the charter in the text, it refers to a declaration annexed which explicitly states that the Charter has binding power[102].

The EU Charter of Fundamental Rights guarantees the respect of the right to asylum, in accordance with the Geneva Convention and the Protocol. Article 4 forbids inhuman or degrading treatment or punishment, to be in European territory or abroad, and Article 19 prohibits collective expulsion, especially to any country where there is a serious risk of torture or death penalty. The words used for Article 4 of the CFR are identical to Article 4 of the ECHR. The prohibition of torture and inhuman or degrading treatment is related to the respect of the dignity of every person, it complements customary International law and is a *jus cogens* norm; therefore absolute and binding.

The EU was not created as an instrument for the protection of human rights but as a union with economic aims and the value of the Charter was subject of discussion in the doctrine. First of all, the protection of the fundamental rights is linked to the division of the competences within the European Union (principle of conferral) laid down at Article 3 of the Treaty of the European Union which does not confer any competence in the field of human rights to the European Union. The EU is based on the values enshrined in Article 2 of the TUE and is not dedicated to the protection of human rights but, nevertheless, the respect of the fundamental rights is important[103].

In addition, Article 19.2 of the Charter establishes that "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.[104]"

In line with Article 4 of the Charter, the CJEU has decided that in the event of a European arrest warrant, if there are serious reasons to suspect that the person would be at risk of inhuman or degrading treatment, the authorities in the state of execution of the mandate

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[102] B. Alomar, S. Daziano, T. Lambert, J. Sorin, *Grandes Questions Européennes*, Armand Colin, Horizon, 2017, s.l. , p. 527

[103] V. Petralia, *La tutela dei diritti fondamentali nell'ordinamento dell'Unione Europea e la (mancata) adesione alla Convenzione europea dei diritti dell'uomo*, in L. D'Andrea, G. Moschella, A. Ruggeri, A. Saitta, Crisi dello Stato nazionale, dialogo intergiurisprudenziale, tutela dei diritti fondamentali, Giappichelli Editore, Torino, 2015, p. 194.

[104] Article 19.2, European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012.

must request specific information from the issuing state before the execution of the mandate.
However, the European Union is not part of the Charter of Fundamental Rights.

3.4 The question of the applicability of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union outside the territory of the European Union

The issue of the applicability of the European Convention on Human Rights and of the Charter of Fundamental Rights of the European Union applies to both legal instruments in different ways. The territorial application of the Charter of Fundamental Rights of the European Union is linked to the criteria of the implementation of the European law enshrined ad Article 51.1, whereas in the European Convention on Human Rights the notion of jurisdiction the responsibility of States for violations of the rights is at Article 1.
The European Court of Human Rights considered the question of the applicability for the first time in the case *Soering v. United Kingdom* in 1989[105], in which it stated that extradition of a person to the United States of America where he would be subject to death penalty constituted inhuman or degrading treatment contrary to Article 3 and that the provisions of the ECHR must be interpreted so as guarantee a practical and effective protection of the rights of every individual[106]. Moreover, in other two cases[107], the Court stated that the principle applies also to decisions to expel or to extradite.
The CJEU claimed that the concept of jurisdiction at Article 1 of the ECHR is essentially linked to the territory and dependent on the borders of the States parties[108] which have the

[105] ECtHR, 7 July 1989, *Soering v. the United Kingdom*, Application no. 14038/88.

[106] N. Mole, C. Meredith, *Asylum and the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg, 2010, pp. 19-20

[107] ECtHR, 20 March 1991, *Cruz Varas v. Sweden*, Application no 15576/89 ; ECtHR, 30 October 1991, *Vilvarajah and others v. the United Kingdom*, Application no. 13163/87.

[108] ECtHR, 7 july 1989, *Soering v. the United Kingdom*, Application no. 14038/88.

duty to guarantee the respect of the Convention within their territory[109]. Nonetheless, the CJEU stated that the basis for the extraterritorial application of the effects of the European Convention on Human Rights derives from its specific nature as a treaty for the collective guarantee of human rights and fundamental freedoms, from which derives the objective obligations for the States. As a result, the object and purpose of the ECHR require an interpretation which seeks to ensure that the guarantees provided are real and effective, particularly in the case of the principles laid down in Article 3[110].

Furthermore, the Court has acknowledged that certain conducts of the State carried out outside their national borders may be an exception to the provisions of Article 1. In particular, the exceptions are: the effective control by a State of an area and the authority and control by State agents on individuals.

The effective control regards cases in which a State, as a result of an action taken legally or illegally, exercises effective control over a territorial area outside its national borders. It provides for the State the obligation to ensure the respect of the provisions of the ECHR within the area under its control directly, for example through its armed forces, or indirectly through local governments. The effectiveness of this control needs to be verified in practice and on the basis of the particular circumstances, such as the extent and the duration of the military presence in the territory. Concerning the State agent authority and control, it is the control by agents of the State in position of authority over individuals in foreign territory[111].

In regard to the migratory issue and the question of border controls, the European Court of Human Rights has recognised the extraterritorial applicability of the ECHR, including actions conducted outside national territory or in international waters or in actions carried out by agents acting in the name of the State[112].

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[109] F.L. Gatta, *La "saga" de visti umanitari tra le Corti di Lussemburgo e Strasburgo, passando per il legislatore dell'Unione Europea e le prassi degli Stati Membri*, Dirittifondamentali.it, Fascicolo 1/2019, 12 june 2019, pp. 23-24.

[110] A. Saccucci, *Diritto di asilo e Convenzione europea dei diritti umani*, in C. Favilli, Procedure e Garanzie del Diritto di Asilo, CEDAM, Milano, 2011, pp. 150-151.

[111] F.L. Gatta, *La "saga" de visti umanitari tra le Corti di Lussemburgo e Strasburgo, passando per il legislatore dell'Unione Europea e le prassi degli Stati Membri*, Dirittifondamentali.it, Fascicolo 1/2019, 12 june 2019, pp. 24-25.

[112] ECtHR, 23 February 2012, *Hirsi Jamaa and Other v. Italy*, Application No. 27765/09; ECtHR, 3 October 2017, *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15.

The question of territoriality also concerns cases relating to embassies and consulates. On the basis of the state agent authority and control criteria, the European Court of Human Rights claimed that the exercise of some functions by diplomatic representatives may be considered as under the jurisdiction and the responsibility of the State of origin, in their actions as well as in their omissions[113]. Nonetheless, the Court considered that the simple control of the state is insufficient and that there must be a "physical power" on the individual. This approach based on the physical control of the individual has been confirmed in several cases of detention, deprivation of liberty by State agents present and operating in foreign territory or in international waters[114].

In conclusion, States Parties are nonetheless strongly determined to oppose the possible extensions of the European Convention on Human Rights outside its natural borders. States Parties underline the importance of the role of the ECHR of guaranteeing "the observance of the engagements undertaken by the High Contracting Parties". States claimed that, by extending the protection of the Convention also to extraterritorial situations would be considered similar to arguing that anyone who is somehow armed by an act imputable to a Member State is to be considered as falling under the jurisdiction of the ECtHR[115]. Moreover, they recalled the restrictive approach adopted by the Grand Chamber in the *Bankovic* case, in which the judges recognized defined the ECHR as a "constitutional instrument of European public order"[116].

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[113] ECtHR, pending before the Grand Chamber, *M.N. and others v. Belgium*, Application no. 3599/18; ECtHR, 15 December 1977, *X v. the United Kingdom*, Application no. 7215/75.

[114] P. De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, cit., pp. 48-53.

[115] F.L. Gatta, *La "saga" de visti umanitari tra le Corti di Lussemburgo e Strasburgo, passando per il legislatore dell'Unione Europea e le prassi degli Stati Membri*, Dirittifondamentali.it, Fascicolo 1/2019, 12 june 2019, p. 35

[116] ECtHR, 12 December 2001, *Bankovic and others v. Belgium and others*, Application no. 52207/99.

CHAPTER 2
THE EUROPEAN UNION LAW: A MULTILEVEL SYSTEM

1. From intergovernmental cooperation to common policy

Before moving to a deeper analysis of the Visa system and the Dublin Regulation, I would like to shortly introduce the history of the European Union law regarding asylum and refugees. starting from the origins of the European Community.

The process of European integration has been constantly developing, from the initial proposal for a common market to an area guaranteeing the freedom of movement of goods, persons and capitals. As we all may know, the first steps that led to the what we nowadays call the European Union was the signature of the Treaty of Paris in 1951 establishing the European Coal and Steel Community (ECSC), followed by the Treaties of Rome in 1957 that created the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). The aims of these first treaties were to regulate the industrial production and to avoid another conflict like World War II, that was just about to finish. Starting from an initial proposal for a common European market, the process of integration has developed and progressively included the freedom of movement for goods, capitals and persons, which is nowadays one of the core elements of the European Union[117]. Nevertheless, Member States had competence on the regulation of the movement of persons of third countries.

During the 1980s all Member States of the EEC promoted joint actions in order implement of the so called "four freedoms": goods, persons, services and capital. At the same time, they promoted the strengthening of the external borders and regularisation of the entry of individuals from third-countries[118]. As a result, Member States signed in 1985 the Schengen Agreement with the aim of defining the measures for the abolition of the internal

[117] S. Kahn, *Histoire de la Construction de l'Europe depuis 1945*, Quadrige Manuel, Paris, January 2018, pp. 54-55.

[118] B. Alomar, S. Daziano, T. Lambert, J. Sorin, *Grandes Questions Européennes*, Armand Colin, Horizon, 2017, n.p. , pp. 516-517.

borders controls within the Schengen Area, and at the same time, the implementation of borders controls so as to prevent the unauthorised entry[119].

The issue of the absence of regulations for third country nationals was still present in 1986 after the adoption of the Single European Act. The text of the agreement provided the definition of internal market as "an area without internal borders where free movement of goods, persons, services and capitals was ensured"[120]. Besides, it enshrined the principle of freedom of movement for persons. However, the SEA did not specify whether this principle applied to all individuals present in the territory of the Union, regardless of their nationality.

The Schengen Agreement and the Single European Act were the first steps in the creation of the area for the freedom of movement. Moreover, they represented the first attempts to set up the basis for the development of a common policy in the field of migration and asylum[121]. However, many European Member States still were not so willing to abolish checks at internal borders and lose control on the flux of entries of foreigners in their territory.

As a result, in 1989 the European Council stressed in the Palma Document the need for a more common policy. The main focus of Member States initially included: creating common goals in the aim of determining the State responsible for examining the application for asylum as well as developing a simplified or priority procedure for the examination of the requests. It also focused on bettering the conditions regarding the movement of the applicant between Member States. Lastly, it proposed the creation of a financing system to fund the implementation of the before mentioned commitments[122].

In the 1990s, Member States committed themselves to combat the abuses of the right of asylum which was frequently seen as an alternative mean for migration. As a result, the Council of the European Union introduced in 1992 a specific procedure for cases where the applications for asylum were manifestly unfounded. It was based on the following presumptions: if the application was intentionally fraudulent; if the application was

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[119] L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale*, G. Giappichelli Editore, Torino, 2011, pp. 164-165.

[120] Article 8(a), European Union, *Single European Act*, 28 February 1986.

[121] C. Teitgen-Colly, *Le droit d'asile, Que sais-je ?,* Paris, 2019 pp. 30-32.

[122] European Council, *The Palma Document. Free Movement of Persons. A Report to the European Council by the Coordinators' Group*, Madrid, June 1989, Part iii.B.

contradictory or unbelievable; if the application did not comply with the principles of the Geneva Convention, such as the "well-founded fear of persecution"[123].

The Council adopted another resolution in order to establish the conditions under which an application could be rejected. According to the text, an application can be rejected if it was already presented in a host third country. The Resolution also addressed the issue of the determination of country as "host third country", "first country" or "safe country", by referring to Article 33 of the Geneva Convention[124]. As we will see later, the practice of return has progressively increased over the years. In theory, this could not represent a problem but the cases in which the third country cannot boast a sufficiently developed legal system to deal with asylum applications yet are more and more frequent. As we will see later, this results in an increase of the number of refugees "in orbit".

The Treaty of Maastricht, who entered into force in 1993, gave birth to the European Union. Focusing on the question of asylum, it called for the cooperation among Member States and created one of the backbones of the EU system: the three pillars structure[125]. Furthermore, the treaty introduced the principle of subsidiarity which, as we will see in the following paragraphs, plays an important role within the Dublin system.

At the beginning of the 2000s, the European governments acknowledged the importance of finding common grounds between the legal systems of every Member State. As a result, the Treaty of Amsterdam entered into force in 1999, marking a fundamental step for the communitarisation process of the right to asylum. It is important to notice that by this treaty, the matters of Justice and Home Affairs of the Title IV of the TEU were transferred from the third pillar to the first pillar, i.e. from the intergovernmental system to the supranational one. What is more relevant is that Article 63 of the Treaty defined three fundamental aspects. Firstly, it explicitly refers to the Geneva Convention and to the definition of the status of refugee; secondly, it enshrines the concept of temporary protection for those who did not qualify for refugee status under the Geneva Convention; thirdly, it focused on the principle of burden-sharing. Furthermore, a number of matters were brought within the competence of the bodies of the European Community, including

[123] Council of the European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum* ("London Resolution"), 30 November 1992.

[124] Council of the European Union, *Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries* ("London Resolution"), 30 November 1992.

[125] This division was overruled with the adoption of the Treaty of Lisbon.

borders control, the conditions for the issuance of visas, the movement of third-country nationals within the territory of the European Community[126].

The European Council of Tampere on 15 and 16 October 1999 marked an important step in the divisions of competences between the European Institutions and Member States and in the definition of the priorities regarding migration[127]. During these days, Member States reaffirmed the importance of creating an area of freedom, security and justice and stressed the need for a more effective management of migrations flaws at all stages. Third countries were also recognized as having a key role because Member States requested their collaboration in order to develop information campaigns on the various possibilities of legal immigration and on the prevention of all forms of trafficking in human beings. Member States in addition focused on common grounds in their national criminal laws by agreeing on definitions, indictments and sanctions. Furthermore, the European Council stated that in order to join the European Community, a new state must ensure an effective control of its external borders, provide the same guarantees as the other Member States as well as being able to stopping third-country nationals who do not fulfil all the prescribed conditions[128].

Member States confirmed their commitment with the proclamation of the Charter of Fundamental Rights of the European Union, stressing the importance the prohibition of slavery and trafficking in human beings as serious violations of human rights. However, as we will see in the following chapter, the Charter was not legally binding until the entry into force of the Treaty of Lisbon.

A new step was taken with the Treaty of Nice, which defined for the first time the right of asylum as a fundamental right[129]. In addition to underlining the importance of the right of asylum as described in the Geneva Convention, it reaffirmed the prohibition of expulsion, both individual and collective, towards a State where a person is at risk of being subjected to torture or other forms of violence. Besides, the Council approved the application of the co-decision procedure for the matters of asylum and migration, thus giving greater power to the European Parliament.

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[126] L. Nascimbene, *L'incorporazione degli accordi di Schengen nel quadro dell'Unione Europea e il futuro ruolo del comitato parlamentare di controllo*, in Riv. it. dir. pubbl. comunit., Milano, 1999, pp 731-742.

[127] C. Teitgen-Colly, *Le droit d'asile, Que sais-je ?,* Paris, 2019 pp. 30-32.

[128] L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale,* G. Giappichelli Editore, Torino, 2011, pp. 182-184.

[129] C. Teitgen-Colly, *Le droit d'asile, Que sais-je ?,* Paris, 2019 pp. 32.

The terrorist attacks of 2001 accelerated the process towards an European space of freedom. In December 2001 the Council of Ministers of the European Union met in Laeken and discussed about the fight against terrorism, the need to reduce illegal immigration and the creation of instruments to protect borders[130].

The theme of security became the focus of the European Council of 2002 in Seville. Heads of states agreed on the following points: the Dublin II Regulation needed to be adopted by December 2002; the Directives on the definition of refugee and on family reunification were to be adopted by June 2003; Asylum procedures needed to be implemented by the end of 2003.

Following the raising of the migratory flows, the Commission and the European Council stressed the importance of taking measures in a communication of 30 November 2006.[131] The Commission stated that not only must the system of asylum be an important response to the migratory flows, but also it must constitute an effective option for people in need for international protection. To do so, it is important that Member States, as well as third countries, efficiently apply their obligations[132].

The European Pact on Immigration and Asylum of 24 September 2008 marked an important point the EU asylum policy. The main aim of the pact was creating a basis for a uniform migration and asylum policy, as well as developing cooperation with the non EU countries. The text set out 20 strategic guidelines with the aim of ensuring a greater protection of the rights of migrants, refugees and asylum seekers in the identification centres. Furthermore, States committed to pursue a series of objectives: favouring legal immigration and taking into account the needs and the capacity of every state as well as promoting integration; combating irregular immigration, in particular by ensuring persons a safe and effective return to their country of origin or to another safe country; implementing border controls; implementing asylum policies; developing cooperation projects with the countries of origin of the migration flows. In addition, the Pact promoted individual regularisation procedures and bilateral agreements for the readmission of the

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[130] B. Alomar, S. Daziano, T. Lambert, J. Sorin, *Grandes Questions Européennes*, Armand Colin, Horizon, 2017, s.l. , p. 516.

[131] Commission of the European Communities, *Communication from the Commission to the Council, Reinforcing the management of the European Union's Southern Maritime Borders*, COM(2006) 733 final, Brussels, 30 November 2006.

[132] L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale,* G. Giappichelli Editore, Torino, 2011, p. 188.

irregular persons. The pact also focused on giving greater importance to the role and of the operational means of Frontex, as well as on the development of new intelligence systems[133].

In 2009 the Treaty of Lisbon marked a turning point in the history of the European Union. By amending the previous treaties, it provided a substantial reform of the institutions and gave birth to the TEU and TFEU. The changes introduced aimed at removing the three-pillar structure and reaffirming the legal personality of the Union. First of all, it conferred the European Parliament greater importance and promoted transparency and a clear division of the competences between European Institutions and national bodies; secondly, it acknowledged the values of freedom, security and solidarity as core values of the European Union through the integration of the CFR within the primary sources of European law. It is important to stress that it introduced the matter of migration in the Title V of the third part of the TFEU. Besides, Member States showed a greater interest in preventing the phenomenon of illegal immigration, a more effective management of migratory flows and combating the trafficking in human beings, by stating:

> "The Union shall develop a policy with a view to: (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; (b) carrying out checks on persons and efficient monitoring of the crossing of external borders; (c) the gradual introduction of an integrated management system for external borders."[134]

In the recent years, Member States have put some efforts in the question of managing the flow of asylum seekers.

With the so-called Qualification Directive[135], Member States aimed at establishing a set of minimum standards for the attribution of the status of refugee to third-country nationals or to stateless persons. The importance of this Directive was that it represented the first

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[133] Council of the European Union, *European Pact on Immigration and Asylum*, 24 September 2008.

[134] Article 77, European Union, *Consolidated version of the Treaty on the Functioning of the European Union (TFEU)*, 13 December 2007..

[135] European Union, *Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 29 April 2004.

official document defining the criteria requested for the international protection, as well as subsidiary protection. However, the text of the Directive presented some limits the European Commission felt the need to modify its text as it did not include the evolution of the jurisprudence regarding human rights. At the same time, there were some disparities in the implementation of the Directive in the different Member States.

As a result, the Directive 2011/95/EU[136] was approved and introduced new elements. Among the others, the definition of family member was broadened, including to any other adult responsible for the minor beneficiary of international protection. It also included the requirement for States to have up-to-date and accurate information on situation in that part of the country, as well as an obligation to take into account gender, including gender identity, before determining the belonging to a particular social group. Besides, some provisions aiming at reducing differences between the rights enjoyed by those who have obtained refugee status and those who have obtained subsidiary protection are included in the renewed text.

Another important Directive that needs to be cited is the Directive 2005/83[137] then replaced by the Directive 2013/32/EU[138], also known as "directive procedures". The Geneva Convention had left authorities a great margin of discretion to decide procedures for granting the status of refugee, causing many discrepancies. Therefore, authorities engaged for a more in-depth and comprehensive training for staff and authorities responsible for analysing asylum applications, as well as guidelines for the modalities for interviews. Like the Dublin system, the new "procedures" Directive extends its scope to all applicants for international protection. It also confirms the obligation for the State authorities to examine requests made in the territory of the State, including the borders, the territorial waters and the transit zones. Concerning the procedures, Article 6 of the Directive affirms that the application must be registered as soon as possible, this means within three working days, which may become six under some conditions, namely if it has been received by bodies other than the competent one or to ten days in case of mass influx.

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[136] European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, 13 December 2011.

[137] Ibid.

[138] European Union, *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*, 26 June 2013.

Article 8 needs to be cited as it introduces the obligation for that the police, the border guards, the staff of detention centres to receive adequate training so as to being able to out their duties and inform applicants about the access to the procedure.

Following the jurisprudence of the ECtHR, which considered it necessary for the applicant to obtain sufficient information on asylum procedures no matter where the person finds himself/herself[139], the Directive introduced therefore the obligation to provide information and advice and assistance is extended to border passages and detention centres.

Article 9 confers the person the right to remain in the territory of the State until the conclusion of the procedure at first instance. The Directive requires Member States to establish a single procedure for the examination of every individual application, focusing especially on whether the applicant can be granted refugee status and subsidiary protection and taking into account the information provided by the EASO, the UNHCR and other humanitarian organisations regarding the country of origin of the person[140].

In addition to the ordinary procedure, the Directive also provides for certain special procedures at Article 31, namely when the application is likely to be well founded or where it has been submitted by a considered vulnerable applicant.

Article 31 specifies the conditions for an accelerated procedure, carried out at the border or in transit zones. The above mentioned procedure is described as follows: "Member States may provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be accelerated and/or conducted at the border or in transit zones."[141]. This can be done only in particular cases, among the others: if he/she comes from country considered as safe; if he/she has submitted false information or documents; if in bad faith he/she has destroyed or concealed the identity or travel documents; if he/she has applied for international protection for the sole purpose of delaying or preventing removal[142]. The application may be declared inadmissible and therefore excluded from examination where the applicant has obtained protection in another Member State, when a

[139] ECtHR, 23 February 2012, *Hirsi Jamaa and Other v. Italy*, Application No. 27765/09.

[140] A. Del Guercio, *La seconda fase di realizzazione del sistema europeo comune d'asilo, Osservatorio Costituzionale*, September 2014, pp. 22-26.

[141] Article 31, European Parliament, Directive 2013/32/EU.

[142] *Ibid*.

non-member State is considered to be a "first country of asylum" or a safe third country[143]. The concept of safe third country was codified in the first Dublin Convention.

Prior to the above mentioned directives, the European Council also adopted the Directive 2003/9/CE, substituted by the Directive 2013/33/UE, setting up the minimum standards for the reception of asylum seekers. The most important parts of the text regarded the obligation of the States to provide persons with all the necessary information, the right to public health, the recognition of the freedom of movement and residence, the right to work and to have a vocational training.

Lastly, Member States adopted an European Agenda on Migration. On the one hand, Member States engaged to take immediate measures to deal with emergencies such as implementing the work of Triton, Frontex and Poseidon and the hot-spot system, putting in place reallocation systems as in Article 78 of the TFEU, implementing regional program. On the other hand, a new approach to manage medium- and long-term migration was proposed. This approach included discouraging illegal immigration through common procedures for repatriation, implementing border controls through the role of Frontex, reinforcing the common asylum policy[144].

In 2014 the Commission in the Stockholm Guidelines stressed for the importance of enforcing measures to ensure a more organised and coordinated action of Member States, through the implementation of the Task Force Mediterranean.

[143] Article 33*, Ibid*

[144] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration*, Brussels, 2015.

2. The European Union Visa policy

2.1 Historical evolution

After having introduced a general overview of the history of the European Union, I will try to provide with a more specific analysis of the EU visa policy.

The Members of the European Union took over 40 years to handle the question of borders management and the entry and stay of foreigners. The debate resulted in the first Schengen Agreement of 1985 who reaffirmed the freedom of movement of persons. However, the first agreement only indicated the areas where it was necessary to harmonise policies and initiate forms of cooperation, but did not lay down precise provisions.

The final removal of internal barriers between Member States was finally achieved in 1995 with the Schengen Convention. The Convention defined the harmonisation measures that were considered necessary to ensure internal security, thus forming the so called Schengen *acquis*. Not only did it definitively abolish controls at internal borders, but also it introduced the concept of external borders, it proposed a common visa policy for short stays and provided for provisions regarding the asylum requests[145]. Nonetheless, some observers saw the first agreement as a mean to share information on foreigners in an attempt to combat illegal immigration, rather than an effort to implement the free-circulation[146]. As a matter of fact, the system only worked, and still works today, if the external border are secured and if there is mutual trust, solidarity and responsibility among States Parties. Moreover, if on the one hand all the signatory countries can benefit from the abolition of the internal borders, what happens in practice is that only the countries constituting the external border are responsible for carrying out border controls.

The effective implementation of the first Schengen Agreement happened 5 years later, when the States decided to remove their border posts and open the agreement to new Member States. In 1990 the relevant Convention was signed. It implemented the Schengen Agreement by establishing the measures for the abolition of controls at the internal

[145] R. Bontempi, *Gli Accordi di Schengen*, in B. Nascimbene, Da Schengen a Maastricht: apertura delle frontiere, cooperazione giudiziaria e di polizia, Giuffrè, Milano, 1995, pp. 35-36.

[146] D. Bigo, E. Guild, *La logique du visa Schengen : police à distance*, Cultures & Conflits, n 49(1/2),2003, p.5.

borders, introducing the concept of external borders, and specifying the relationship with the European legislation[147].

Besides, following the entry into force of the Treaty of Amsterdam, the Schengen *acquis* became part of the European law framework in Title IV at Article 61.

As a result, the European Union was given the exclusive competence of issuing short-stay visas, and the Court of Justice was given the jurisdiction to rule on asylum and immigration disputes. According to this, EU Member States engaged themselves to adopting measures for granting visas to third-country nationals, measures determining the conditions under which third-country nationals could freely move within the territory as well as measures for the issuance of long-term visas and residence permits, within a five-year period[148].

In the 2000s, the question of the controls at the external borders became more and more relevant. During the Tampere Council of 1999, the European Council stressed the importance of engaging in the protection of the refugees' right to access the territory of the European Union while strengthening controls on external borders [149].

Later, Member States started to think about options to facilitate the access to the territory of the European Union. Governments engaged in ensuring a fair treatment to third-country nationals legally residing in the territory of the Member States, in implementing a comprehensive approach to migration management, and developing cooperation with countries of origin and transit[150]. In 2004, the EU Agency Frontex was created in order to support Member States in the management of the external borders.

However, the European visa common policy was at the beginning a simple list of countries whose citizens were subject to visa restrictions to enter the European Union, integrated in the Maastricht Treaty[151]. The Regulation 2018/1806[152] sets up the list and the criteria for

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[147] L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale,* G. Giappichelli Editore, Torino, 2000, pp. 164-165.

[148] C. Simoncini, *La libertà di movimento delle persone e lo straniero, Profili costituzionali e comunitari*, ARACNE Editore, Roma, 2014, pp. 157-158.

[149] European Council, *Presidency Conclusions of the Tampere European Council*, 15-16 October 1999.

[150] C. Simoncini, *La libertà di movimento delle persone e lo straniero, Profili costituzionali e comunitari,* ARACNE Editore, Roma, 2014, pp. 158-159.

[151] Article 63, European Union, *Treaty on the European Union*, Maastricht, 7 February 1992.

[152] European Union, *Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the*

visa obligation. However, the list is not exhaustive and the European Institution promote a case-by-case evaluation of every country.
However, the visa policy remains a shared competence between the European Union and Member States.

2.2 Overview of the Schengen Agreement

The Schengen Agreement, and then the Schengen Implementing Agreement of 1990, set up harmonised entry conditions required for applicants to be granted a visa. In its preamble, it is clearly stated that the abolition of internal borders controls is a necessary step to take in order to reach the objective of the European market.
Article 17 clearly states that Member States must abolish borders control, whereas Article 20 stresses the importance of harmonisation.
Chapter VII of the Agreement deals with the question of determining which state is responsible for assessing the application and sets up some criteria, such as the applicant's proximity to the country who has issued the visa or had granted the first entry.
The Schengen Agreement enshrines two controversial but important clauses: the sovereignty clause and the humanitarian clause.
According to the sovereignty clause, or opt-out clause, a State can process an application even if, according to the Schengen criteria, another State would be responsible for it.
As concerns the humanitarian clause, a State can ask to another one to take in charge of the examination an application on humanitarian reasons. Article 15 establishes a list of exceptions, claiming that the general conditions can be derogated if the authorities estimate it necessary "on humanitarian grounds, on grounds of national interest or because of

external borders and those whose nationals are exempt from that requirement (codification), 14 November 2018.

international obligations"[153]. However, the notion of humanitarian grounds remains undefined[154].

Many scholars underlined this problem. For example Noll claimed the notion "remain undefined in the Schengen Convention, but it is contextually clear that the grant of visas to alleviate threats to the applicant's human rights are covered by the term."[155]. The non-binding Visa Handbook provides examples and for humanitarian grounds that could lead to an examination of an application that could be inadmissible, or to an extension of the visa.

The Handbook focuses more on health issues defining humanitarian grounds as follows:

> "Sudden serious illness of a close relative or of other close persons. Death of a close relative or of other close persons. Entry required so that initial medical and/or psychological care and, by way of exception, follow-up treatment can be provided in the Schengen State concerned, in particular following an accident such as shipwreck in waters close to a Schengen State, or other rescue and disaster situations."[156]

The Convention on the application of the Schengen Agreement sets up in the Title II the provisions concerning the harmonisation of the national policies and the discipline of the entrance and stay non-European nationals on the Schengen area, such as the issuance of a visa for short-term stay valid in all the Member States or the obligation for third-country nationals to declare their presence to the authorities of the State of entry. However, the

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[153]Article 5, European Union, *Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, 19 June 1990.

[154] G. Noll, *Safe Avenues to Asylum? The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests*, the Danish Centre for Human Rights, UNHCR, April 2002, pp. 14-17.

[155] G. Noll, *Study on the feasibility of processing asylum claims outside the EU, The Danish Centre for Human Rights, European Commission*, 2002, p.235.

[156] European Commission, *Commission Recommendation establishing a common Practical Handbook for Border Guards*, 9 November 2006, p.48.

Member States have the power to re-establish internal border controls for reasons of public order or national security[157].

More in detail, firstly, with the entry into force of the Agreement, the meaning of the words such as internal borders, external borders, asylum seekers, residence permit are defined in Title I. Secondly, Title II aims to regulate the questions of the abolition of internal border controls and a series of measures aimed at harmonising asylum policies and arrangements for the movement of foreigners for the purpose of tourism. In Title III deals with the police cooperation and the adoption of measures in case of a possible threat to the internal security[158].

With regard to the crossing of internal borders, the Agreement provides for the complete abolition of internal border controls and provides that internal borders may be crossed at any point without being exercised personal controls[159].

On the contrary, controls at external borders are strengthened, which can in principle be crossed only at control posts and only during the established opening hours[160]. The Agreement introduces uniform visas for short-term periods of up to three months for all the Contracting Parties[161], whereas for periods of more than three months, visas shall be issued by the Member States in accordance with their respective legal systems[162]. The agreement also provides for rules on responsibility for processing asylum applications, setting up the principle according to which the State responsible for processing an application for asylum shall be determined in accordance with Article 30[163].

However, some scholars believed that the first agreement was focused on border security, illegal immigration. Moreover, it was perceived as a chance to share information on

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[157] L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale*, G. Giappichelli Editore, Torino, 2000, pp. 166-167.

[158] C. Joubert, H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights*, Kluwer Law International, The Hague, 1996, pp.15-17.

[159] Article 1, European Union, *The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, 22 September 2000.

[160] Article 3, *Ibid.*

[161] Article 10, *Ibid.*

[162] Article 18, *Ibid.*

[163] R. Bontempi, *Gli Accordi di Schengen, in B. Nascimbene, Da Schengen a Maastricht: apertura delle frontiere, cooperazione giudiziaria e di polizia*, Giuffrè, Milano, 1995, pp. 37-40.

foreigners in illegal situation, rather than on a mean to foster freedom of movement[164]. After an initial distrust, between 1990 and 1995 all the Members of the European Union (excepting the United Kingdom and Ireland) adhered to the Schengen Agreement and, with the Treaty of Amsterdam, the Schengen *acquis* was comprehensively integrated in the European Legislation.

The Agreement also provided for the establishment of the Schengen Information System (SIS) for the management and exchange of information between the countries party to the Convention and an instrument for police cooperation in Europe. Thanks to this system, alerts on persons or property are made available and automatically consulted, both in the context of controls at the external borders and in the context of police and customs controls. Moreover, the purpose of the system is to permit checks on persons and objects as a result of border checks, or other customs or police checks carried out on the territory of the Member State, thus avoiding the issue of visas and residence documents to foreigners reported for the purposes of non-admission. With the Council Decision of 24 February 2005[165], the scope of the SIS was extended to the fight against terrorism[166]. However, only a limited number of data can be recorded, even if several categories of people can be registered. Some categories cannot be registered, such as asylum seekers who would enjoy special protection This system has been criticised because of the risk of discrimination, as privacy systems differ from one country to another[167].

The Schengen Agreement has positive but also negative aspects. Firstly, it represents an opportunity to combat international crime and an opportunity for operational rapprochement between police forces. Secondly, it marks the beginning of a common policy on border monitoring and expulsions, through simplification of asylum procedures and the introduction of uniform access conditions[168].

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[164] D. Bigo, E. Guild, *La logique du visa Schengen : police à distance*, Cultures & Conflits, n 49(1/2),2003, p.5.

[165] European Union, *Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism*, 24 February 2005.

[166] R. Bontempi, *Gli Accordi di Schengen,* in B. Nascimbene, Da Schengen a Maastricht: apertura delle frontiere, cooperazione giudiziaria e di polizia, Giuffrè, Milano, 1995, pp. 45-47.

[167] L. Van Outrive, *La Collaboration Policière en Europe: de Schengen à Europol*, in B. Nascimbene, Da Schengen a Maastricht: apertura delle frontiere, cooperazione giudiziaria e di polizia, Giuffré, Milano, 1995, pp. 76-77.

[168] R. Bontempi, *Gli Accordi di Schengen,* in B. Nascimbene, Da Schengen a Maastricht: apertura delle frontiere, cooperazione giudiziaria e di polizia, Giuffrè, Milano, 1995, pp. 43-44.

On the other hand, the Schengen Agreement has negative aspects. Firstly, the cooperation between European police and judicial bodies is hampered by the lack of cohesion between the numerous initiatives in this field which overlap each other. Secondly, the Schengen Information System (SIS) presents some limits. In fact, only a limited amount of personal data can be stored in the SIS and the data types are too vague. The notions of public order and internal security may be interpreted differently according to each State. Besides, there is a lack regarding clear rules on the transmitting of information and the maximum retention period for information appears to be too long. Since the Convention leaves a great margin of discretion to each State, there are gaps in terms of privacy and protection of privacy as regards the obligations imposed on the Member States[169].

2.2.1 The Schengen Borders Code

The question of border controls in favour of the freedom of movement has always been at the centre of the debate among Member States. The apparent loss of control has always been seen as a source of instability and a threat for some Member States, hampering the proper functioning of their activities to protect the State and its citizens.
The Schengen Borders Code was introduced in 2006[170] , then amended in 2016[171], in order to concentrate in a single code all the provisions of the Schengen *acquis* as regards border controls. It is important to underline that, not only does the Schengen Borders Code lay down the rules on the abolition of the internal border controls, but it also includes the main rules on the management of the external borders, taking into account the principles of the freedom of movement as well as the rights of refugees and asylum seekers[172].

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[169] R. Bontempi, *Gli Accordi di Schengen*, in B. Nascimbene, Da Schengen a Maastricht: apertura delle frontiere, cooperazione giudiziaria e di polizia, Giuffrè, Milano, 1995, pp. 44-46.

[170] It was introduced by the Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), 15 March 2006.

[171] *Ibid*.

[172] S. Peers, *The Future of the Schengen System*, University of Essex, n.d., p.34. Available at https://www.academia.edu/14966170/The_Future_of_the_Schengen_System

The text of the Schengen Borders Code states that external borders can only be crossed at points and during official times. Derogations are allowed under certain conditions, such as in the case of unforeseen emergency situations. Moreover, it lays down the conditions for short-term entry into the Schengen area, namely a maximum of three months within a six-month period. If a person cannot boast these criteria or does not belong to any exception, authorities must deny him/her the permission to cross the borders. The refusal must be justified by the authorities and the person denied entry has the right to appeal to the refusal, in accordance with national law. There are some special provisions regarding asylum seekers and the issuance of long-term visas[173].

Besides, all persons should be subject to controls in order to verify their identity and their travel documents, always respecting the EU law and the principle of freedom of movement. However, this does not apply to third-country nationals. As a matter of fact, third-country nationals can be subject to more accurate controls, especially regarding the validity of their documents, the period and reason for stay within the Schengen area. Furthermore, States have the right to carry out checks in their databases or in the SIS and VIS so as to prevent potential illegal immigrants.

The Schengen Code provides at Article 25 a general framework on the exceptional possibility of temporarily reintroducing controls at internal borders. Indeed, Member State can decide to reintroduce border checks in the event of a serious threat to public policy or to internal security, or serious gaps which could endanger the functioning of the Schengen system. The State in question may temporarily reintroduce border controls for a limited period of 30 days or for the foreseeable duration of the threat, but it must in no way exceed the duration necessary to respond to the threat. Moreover, Article 26 sets up the criteria for the temporary reintroduction of border controls. The Member State may decide to reintroduce these measures as a last resort and with a temporary nature. It is imperative for the State to assess whether the measure adopted can provide an adequate remedy to the threat and may be proportional to the measure in relation to the threat. The State must take into account the possible impact of any threat on its public order and internal security, including possible terrorist threats, as well as the possible impact of the measures on the

[173] *Ibid,* p. 36.

free movement of persons within the Schengen Area. The procedures for the temporary reintroduction of border controls are described at Article 27[174].

Border controls have been reintroduced on multiple occasions and event. However, the refugee crisis between 2015 and 2016 and the decision of some governments to reintroduce internal border controls as a response have brought the question of the loss of sovereignty and the threat to public security back[175]. As a matter of fact, numerous States have reintroduced borders controls because of the increasing flows of persons seeking international protection, such as Austria, Germany, Slovenia, Hungary and Sweden[176]. However, the European Commission does not have the power to control governments' decisions.

2. 3 The Visa Code system

The Visa Code Regulation has been adopted in 2009, and amended several times[177], in order to regulate the issuance of visas up to three months. However, the system is still incomplete and the visa policy remains a shared competence between the European Union and Member States. Indeed, only short-stay visas have been harmonised.

These types of visas may be issued as: uniform visas "valid for the entire territory of the Member States"; visas with limited territorial validity, or airport transit visa, "valid for transit through the international transit areas of one or more of the Member States"[178]. The text of the Code must be interpreted in the light of the rules of the Treaties and of all the others instruments already in force in the European Union law.

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[174] Regulation (EU) 2016/399.

[175] European Parliament, Directorate-General for Internal Policies, *Internal borders controls in the Schengen area: is Schengen crisis-proof?*, study for the LIBE Committee, 2016, pp. 23-25.

[176] Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 of the *Schengen Borders Code*.

[177] The last version that will be analysed in this work is *Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).*

[178] Article 2, *Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code)*, 13 July 2009.

Member State have a broad margin of discretion and may refuse to issue a Schengen visa. This means that a person could see his/her application for a Schengen Visa denied in one State but accepted in another. This led to the phenomena called visa shopping. As the criteria vary from one country to another, persons choose to apply for visas in more than one country in order to have greater chances to see their application accepted. The Court of Justice of the European Union claimed that the authorities of a State may refuse it where one of the grounds for refusal listed in the Visa Code may be invoked against him, namely where there is a reasonable doubt regarding the applicant's intention to leave the territory before the expiry of the requested visa[179]. The authorities must conduct an individual examination of the visa application in order to determine whether there is a reasonable doubt as to this intention, taking into account not only the general situation of the applicant's country of residence, but also its personal social and economic situation, the existence of any previous legal or irregular residence in one of the Member States, as well as its links in the country of residence and in the Member States[180].

Some scholars agree to say that the harmonisation of visas could boast many advantages for the Member States as well as for the persons. As a matter of fact, by providing a legal way to reach the territory of the European Union. On the one hand, visas represent safe alternative to the illegal routes and a reinforcement of the right to international protection; on the other hand, they provide a mean for States to control migration flows, implement control and security and discourage the activity of human traffickers[181]. Chiara Favilli asserts that the extension of the scope for granting humanitarian visas is mentioned in some documents of the European institutions, but has never been translated into the proposal for a legislative act. According to her, none of the Member State have ever intended to regulate the entry into the European Union of persons seeking international protection or have ever foreseen the procedures and modalities to issue visas in such cases[182]. As a matter of fact, humanitarian visas are issued upon discretion of the State and do not exist juridically, as the only two types of existing visas are short-term and long-term

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[179] CJEU, *Rahmanian Koushkaki v. Bundesrepublik Deutschland*, 19 December 2013, C-84/12.

[180] Council of Europe, *Handbook on European law relating to asylum, borders and immigratio*n, European Union Agency for Fundamental Rights,, Strasbourg, 2014, p. 31.

[181] European Union Agency for Fundamental Rights, *Legal entry channels to the EU for persons in need of international protection a toolbox*, FRA focus, Luxembourg, Publications Office, 2015, p.4.

[182] C. Favilli, *Visti umanitari e protezione internazionale: così vicini e così lontani*, Diritti Umani e Diritto Internazionale,il Mulino, vol. 11, 2017, p.557.

visas[183]. They can therefore be used by States in order to simplify the entrance to their territory for people in need for humanitarian aid, such as for medial or family-related emergencies.

Furthermore, as we will see in the final part of this work, there is some disagreement on the question whether the increasingly restrictive visa policies are effectively reducing the flow of migrants. On the one hand, some scholars agree to say that these restrictive policies are effective and it has become more difficult for people to migrate, on the other hand the so called "migration policy pessimists" say that this policy has increased the use of illegal means and asylum techniques to entry the territory of the European Union[184].

The Visa Code lays down at Article 19 the rules on the admissibility of the applications.. In order to be considered admissible, the article states that a request must contain: application form signed and completed on time, valid travel documents, photographs, visa fee paid, biometric data). The article gives a great margin of discretion to Member States as they can decide whether to derogate these requirements. It states: "By way of derogation, an application that does not meet the requirements set out in paragraph 1 may be considered admissible on humanitarian grounds or for reasons of national interest."[185].

If a visa is refused, the Visa Code grants the right to appeal at Article 32.

2.3.1. The different types of visas: the need for harmonisation

The Visa Code System provides for the conditions for the issuance of the so-called short-stay visas, namely those not exceeding 90 days, and for the visas for the transit of people through the European area, such as through airports.

The short-term visas allows the entry and movement within the Schengen Area for stays of no more than 90 days within any period of 180 days and is issued by a Member State

[183] D. Neville, A. Rigon, *Towards an EU humanitarian visa scheme*?, Briefing of the European Parliament, Study PE 556, May 2016, Brussels, 2016, p.2.

[184] M. Czaika, M. Hobolth, *Do restrictive asylum and visa policies increase irregular migration into Europe?,* European Union Politics, Volume 17(3), September 2017, pp. 345-365.

[185] Article 19, Regulation (EC) No 810/2009.

under the respect of an common European set of rules. Being issued on the basis of common European conditions, these visas are part of a system consisting of the list of countries whose citizens are required to have a visa, a database and a list of assumptions and procedures for the issuance. Therefore must be interpreted and applied according to uniform criteria, in the interest of all EU States Parties to the area of free movement. States may depart from it and issue short-term visas on the basis of conditions other than those laid down in Article 25, such as the visas with limited territorial validity (LTV)[186].
As concerns long term visas, they are still subject to the discretion of the national authorities. Although the EU also has competence to regulate the issue of long-term visas, no legislation has been adopted to date. The only exceptions concerns the equivalence of long-term visas with short-term ones, but it is a duty of the States to declare which visas or residence permits are allowed to the equivalence, according to the principle of loyal cooperation and responsibility[187].

2.3.2 The exception of the visas with limited territorial validity

The visas with limited territorial validity (LTV) allow short-term stays for persons who do not fulfil the condition for the classic short-stay visas. As they are not issued on the basis of the common European conditions, they can only allow entries and stays up to 90 days only in the issuing State. The Visa Code Regulation sets up the legal ground at Article 19 and 25, stating that:

> "a visa with limited territorial validity shall be issued exceptionally, in the following cases: when the Member State concerned considers it necessary on humanitarian grounds, for

[186] C. Favilli, *Visti umanitari e protezione internazionale: così vicini e così lontani, Diritti Umani e Diritto Internazionale*,il Mulino, vol. 11, 2017, p.557.

[187] Ibid.

reasons of national interest or because of international obligations.[188]".

The Visa Code does not establishes guidelines for the lodging or processing of an application, and does not explicitly say whether Member States have an obligation to initiate an assessment under Article 19 and 25. Country authorities are obliged to assess possible humanitarian grounds and international obligations. However, because there is no separate procedure for LTV visas the question regarding the possibility of appeal to refusal remains unclear.

Usually LTV visas are issued in cases of a need for an urgent medical treatment or in cases of illness or death of a family member. Member States have a great margin of discretion in deciding whether the issuance of such visa is needed and these types of visas have been subject to many controversies and different interpretations. First of all, scholars believe that the framework of the LTV visas is incomplete as it leaves a broad discretion to national authorities. Indeed, they allow people to access only to the Member State who have issued it and therefore reflects the national interests of the State. Besides, the three criteria that justify the derogation are unclear as not explicitly defined by the article.[189]

Secondly, in the light of international obligations to respect human rights imposed on States, this type of visa has been interpreted as a potential safe and legal mean to reach the European Union and apply for asylum[190]. Moreover, Article 25 also does not allows the possibility to convert the short-term visas into long term-visas, as it limits states to renew short term visas for the same period of 180 days and only for reasons deemed justified by the consulate. Chiara Favilli stressed that the extension of the provisions to the requirement would mean recognising a right to persons seeking asylum to apply for protection through diplomatic representations[191].

The aim of this work is to investigate the question whether the so called humanitarian visas could offer a safer and legal mean to entry the territory of the European Union, thus

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[188] Article 25, Regulation (EC) No 810/2009.

[189] D. Neville, A. Rigon, *Towards an EU humanitarian visa scheme?*, Briefing of the European Parliament, Study PE 556, May 2016, Brussels, 2016, p.2.

[190] E. Delval, *La CEDH appelée à trancher la question des 'visas asile' laissée en suspens par la CJUE: lueur d'espoir ou nouvelle d'éception?,* Strasburg Observer, 12 February 2019.

[191] C. Favilli, *Visti umanitari e protezione internazionale: così vicini e così lontani*, Diritti Umani e Diritto Internazionale,il Mulino, vol. 11, 2017, p.557-558.

representing an alternative to the Mediterranean illegal ways. Practice shows that such use of these visas as a mean for obtaining international protection is already taking place in some EU Member States. However, Member States which issue these types of visas do so on the basis of their own specific national practices, since there is no clear provision in the Visa Code[192]. Data show that the majority of humanitarian visas have been issued in relation to resettlement programs of the UNHCR, to the rescue operations of Syrians or humanitarian corridors such as the Community Sant'Egidio[193].

There is, however, a certain level of uncertainty regarding these types of visas, both on procedural and substantive aspects. In fact, there is no separate procedure for the submission of an application for a VTL visa on humanitarian grounds and for its subsequent examination and the existence of a right to appeal against refusal to issue a VTL visa is unclear[194]. Indeed, Estimates suggest that 90% of all asylum seekers enter Europe in an irregular manner[195].As I will analyse in the second part of this work, this lacking of harmonisation and clarity has been stressed by the Court of Justice of the European Union in its judgement *X and X v. Belgium* of March 2017.

In the a study conducted by the LIBE Commission of the European Parliament, the question of the existence of an obligation for States to issue humanitarian visas is investigated. Article 25 of the Visa Code states that the issuance of visas is a prerogative of the States. Indeed, authorities traditionally have the sovereignty to control their borders and to decide on the entry of foreigners into their territory. On the contrary, according to a broader interpretation, States would have a positive obligation under which, in certain circumstances, they would be required to issue a humanitarian visa because of their positive obligations to respect human rights, namely the principle of *non-refoulement*, the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the

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[192] F.L. Gatta, *La "saga" de visti umanitari tra le Corti di Lussemburgo e Strasburgo, passando per il legislatore dell'Unione Europea e le prassi degli Stati Membri*, Dirittifondamentali.it, Fascicolo 1/2019, 12 june 2019, p. 10.

[193] Myria, *Visas Humanitaires: vers une politique encadrée et transparente*, Note de Myria pour la Commission de l'intérieur, des Affairs générales et de la Fonction publique, 29 january 2019, p. 5.

[194] F.L. Gatta, *La "saga" de visti umanitari tra le Corti di Lussemburgo e Strasburgo, passando per il legislatore dell'Unione Europea e le prassi degli Stati Membri,* Dirittifondamentali.it, Fascicolo 1/2019, 12 june 2019, pp. 10-11.

[195] C. Hein, M. De Donato , *Exploring avenues for protected entry in Europe*, Report, Italian Council for Refugees, March 2012, p. 17.

ECHR and Article 4 of the CFR) the right to seek asylum (Article 18 CFR)[196]. Nonetheless, as I will analyse in the second part of this work, the Court of Justice of the European Union does not agree on this extensive interpretation based on the Member States' obligations to respect human rights. The CJEU claimed that the positive obligations for the State may result in the duty to take action with measures of prevention and protection of the person but cannot result in a burden for them[197].

[196] U.I. Jensen, *Humanitarian visas: option or obligation?*, study for the LIBE Committee, European Parliament, Directorate General for Internal Policies, Policy department C: citizens' rights and constitutional affairs, Justice, Freedom and Security, European Parliament, Brussels, 2014.

[197] ECtHR, 9 June 2009, *Opuz v. Turkey*, Application. no. 33401/02.

3. The Common European Asylum system

3.1 From the Dublin Convention to the Dublin Regulation III

The creation of the Schengen Area had many consequences. Among the others, the need to harmonise the policies on asylum at European level that, up to that moment, were still under the competences of the Member States and not within those of the European Community. In 1989 the Palma Document was adopted during the European Council in Madrid. This document was composed of two drafts: the first one concerned the crossing of external borders, the second one was about the responsibility of Member States concerning the assessment of asylum applications. The first one was never adopted, whereas the second one turned resulted in them Convention determining the State responsible for examining application for asylum lodged in one of the Member States of the European Communities, namely the Dublin Convention[198].

The Convention introduced some important elements as well as some binding provisions. From the introduction of new definitions, such as the definition of alien, application for asylum, applicant for asylum and examination of an application for asylum, to the lists of criteria for determining the State responsible for the application. In order to prevent the spreading phenomena of asylum shopping, the Convention introduced the so-called authorisation principle, according to which only one Member State is responsible for assessing an asylum application within the European Community[199]. However, the Convention did not establish an harmonised common system, but it still left national laws to decide the modalities for the examination of the applications, stating that their national and international obligations had to comply with the provisions established by the UN Refugee Convention. Furthermore, the Convention provided at Article 15 a system for the exchange of information and data and called for a computerization of the system, that will later became the EURODAC Regulation.

During the European Council in Tampere, a system for the identification of asylum seekers was created with the aim of implementing the effectiveness of the Dublin Convention by

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[198] European Union, *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention*, 15 June 1990.

[199] V. Chetail, *The Common European Asylum System: Bric-à-brac or System?,* in V. Chetail, P. De Bruycker, M. Francesco, Reforming the Common European Asylum System: the New European refugee law, Brill Nijhoff, Boston, 2016, p. 6.

ensuring the determination of the competent State when examining the application for the refugee status[200]. The Regulation provided for the Member States the obligation to send the fingerprints of all asylum applicants aged 14 years or more or who were caught while illegally crossing their external borders to the Central Database. However, it remained up to the discretion of the authorities to decide whether or not to send fingerprints.

The system of the Dublin Convention revealed to be faulty, therefore a new regulation was drafted. The Dublin II Regulation[201], which, together with the EURODAC Regulation[202] and the respective implementing regulations form the so-called "Dublin system", was adopted in 2003. The aim was to improve the existing system by ensuring that applicants are examined at least by one of the Member States through a binding instrument. As a matter of fact, the regulation is a binding EU legislative act, contrary to the Convention.

The criteria to recognize the competent State were defined to implement the previous measures to avoid the phenomenon of refugees in orbit and the asylum shopping. The criteria were defined with a precise hierarchical order and indicated how the responsibility is attributed to a State: the presence of a family member of the applicant who already is a refugee or the issuance of a residence permit or a visa to the applicant[203]. Besides, Member States had the possibility, according to the sovereignty clause and the humanitarian clause, to examine an application even if they were originally not designated as competent.

As for the Dublin Convention, the States parties reaffirmed the principle according to which the asylum seeker did not have any choice but that the State responsible for the application was the one in which the applicant first entered and to which he/she would have been transferred if he/she decided to submit another application in an another State.

Besides, Dublin II introduced some positive elements, focusing more on the protection of unaccompanied minors.

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[200] European Union, *Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention*, 11 December 2000.

[201] European Union, *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*, 18 February 2003.

[202] The above mentioned Eurodac Regulation will not be deepened in this thesis.For a general framework on the topic, see: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/identification-of-applicants_en .

[203] Chapter III, Council Regulation (EC) No 343/2003.

The Dublin III Regulation[204] was adopted in 2013 and, together with the EURODAC Regulation, forms the current Dublin system. The aim of this new regulation was tackle the lacks of the previous Dublin II Regulation. Indeed, albeit the core principles remain the same as the previous regulation, it clearly defines criteria for the evaluation of the applications, enlists criteria for the assessments of the applications, provides for efficiency of the asylum procedures[205]. The new Regulation aligned itself with the previous discipline for some aspects. First of all, sovereignty of the States continues to be a core principle. As a matter of fact, the application for international protection which is submitted within the territory of the European Union must be examined by the competent authorities of a single Member State, in order to avoid the phenomenon of asylum shopping. Secondly, Dublin III continues to set up a list of criteria for the competence of the State on the application. Moreover, in order to prevent the person from being rejected without taking account their need for protection, it establishes that all individuals can apply for international protection when they find themselves within the territory of the EU, including the border or the transit zones[206]. Such right is reaffirmed in art. 15, which specifically deals with the applications submitted in the international zone of airports, following the jurisprudence of the ECtHR. Indeed, the Court established in the judgement *Amuur v. France* of 1996 that the international zones of the airports are also subject to the jurisdiction of the state and that therefore all the obligations to which the State is bound can also be applied[207].

Many were the elements introduced by the new Dublin Regulation. Firstly, Article 1 no longer refers only to applicants for refugee status but is extended to all those applying for international protection, thus including beneficiaries of subsidiary protection and stateless persons. Further definitions have been introduced, in particular: minor children must be unmarried but not necessarily dependent on one parent, and the guardian of the minor can replaced by another adult responsible, such as grandparents or uncles.

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[204] European Parliament, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, 26 June 2013.

[205] S. Fratzke, *Not Adding Up: The Fading Promise of Europe's Dublin System, Migration Policy Institute Europe*, Brussels, 2015, p. 2.

[206] Regulation (EU) No 604/2013.

[207] ECtHR, 25 June 1996, *Amuur v. France*, Application no 19776/92.

Besides, the system includes the hypothesis that if it is not possible to transfer an applicant to the State responsible for the application because he/she would be at risk of being subject to inhuman or degrading treatment, it is necessary to verify whether it is possible to transfer him/her to another State.

Furthermore, one of the main elements introduced by the Dublin III Regulation is the extension of its scope also to those applicants seeking for subsidiary protection.

In addition to providing for the transfer from one Member State to another, it does not exclude the possibility of sending the asylum seekers to a safe third country either, provided that this country respects the rules on the recognition of international protection[208]. However, some scholars believe that this provision is not compatible with the principle of *non-refoulement* and the provision of the CFR and the ECHR that we discussed in the first chapter[209].

The new Dublin III Regulation introduced some provisions regarding the restriction on movements. The fundamental principle enshrined in Article 31 of the Geneva Convention is reaffirmed, namely the authorities cannot detain or deprive of liberty the applicant who is waiting for a pending transfer from one Member State to another, even if certain conditions limiting state discretion and protecting the rights of the individual are respected. Detention should be an exception and should only be provided, in accordance with the principles of necessity and proportionality, where there is a significant risk of escape[210].

Furthermore, Article 18 claims that the asylum seeker has the right to submit a new application in the State recognised as competent without being considered as a repeated application with respect to the Procedures Directive[211].

In the event that the applicant moves to another country while his/her application is still under examination, Dublin III sets up that the application continues to be examined in the State in which it was firstly presented[212]. The exception to this principle concerns the case in which the applicant travels outside the territory of the European Union for a period of at least three months or if the State where he resides issues him/her a residence permit.

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[208] Article 3, Regulation (EU) No 604/2013.

[209] A. Del Guercio, *La seconda fase di realizzazione del sistema europeo comune d'asilo, Osservatorio Costituzionale*, Associazione italiana dei Costituzionalisti, September 2014, p. 5.

[210] Article 28, Regulation (EU) No 604/2013.

[211] European Union, *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*, 23 June 2013.

[212] Article 20, Regulation (EU) No 604/2013.

Moreover, if the competent State has been recognised as such by EURODAC, the period for which the request to take charge from three months shall be reduced to two, otherwise the State in which the applicant has submitted the application becomes competent for it.
Lastly, the new regulation protects the right to effective remedies. As a matter of fact, Article 27 provides the right of the applicant to appeal against a transfer decision.

3.1.1 Elements of continuity and discontinuity between the Dublin Convention, the Dublin Regulation II and the Dublin Regulation III

As we have seen previously, the new Regulation was introduced in order to tackle the issues of the previous Dublin systems. The new text introduced some provisions but at the same time reaffirmed some old principles.
Firstly, Dublin III contains provisions as concerns effective remedies The Dublin II Regulation recognised a general right of appeal but did not give it effect, whereas the new regulation confers greater importance to procedural guarantees for asylum seekers involved in transfer procedures. In fact, the asylum seeker must be informed immediately, in writing and in a language he/she knows or is reasonably supposed to be known, about the provisions of the regulation, the criteria for determining the examining of his/her application, on the possibility to inform the authorities about the presence of family members in other EU States, but more importantly, of the possibility of challenging the transfer decision. Article 27 establishes that, in order for the right of appeal to be effective, the access to a court must be guaranteed within a certain period of time. Besides, in case of appeal, the transfer must be suspended automatically or on request[213]. The claimant must be given free legal aid must also be granted at request, unless the competent authority considers that the appeal or review has no concrete prospect of success.
Secondly, Dublin II did not contain any provision devoted to the regulation of the detention of applicants waiting for being transferred. On the contrary, Article 28 of Dublin III states that: a person may not be detained only because he or she is under the Dublin

[213] A. Del Guercio, *La seconda fase di realizzazione del sistema europeo comune d'asilo, Osservatorio Costituzionale*, Associazione italiana dei Costituzionalisti, September 2014, p. 13.

system, the assessment must be made on a case-by-case basis, there must be a real risk of escape to detain a person. In addition, the detention must last as long as necessary to carry out administrative procedures. In such cases, the period of examination of the application must be shorter than the normal procedure, and the request for taking charge must be made within one month from the filing of the application for refugee status. The response from the authorities must then be received within two weeks, otherwise it shall be considered as accepted. The transfer of the detained person must then take place within six weeks of taking charge of the request. If the above limits are exceeded, the applicant may not be further detained. Finally, Article 28 provides that the provisions regulating the conditions of detention and the rights of detained persons refer to the provisions of Articles 9, 10 and 11 of Directive 2013/33/EU.

As concerns the criteria for determining the competent State, the division between family links are partially modified by the new regulation, whereas the elements related to the residence permits remain identical to those provided by the previous regulation. Article 6 provides for the criteria of presence of a relative in one of the Member States in cases concerning unaccompanied minors. The notion of relative includes not only the mother or the father, but also a brother or a sister or a guardian. If there are no family members or relatives, the competent State shall be the State in which the unaccompanied minor has submitted the application in order to guarantee the best interest of the minor. In the case of a family member being already a beneficiary of international protection, the applicant must present a document stating the preference to have the application examined by the Member State in which the member of the family resides. This applies even if the links were established after departure from the country of origin[214], or in cases in which the family members have already applied for asylum and have not yet received a reply[215]. Finally, if members of the same family submit applications in different countries, the competent State is the one who is responsible for the greater number of them[216].

The criteria for determining which State was responsible were, with some additional amendments, taken over by the above mentioned Dublin Convention. They can be divided into two groups: the first is linked to the principle of family unity, the second to relates to the presence of residence permits. The additional provisions stated that: if the asylum

[214] Article 9, Regulation (EU) No 604/2013.

[215] Article 10, *Ibid*.

[216] Article 11, *Ibid*.

seeker is an unaccompanied minor, the competent State shall be that in which a family member is present or, if there is no family member, the competent State shall be the State in which the minor has applied for asylum. Moreover, if a family member has applied to be recognised as a refugee in a Member State but has not yet been answered, this is also responsible for the claim of the other family member requesting.

Another important element is the change introduced with respect to the determination of the competent State where the applicant has entered irregularly. The new regulation establishes that the responsibility of the State ends after 12 months from the date of entry. The minimum period of stay in the country that makes the State responsible of the examination of the application is reduced from 6 to 5 months[217].

Moreover, the requested State must reply within two months of the request otherwise it has the obligation to take charge of the applicant[218]. There are cases in which the State where an asylum application is made has the possibility to claim an urgent response, but it must not be less than a week. Once the competent State has been identified, the transfer of the applicant shall take place within six months of the date of taking over of the application. The State has an obligation to provide the applicant with reception measures.

Besides, States were given the possibility to conclude bilateral agreements between them in order to simplify procedures and facilitate the application of the Regulation.

3.1.2 The proposition for a Dublin IV Regulation

Throughout the years, the Dublin system has been subject to criticism, especially regarding the question of the transfer of asylum seekers. As a matter of fact, a Dublin transfer often means that the individual's application is not examined by any Member State and that the person is detained or separated from his/her family members.

Due to the unwillingness of the European Member States to reform the Dublin system, the jurisprudence, such as the ECtHR and the CJEU, has been more and more asked to rule on

[217] Article 10, Regulation (EC) No 343/2003.

[218] Article 18, *Ibid.*

the interpretation of the Dublin Regulation and to intervene for the protection of the rights of the asylum seekers[219]. The Council of Europe stressed the need to "revise and implement the Dublin Regulation in a way that provides a fairer response to the challenges that the European Union is facing in terms of mixed migration flows"[220].

The Commission has proposed in 2016 a fourth version of the Dublin Regulation, which included creating a simpler and more effective access to the asylum procedures. The main goals of the proposal included: strengthening the capacity of the system in order to determine a single Member State responsible for examining the application for international protection; ensuring a fair sharing of the responsibilities between States by integrating the current system with some corrective measures to compensate disproportionate pressure on certain States; discouraging abuses and prevent secondary movements; protecting the interests of asylum seekers at best.

However, the road to a more effective system is still long. Since 2015, the European Institutions have adopted many sanctions and published many reports stressing that many EU Member States have not implemented their policies. More specifically, the European Commission has adopted many sanctions against Hungary because it considered the Hungarian legislation incompatible with European Union law[221]. In the Resolution on the situation in the Mediterranean and the need for a holistic EU approach to migration, the Parliament claimed that this situation mainly regards Eastern European Member States. Besides, it underlined the need for further harmonisation and solidarity among States in sharing their responsibilities[222].

3.2 Mutual trust system and sovereignty under Dublin III

[219] European Council on Refugees and Exiles, *Dublin II Regulation: Lives on hold*, European Comparative Report, February 2013.

[220] Council of Europe, *European Parliament Evaluation of the Dublin System* (Own Initiative Report), INI (2008) 2262, 2 July 2008.

[221] European Commission, Press Release, 19 July 2018 available at http://europa.eu/rapid/press-release_IP-18-4522_en.htm

[222] European Parliament, *Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration*, 2015/2095(INI), 12 April 2016.

The Dublin Regulation does not allow a proportionate division between Member States as concerns the responsibility for examining asylum applications. In fact, the basic rule is that the first Member State in which the application was made is the one that becomes competent. Indeed, in the light of the criteria listed in Chapter III, the first Member State in which the application was submitted shall be responsible for examining the application. Article 7 further states that the determination of the competent State must be based on the situation existing at the time when the applicant first applied for international protection, except in the case of unaccompanied minors. The application of this criteria of competence has led to disproportionate pressure on border States such as Italy and Greece, which have also shown, in some cases, that do not have an adequate asylum system, thus undermining the effectiveness of the system[223].

As we have seen previously, the Dublin system is based on a set of objective criteria, designating a single State responsible for examining an application for asylum presented in one of the Member States by a third-country national. It is based on the assumption that the Member States respect the principle of *non-refoulement* and can be considered as safe States for third-country nationals[224]. However, his system of mutual trust would require the existence of common standards in every EU State. Nonetheless, this is not possible for the time being, and the strong divergences on law systems and national practices have caused many problems. Moreover, since the main determination parameters identifies the country of first entry as State responsible for examining the application, this leads to excessive pressure on Border States and an increased risk of death in the Mediterranean[225].

As for the Schengen Agreement, the mechanism established by the Dublin Regulation is based on trust between Member States that mutually consider themselves as safe. Indeed, Protocol No. 24 on asylum states that, given the level of protection of the fundamental human rights and all freedoms guaranteed, "Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical

[223] European Parliament, *Draft report on the evaluation of the Dublin System*, ECRE, Sharing Responsibility, 2008, p. 13.

[224] Preamble, Regulation No 604/2013.

[225] A. Liguori, *Clausola di sovranità e regolamento "Dublino III",* in G. Cataldi, A. Del Guercio, A. Liguori, Il diritto di asilo in Europa, Università degli studi di Napoli "L'Orientale", Napoli, 2014, pp. 43-44.

purposes in relation to asylum matters."[226]. The authorities of a Member State cannot accept an application for asylum from a citizen of another European Member State, unless under certain circumstances. However, this provision raises doubts as regards its compatibility with the Geneva Convention and it has proved to be unfounded and denied by the European Courts in cases *M.S.S. v. Belgium and Greece* and *N.S.*, that will be explained sooner. Moreover, the system was based on a mutual trust which allowed an almost automatic transfer of the asylum seeker to the Member State identified as competent. However, the lack of harmonisation in the various EU States regarding the asylum procedures and the reception conditions, made the system particularly incongruous.

The Dublin system has therefore been the subject of a number of criticisms, both at institutional level, by the doctrine and by multiple humanitarian associations.

The new regulation has introduced some changes that should tackle its more controversial issues. For example, one of the controversial elements regards the adoption of the amendment submitted in 2008 with the aim of creating a mechanism of the suspension towards one single or all the transfers towards a Member State in a situation of particular urgency undermining its receptions capacities[227].

The clause of sovereignty constitutes another pillar of the Dublin system. According to this clause, the Dublin Regulation attributes to the State the power to take responsibility for examining an application for asylum, including in derogation from the competence criteria laid down in the text. Article 3 of the regulation states that if the transfer of a person to another Member State would expose him/her at risk of ill-treatment prohibited at Article 4 of the CFR, the authorities of the State must examine the criteria and, with a reasonable delay, determine if another State could be identified as responsible for the examination of the application. At the beginning this clause had been used often by states to ensure greater expedited rejection of manifestly unfounded claims. Under the Dublin II Regulation it turned out to be, however, a key instruments to fill some gaps in the protection of the rights of asylum seekers. Thanks to this, the European Union managed to mitigate some of

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[226] European Union, *Consolidated version of the Treaty on the Functioning of the European Union* , Protocol (No 24) on asylum for nationals of Member States of the European Union, 09 May 2008.

[227] Article 31, European Union, *Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, 4 May 2016.

the points that has aroused the most criticism in the old human rights regulation, namely the presumption of conformity of the EU Member States to the standards of the ECHR, according to which all States are considered as safe states[228].

The sovereignty clause was explicitly identified by the ECtHR in the judgement *M.S.S. v. Belgium and Greece* of 2011 and by the Court of Justice in the judgement *NS* of 2011 as the appropriate instrument for interpreting the text of the Regulation in accordance with human rights law. In the case *M.S.S. v. Belgium and Greece*, the European Court of Human Rights affirmed for the first time that before sending the applicant towards the State which should be responsible according to the Dublin regulation, the authorities of State in which the application is submitted must ensure that the other State has the means to ensure the access to effective asylum procedures. In case of negative answer, the authorities must not proceed to the transfer but examine themselves the application for asylum, using the discretionary power given by the sovereignty clause[229]. Eventually the Court found Belgium guilty as it was aware of the risks that the person would be exposed to in Greece but transferred him there.

The Court of Justice of the European Union reaffirmed in the *N.S and M.E. joint cases*. the principle of mutual trust is at the core of the Dublin mechanism. The CJEU has however downgraded the Member States' presumption of safety from absolute to relative. The Court added that the impossibility of transferring an asylum seeker to another Member State of the Union means that the Member State has the obligation to continue the examination of the criteria for identifying another possible competent State. According to the Court, the possibility could become an obligation if the duration of the procedure for the determination of the new competent State had an unreasonable duration[230]. However, the judgements show that the presumption that fundamental rights are guaranteed in each Member State is not absolute.

In addition, this principle is enshrined at Article 3 of the Dublin III Regulation. However, the text of the article is however rather restrictive and deficient as it does not reproduce the important statement of the Court of Justice regarding the obligation of the State, that was

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[228] A. Liguori, *Clausola di sovranità e regolamento "Dublino III"*, in G. Cataldi, A. Del Guercio, A. Liguori, Il diritto di asilo in Europa, Università degli studi di Napoli "L'Orientale", Napoli, 2014, p. 46.

[229] ECtHR, 21 January 2011, *M.S.S. v. Belgium and Greece*, application no. 30696/09.

[230] CJEU, 21 December 2011, *N.S. v Secretary of State for the Home Department*, C-411/10; CJEU and *M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, C-493/10.

in charge of the transfer, to examine itself the application if the procedure for determining the competent State is too long. In addition, Anna Liguori highlights that the text of the article explicitly mentions the existence of systemic deficiencies but does not indicate the criteria for identifying such deficiency. Besides, the text only identifies the case where the transfer affects the prohibition of torture, and does not cover serious violations of other rights such as the right to life or the right to an effective remedy[231].

On the basis of the case law of the Court of Justice, the European legislator introduced a new paragraph in art. Article 3 of the Dublin Regulation. The text adopted leaves to the Member States the possibility to suspend the transfer after a case-by-case evaluation, and only if there are systemic shortcomings in the asylum system of the country of destination. However, the provision is vague as the power to suspend the transfer of the applicant remains at full discretion of the State concerned, without giving any specific indication about the elements that should be taken into account to consider that the reception conditions or the effectiveness of the procedures are below the minimum standards[232].

3.3 The limits of the Dublin system

The Dublin system has been subject to criticism since the entry into force of the first Convention.

It has been recognised that the Dublin system has increased the pressure on Member States at Europe's external borders, resulting in some of the countries not always being able to provide effective and adequate support to asylum seekers.

The case *M.S.S. v. Belgium and Greece* of 2001 represents an example. The ECtHR found Belgium and Greece in violation of the European Convention on Human Rights. Despite Greece did not have a functioning asylum system, left the defendant in degrading

[231] A. Liguori, *Clausola di sovranità e regolamento "Dublino III*", in G. Cataldi, A. Del Guercio, A. Liguori, Il diritto di asilo in Europa, Università degli studi di Napoli "L'Orientale", Napoli, 2014, pp. 48-50.

[232] A. Del Guercio, *La seconda fase di realizzazione del sistema europeo comune d'asilo, Osservatorio Costituzionale*, Associazione italiana dei Costituzionalisti, September 2014, pp. 11-12.

conditions, thus violating the principle at Article 3 of the ECHR. Belgium has violated the principle of *non-refoulement* by transferring the defendant to Greece as the Belgian authorities knew or should have known that there were no guarantees that the asylum application would be seriously examined by the Greek authorities.

According to the Commission's final report on the functioning of the Dublin Regulation, the Dublin system has presented some systematic shortcomings. As a matter of fact, data shows that it has not discouraged the phenomenon of asylum shopping, as 16% of the applications submitted in 2017 were submitted in several countries[233]. In order to avoid this phenomena, governments have tried to provide asylum seekers with information about the consequences of multiple applications at the same time in different Member States. Besides, the Commission has included a report by EURODAC showing that 6% of the data recorded are rejected because they are of poor quality and that the main problems are related to the recording of irregular entries.

Moreover, the transfer to another country different from the one in which the applicant has submitted his/her application is thought to be cause of serious delays in the processing. As a matter of fact, it has been demonstrated that the consequence of the Regulation may result in a denial of the possibility to have effective remedies against the transfer. Moreover, the difficulty that people have to face, such as the question of the integration that applicants forced to live in States with which they have no particular link, may also be taken into account.

One of the problems concerns the fact that the Dublin system does not take into account the wishes of individuals, many of whom are linked to some countries by personal or cultural ties, nor even the employment realities in the European labour market. Indeed, the person who obtains international protection is linked to the State chosen by the Dublin system and cannot automatically work in another Member State. These problems even led the Commission to propose an amendment to the Regulation to introduce the possibility to suspend the transfer of asylum seekers in cases in which the competent State was in a particularly difficult situation or could not offer a level of assistance to applicants in accordance to the European standards. This hypothesis was subsequently changed into an assisted crisis management system, namely the European Asylum Support Office (EASO).

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[233] Commission of the European Communities, *Final Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system*, Brussels, 2017.

In addition to this, the criticism towards the Dublin system focused mainly on three points which regard its fairness, its efficiency and its effectiveness.

Firstly, because of the fact that the country of arrival is considered the country responsible for the evaluation, some Member States happen to have a greater responsibility than others. Therefore the system is not considered fair. In fact, the aim of the Dublin system is not to fairly distribute the refugees among Member States but is to establish, according to the pre-established criteria, which State is competent for processing each asylum application, so as to avoid the above-mentioned asylum shopping or orbiting asylum seekers[234].

Secondly, the Dublin system is believed not to be efficient because many asylum seekers decide to apply for asylum in countries different from the one of arrival, thus finding themselves caught in a circular path. EUROSTAT and Frontex statistics showed that less than the 40% of the illegal immigrants arriving in Italy applied for asylum there. Usually asylum seekers decide to prefer one country to another because they have their family or friends there, or because they know the language spoken in that country, but they also consider the economic and the reception conditions in that specific country. As a matter of fact, some countries (such as Italy or Greece) have inadequate structures but at the same time find themselves to deal with a great amount of people[235].

Thirdly, the Dublin system is thought to be ineffective in the protection of the rights of the asylum seekers. the European Council on Refugees and Exiles (ECRE) stressed that the examination of asylum application is not fairly and efficiently guaranteed in all Member States.

Furthermore, the EURODAC system as well as the detention structure are very expensive.

However, the Dublin system cannot be easily be amended or abolished because it is "it is the result of a precarious balance of powers between countries with diverse circumstances and interests that are often opposed."[236]. Some governments have been asking for a re-division of the competences and responsibilities on the reception of asylum seekers, such as the establishment of quotas, whereas other countries are completely opposed and want to maintain their sovereignty status. Of course there is indeed the need for a reform leading

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[234] B. Garcés-Mascareñas, *Why Dublin "doesn't work*", Notes Internacionales CIDOB 135, November 2015, pp. 1-2.

[235] Ibid, pp. 1-2.

[236] Ibid, p. 3.

on a more fair distribution of refugees among the European Member States[237]. However, fairness does have to take into account the needs of the Member States as well as the needs and the preferences of the refugees, which are sometimes left behind.

[237] Ibid.

CHAPTER 3
THE RESIDUAL COMPETENCE OF THE EU MEMBER STATES WITH SPECIFIC REGARD TO VISAS

1. The importance of humanitarian visas in the European Union policy on asylum

The visa policy represents a key instrument for the preventive control of the flow of people trying to reach the European Union. The European Union has been encouraging Member States to set up common guidelines for the issuing of such types of visas. However, the issuance of visas remains a competence of Member States, which are willing to maintain their sovereignty on the subject[238].

In this context, the principle of subsidiarity plays an important role. According to the Treaty of Maastricht, the European Union can act if the objectives cannot be sufficiently achieved by the Member States as concerns the areas that are not under its exclusive competence. This means that Member States have priority as regards the areas of shared competence. The European Union must provide adequate proof that the conditions for its action are met. In the absence of these conditions, jurisdiction is exercised at a national level.

Although the right to seek and enjoy asylum is recognised by the European Union law, this right has in practice been limited by Member States through a restrictive policy on visas and by the implementation of borders controls. For instance, the EU has introduced some Entry Protected Procedures.

At the same time, scholars agree to say that an adequate EU visa policy, especially concerning long-term visas, would have positive effects on the migration flows. As a matter of fact, a not regulated long-term visa system increases illegal immigration, as many people tend to overstay after the expiry date of their short-term visa, thus implementing the number of illegal migration already present in the territory of the EU Member States[239].

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[238] S. Mau, F. Galzau, L. Laube, N. Zaun, *The global mobility divide: How visa policies have evolved over time*, Journal of Ethnic and Migration Studies 41, October 2017, pp. 2-4.

[239] *Ibid*, p. 6.

As it was already explained in the chapter addressing the Visa Code system, Article 25 stipulates that States can issue visas with a territorial limitation under specific circumstances, such as humanitarian grounds. However, the provisions of the CCV do not explicitly address the conditions for these types of visas to be issued and the categories of eligible people.

The implementation of the humanitarian visas tools could have several positive effects. Firstly, it could be a solution to guarantee access to asylum to individuals or groups of individuals seeking international protection. Secondly, it could reduce the illegal networks of traffickers and smugglers by providing an alternative to the illegal routes. Thirdly, it could establish a more managed and equitable system for the claims and the arrivals of asylum seekers, thus alleviating the burden of migration flux on some Member States[240].

Not many EU Member States have managed to regulate the question of humanitarian visas according to their policies on international protection. Indeed, among the European Union, 16 Member States already provide for the issuance of visas for humanitarian reasons. For instance, Austria, France, the Netherlands, Spain, Denmark, the UK, and Switzerland boast humanitarian visas tools[241]. Furthermore, as it will be analysed in the following chapter, the EU institutions and some Member States have tried to put into place programmes for the humanitarian admissions or the resettlement of refugees.

2. The X and X v Belgium case: a deep analysis

This chapter will take into account the controversial case *X. and X v. Belgium* of March 2017, which relates to the Dublin III Regulation and on the Visa Code that we have analysed in the second chapter of this work. The case was chosen for the analysis because it represents a clear example of how the European Union had missed a possible turning point for creating new legal paths of access to international protection in the Member States. In a nutshell, the case concerns the interpretation of Article 25 of the European

[240] G. Noll, T. Gammeltoft-Hansen, *Humanitarian Visas Key to Improving Europe's Migration Crisis*, Raoul Wallenberg Institute, n.d.

[241] *Ibid.*

Visa Code regarding the application for a visa with limited territorial validity made by a Syrian family at the Belgian embassy in Lebanon to legally reach the territory of the European Union and seek for international protection. The Great Chamber of the CJEU asked the question of whether the Visa Code provides Member States with an obligation to issue humanitarian visas to people fleeing their country of origin and seeking asylum in one of the EU Member States.
Despite the opinion released by the Advocate General Mengozzi before the judgement, eventually, the Court found that the facts fell outside the scope of the Visa Code.

2.1 Factual background

The case on which the Court of Justice ruled was based on the reference for a preliminary ruling made by the *Conseil du Contentieux des étrangers* (Belgian Commission for the Litigation of Aliens), according to Article 267 TFEU, concerning the interpretation of Article 25 of the Visa Code[242].
The applicants were a Syrian family with three minor children living in the seized city of Aleppo. Intending to reach Belgium in order to apply for international protection, the family had submitted in October 2016 an application for an LTV visa under Article 25 of the CCV at the Belgian Embassy in Beirut, Lebanon. They had then returned to Aleppo and waited for the decision.
In the application, the family had referred to the current situation in Syria because of the ISIS occupation. They also raised their fear of being persecuted because of their belonging to the Orthodox Christian faith. Furthermore, Mr. X declared to have been kidnapped in the hands of a terrorist group, beaten and tortured, before being released upon ransom. Finally, the family highlighted the fact that they could not be registered as refugees in neighbouring countries because of the closing of the border between Syria and Lebanon,

[242] For further information see chapter 2 of this thesis.

Jordan and Turkey[243]. In addition to this, Lebanon did not provide for a sufficient level of protection as it had not ratified the UN Geneva Convention on Refugees[244].

On 18 October 2016, the Belgian Immigration Office decided to reject the application based on several reasons. First of all, the Office argued that the family's will was incompatible with the scope of the LTV visas. On the basis of Article 32 of the Visa Code, this type of visas allows a maximum stay of 90 days in 180 days. According to the authorities, it was clear that the family wished to stay in Belgium longer than the maximum duration of the LTV visa. Therefore, the application would fall under the Belgian legislation[245]. In addition to this, Article 32 states that it is possible to refuse a visa if there are reasonable doubts about the applicant's intentions to leave the territory of the Member States before the expiry date of the visa[246].

Moreover, they argued that Article 18 cannot be seen as a positive obligation for Member States to guarantee the right of asylum, but it only provides for the prohibition of *refoulement*. The authorities also claimed that the recognition of the status of refugee does not prevent them from the violation of Article 3 of the ECHR and Article 4 of the CFR, as stated by the applicants. As a matter of fact, Article 3 provides Member States with the obligation to prevent torture and other forms of ill-treatment on the one hand, and on the other, it prohibits the expulsion of individuals towards countries where they would face a real risk of being subject to torture or inhuman or degrading treatment.

Moreover, the authorities pointed out that national law does not allow asylum applications to be lodged to diplomatic posts and that would create a precedent[247].

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[243] V. Moreno-Lax, *Asylum Visas as an Obligation under EU Law: Case PPU C-638/16 X, X v État belge (Part I)*, Eu Immigration and Asylum Law and Policy,16 February 2017. Available at http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge/

[244] K. Müller, *No Legal Pathway for Asylum Seekers to the EU through Humanitarian Visas: The case of the X and X v Belgium before the CJEU,* June 2017. Available at http://jean-monnet-saar.eu/?p=1753 ; T. Alves, *Humanitarian Visas and the X and X v. Belgium judgment (Case C-638/16 PPU)*, The Official Blog of UNIO-EU Law Journal, 10 April 2017. Available at https://officialblogofunio.com/2017/04/10/x-and-x-v-belgium-judgment-case-c-63816-ppu/

[245] M. Zoeteweij-Turhan, S. Progin-Theuerkauf, *AG Mengozzi's Opinion On Granting Visas to Syrians From Aleppo: Wishful thinking?*, European Law Blog, 14 February 2017.

[246] K. Müller, *No Legal Pathway for Asylum Seekers to the EU through Humanitarian Visas: The case of the X and X v Belgium before the CJEU,* June 2017. Available at http://jean-monnet-saar.eu/?p=1753

[247] H. De Vylder, *X and X v. Belgium: a missed opportunity for the CJEU to rule on the state's obligations to issue humanitarian visa for those in need of protection*, Strasbourg Observers, 14 April 2017, https://strasbourgobservers.com/2017/04/14/x-and-x-v-belgium-a-missed-opportunity-for-the-cjeu-to-rule-on-the-states-obligations-to-issue-humanitarian-visa-for-those-in-need-of-protection/ .

The applicants appealed to the Council for Alien Law Litigation. The Council claimed that Article 3 of the ECHR may be invoked only if the case falls under the Belgian jurisdiction. However, the Court raised a point asking whether the implementation of the EU visa policy may be seen as the exercise of jurisdiction. The Court also asked if a right of entry could follow, as a corollary to the obligation under Article 3 of the ECHR and Article 33 of the UN Refugee Convention and the principle of *non-refoulement*[248]. Eventually, the Council for Alien Law Litigation ruled that the family had wrongly applied for an LTV visa instead of a long-term one and that authorities have no legal obligation to re-qualify their application[249].
The question resulted in a reference for a preliminary ruling to the CJEU about the scope of Article 25 of the CCV and the alleged obligation of Member States to respect the CFR.

2.2 The judgement of the Court of Justice of the European Union and the opinion of the Advocate General Paolo Mengozzi: a short comparison

On 7 March 2017, the Grand Chamber of the CJEU ruled on the case rejecting the application. According to the judges, as the family's purpose was to apply for asylum once in the territory of the European Union. Therefore the Court claimed that that the application fell outside the scope of the Visa Code, adopted under Article 62 of the TFEU, which covers visas for stays of up to 90 days[250]. However, even if the point of the Court was right, the family did not want to obtain a visa but rather to arrive legally in the territory of Belgium and seek asylum. This could be possible only by obtaining a short-term visa[251] or by entering the territory of the European Union through illegal pathways such as the Mediterranean or the Balkan routes.

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[248] *Ibid.*

[249] *Ibid.*

[250] S. Sarolea, J. Y. Carlier, L. Leboeuf, *Délivrer un visa humanitaire visant à obtenir une protection internationale au titre de l'asile ne relève pas du droit de l'Union: X. et X., ou quand le silence est signe de faiblesse,* Centre Charles De Visscher Pour le Droit International et Européen, Louvain-La-Neuve, 19 April 2017.

[251] K. Müller, *No Legal Pathway for Asylum Seekers to the EU through Humanitarian Visas: The case of the X and X v Belgium before the CJEU,* June 2017.

The Syrian family argued that Article 18 of the CFR sets up the obligation for Member States to ensure the right to asylum. However, the Court claimed that the ECHR and the 1951 Geneva Convention on the Status of Refugees provide for the principle of non-*refoulement* but do not provide for an obligation to admit foreigners on the territory of the States party to the Convention.

By citing the *Fransson case*[252], the Court stated in its reasoning that the CFR is applicable only when the EU law is applicable. Even if Article 51 of the CFR does not contain any clause concerning its territorial application, the provisions of the CFR and the ECHR were not applicable because Member States are only bound when implementing EU law[253]. The Court had enlisted in the *Siragusa case*[254] the criteria to determine the cases in which national legislation involves the implementation of EU law. Among the others, the Court established that a national measure that partially transposes a Directive can be considered as implementing EU law[255] and that the standards for the protection of human rights must be in any case guaranteed, so as not to undermine the unity, primacy, and effectiveness of the EU law[256].

Secondly, the CJEU tried to answer the question of whether the issue of a visa is mandatory or optional. The Court considered that it is not possible to derive from the EU Visa Code an obligation according to which this instrument could be considered as a legal basis for the opening of protected access pathways towards Europe, and that approving their application would undermine the Dublin system and facilitates the so-called asylum shopping[257]. Indeed, the CJEU claimed that this would create a precedent and would allow asylum seekers to choose in which country to apply for asylum.

Lastly, the Court highlighted that the scope of the Dublin system and the Asylum Procedures Directive do not include extraterritoriality.

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[252] CJEU, 26 February 2013, *Åklagaren v Hans Åkerberg Fransson*, C-617/10.

[253] C. Sheridan, A. Taylor, *Looking like a cat, walking like a cat, sounding like a cat but actually being a dog: What the X and X judgment means for the scope of the EU Charter?,* European Database of Asylum Law, 5 April 2017.

[254] CJEU, *Cruciano Siragusa v Regione Sicilia*, 6 March 2014, C-206/13.

[255] C. Sheridan, A. Taylor, *Looking like a cat, walking like a cat, sounding like a cat but actually being a dog: What the X and X judgment means for the scope of the EU Charter?,* European Database of Asylum Law, 5 April 2017.

[256] CJEU, 26 February 2013, *Stefano Melloni v. Ministerio Fiscal*, C-399/11.

[257] C. Peyronnet, T. Racho, *"Ceci n'est pas un visa humanitarire": La Cour de justice neutralise l'article 25§ 1 a) du code des visas*, Actualités Droits-Libertés, 28 April 2017, §11-12.

The reasoning of the Court concluded that the Belgian authorities did a mistake in classifying the application as an application for a short-term LTV visa[258].

According to some scholars, the judges missed an opportunity to create an additional legal pathway for migrants and implement the instruments for the protection of human rights and human dignity[259].

On the other side, the opinion issued by the Advocate General Mengozzi on 7 February 2017 needs to be given attention because it takes a completely different position from the reasoning of the CJEU. In fact, the advocate firmly suggested the Court give a positive answer to the question referred for a preliminary ruling[260].

The opinion of the AG demonstrates that an interpretation of the EU law exists which allows individuals seeking international protection a legal access to the European territory, based on an interpretation of the law consistent with the values of the European Union and with the obligations of respect for fundamental rights to which the Member States are bound, was subject to debate.

From his point of view, the Syrian family applied for a short-stay visa under the Visa Code. However, the authorities assessed the application according to the national Belgian law and not under the Visa Code[261]. Besides, he claimed that when examining an application for a visa under Article 25 of the Visa Code, the circumstances of the applicants must be taken into account. Moreover, authorities have to assess if the refusal would lead to a violation of the applicant's rights as protected by the CFR[262].

Advocate General Mengozzi points out that the Visa Code establishes the criteria for the issuance of short-term visas and that these conditions apply to any persons, including refugees[263]. Besides, the Visa Code provides for a standard application form refers to 'Schengen visa' without distinguishing between the types of visa that can be applied for.

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[258] K. Müller, *No Legal Pathway for Asylum Seekers to the EU through Humanitarian Visas: The case of the X and X v Belgium before the CJEU,* June 2017.

[259] *Ibid,*

[260] Opinion of Advocate General Mengozzi, delivered on 7 February 2017 (1), Case C-638/16 PPU, X, X v État belge, http://curia.europa.eu/juris/document/document.jsf?docid=187561&doclang=EN

[261] M. Zoeteweij-Turhan, S. Progin-Theuerkauf, *AG Mengozzi's Opinion On Granting Visas to Syrians From Aleppo: Wishful thinking?*, European Law Blog, 14 February 2017.

[262] *Ibid.*

[263] V. Moreno-Lax, *Asylum Visas as an Obligation under EU Law: Case PPU C-638/16 X, X v État belge (Part I)*, Eu Immigration and Asylum Law and Policy,16 February 2017, available at

According to Article 25 of the Visa Code, Member States must deliver a humanitarian visa, when they "consider it necessary on humanitarian grounds or […] or because of international obligations"[264]. AG Mengozzi believes that this article leaves a great margin of discretion to national authorities. Indeed, it provides Member States with the possibility to issue a new visa during the period of enjoyment of another visa, despite the serious doubts as to the intention of the applicant to leave the territory after the expiry of the visa or other reasons for refusal under Article 32[265]. Indeed, the Visa Code does not explicitly prohibits the applicants to change the nature, the subject or the length of their application once in the territory.

The AG also stated that the will of the Syrian family to stay longer than the duration of the LTV visa could not be a reason for not applying to the Visa Code[266].

In conclusion, the AG Mengozzi believed that the refusal of the application would expose the Syrian family to a violation of their fundamental rights. Besides, thanks to the file sent in by the referring court, the Belgian authorities did know about the catastrophic situation in Aleppo[267]. Moreover, according to the AG, the applicant would have been granted the status of refugee if they had directly arrived in the European territory. The visa refusal had, therefore, the consequence of encouraging asylum seekers to put their lives in danger and using illegal ways to reach the European Union[268].

2.4 The "missed opportunity" to improve the European Union policy

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http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge/ .

[264] Article 25, Regulation (EC) No 810/2009.

[265] M. Zoeteweij-Turhan, S. Progin-Theuerkauf, *AG Mengozzi's Opinion On Granting Visas to Syrians From Aleppo: Wishful thinking?,* European Law Blog, 14 February 2017.

[266] *Ibid.*

[267] F.L. Gatta, *Vie di accesso legale alla protezione Internazionale nell'Unione Europea: iniziative e (insufficienti) risultati nella politica Europea di asilo*, Diritto Immigrazione e Cittadinanza, Fascicolo n. 2/2018, February 2018, pp. 31-34.

[268] P. Karine, *Le code des visas, un rempart assumé contre les migrants en quête de protection internationale,* Plein droit 2018/1, n° 116, January 2018, pp. 45-48.

The ruling of the CJEU has been widely criticized, especially because of the decision to let state sovereignty and the Common European Asylum System prevail over the protection of human rights.

In the first chapter, the question of the application of the ECHR and the CFR outside the territory of the Member States has been analysed. In the *X and X* judgement, the CJEU questioned whether the ECHR can be applied outside the territory of the European Union and whether the States have positive obligations to issue visas under Article 3. The application, as well as the refusal of the visa, took place at the Belgian embassy in Lebanon. Although the jurisdiction is primarily territorial, the state's human rights obligations under the ECHR trigger this concept.

The CJEU has released two conflicting judgements in the cases *X and X* and in the *Al Chodor*, both concerning the protection of the refugees' human rights and the application of the provisions of the CFR and the ECHR. It is interesting to see the different positions of the judges of the CJEU in two judgements released in March 2017. If on the one hand, the facts of the *X and X* case happened outside the territory of the European Union, in the *Al Chodor* case the asylum seekers already find themselves, even if illegally, in one of the Member States.

The *Al Chodor and others*[269] of March 2017 concerns three Iraqi nationals who, while waiting for the transfer to Hungary, were detained by the Czech authorities in a detention centre. The case concerns the interpretation of Article 28 of the Dublin III Regulation providing for the conditions of detention for the asylum seekers who are to be transferred to another Member State which is responsible for the application according to the Dublin system conditions. In its reasoning, the CJEU stressed the pre-eminence and the importance of the respect and human rights law within the territory of the European Union[270]. To conclude, it could be argued that the CFR and ECHR are interpreted in a rather restrictive way and are therefore covers only the territory of the Member States.

However, the provisions of the ECHR and the CFR can be applied under some exceptional circumstances. The ECtHR ruled on the *Hirsi Jamaa* case[271] that certain conducts of the State carried out outside their national borders may be an exception to the provisions of

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[269] CJEU, 15 March 2017, *Al Chodor and others*, C-528/15.

[270] S. De Vido, *Beyond EU borders, beyond EU responsibility: the protection of asylum-seekers rights in and outside the EU. Reflections on the X. & X. and Al Chodor cases*, forthcoming.

[271] ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl No. 27765/09.

Article 1, namely the effective control by a State of an area and the authority and control by State agents on individuals[272]. The court ruled that it is no longer required that a state has control over the territory for it to exercise jurisdiction. In particular, the case regarded a group of migrants who were intercepted and returned to Libya. The ECtHR found this represented a violation of the human rights obligations enshrined in Article 3 of the ECHR. Moreover, the Court affirmed that jurisdiction was not just based on the *de iure* control as provided by the International law of the sea, but also the *de facto* control of the State, as the event happened on an Italian ship. Following the jurisprudence of the ECtHR, the Belgian authorities could, therefore, have jurisdiction over the Syrian family as they have the duty to protect the applicants' rights under Article 3 of the ECHR[273].

The CJEU did not share the reasoning of Advocate General Mengozzi, choosing instead a very prudent approach that allowed the EU to somehow circumvent the issue. The judgement did not provide an answer to the question of the many tragic episodes of irregular migration but on the contrary, raised many doubts. The Court itself stated that a similar decision would have significant repercussions on the obligation to issue a humanitarian visa and on the already criticised Dublin system[274]. Adele del Guercio highlights the fact that, although the Visa Code aimed to discourage illegal immigration, the CJEU ruled that the Visa Code could not be used to create legal pathways, thus not providing to people other means than putting their lives at risk in the hands of trafficking organisations.

On the contrary, Member States paid close attention to the case and the judgement, as they are deeply concerned about the legal and political implications that a different conclusion

[272] S. Morgades-Gil, *Humanitarian Visas and EU Law: Do States Have Limits to Their Discretionary Power to Issue Humanitarian Visas?,* European Papers, Vol. 2, 2017, No 3, European Forum, 15 October 2017, pp. 1005-1016. Available at www.europeanpapers.eu/fr/europeanforum/humanitarian-visas-and-eu-law-do-states-have-limits-to-their-discretionary-power

[273] H. De Vylder, *X and X v. Belgium: a missed opportunity for the CJEU to rule on the states obligations to issue humanitarian visa for those in need of protectio*n, Strasbourg Observers, 14 April 2017

[274]A. Del Guercio, *La sentenza X. e X. della Corte di Giustizia sul rilascio del visto umanitario: analisi critica di un'occasione persa,* European Papers, Vol 2, European Forum, 12 May 2017, pp. 286-287.

would have. More specifically, 14 States[275] were not in favour to the possible opening of new forms of entry for asylum seekers[276].

The case has aroused a wide echo of comments and critical considerations in the doctrine. The judgement is thought to be a "missed opportunity" for the European Union to act on the international scene as a key player in the protection of human rights. Indeed, this judgement could have been a possible solution consistent with the obligations to protect the rights of asylum seekers as well the will to open new legal pathways for asylum seekers[277].

As the AG stressed, this could have represented an important opportunity for the European Union to protect the "universal values of the inviolable and inalienable rights of the human person' [278]on which European construction is founded and which the European Union and its Member States defend and promote, both on their territory and in their relations with third countries". Unfortunately, the CJEU did not take this chance.

By stating "but, as European Union law currently stands[279]" the Court, however, suggested the European Parliament take the initiative for the adoption of a European humanitarian visa. Following the numerous hints, the European Parliament has attempted to promote the adoption of specific common rules to regulate the issuing of humanitarian visas in order to fill the existing gaps in the EU framework. The first attempt dates back to 2014 when the European Parliament presented some amendments to include specific provisions on humanitarian visas and international protection in the proposal of the European Commission for a reform of the Schengen Visa Code. The proposition, however, met the opposition of the Council which made it impossible to reach an agreement. The opposition between the Parliament and the Council led the Commission to withdraw its project for the reform of the CCV on 3 July 2018[280].

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[275] The States involved were: Belgium, Czech Republic, Denmark, Germany, Estonia, France, Hungary, Malta, Netherlands, Austria, Poland, Slovenia, Slovakia, Finland.

[276]F.L. Gatta, *La "saga" dei visti umanitari tra le Corti di Lussemburgo e Strasburgo, passando per il legislatore dell'Unione europea e le prassi degli Stati membri*, Dirittifondamentali.it, fasciolo 1/2019, 12 June 2019, pp. 15-16.

[277] F.L. Gatta, *Vie di accesso legale alla protezione Internazionale nell'Unione Europea: iniziative e (insufficienti) risultati nella politica Europea di asilo*, Diritto Immigrazione e Cittadinanza, Fascicolo n. 2/2018, pp. 32-33.

[278] Opinion of Advocate General Mengozzi, p. 165.

[279] CJEU, 7 March 2018, *X. and X. v. Belgium State*, C-638/16 PPU.

[280] S. Peers, *External processing of applications for international protection in the EU*, EU Law Analysis, 24 April 2014.

In December 2018 a second attempt was made with the adoption of a Resolution[281]intending to suggest to the Commission to submit a proposal for a regulation establishing a European humanitarian visa[282]. By explicitly referring to the X and X case and to the need to fill the gap in EU law on humanitarian visas, the European Parliament called the European Commission for action through a recommendation setting out the terms of the proposal for a regulation establishing a European humanitarian visa. In a nutshell, the proposition aimed at setting up common conditions and procedures for the issuance of humanitarian visas as a means to apply for asylum. The proposal provides for the possibility for individuals to applying for a humanitarian visa to embassies or consulates of the EU Member States. Third-country nationals who require a visa to travel to the territory of the Member States and who claim to be subject to a risk of persecution can apply for this type of visa. However, they must not already be included in a resettlement procedure, so as to avoid duplication and overlap between different legal channels of access to the EU. As concerns the administrative management, the visa application, which may also be submitted by electronic means at a distance, must be taken into charge by special authority. The authority must have specific competence in the field of international protection and must process the application within 15 days based on information provided and obtained by the applicant, both in documentary and oral form, through an interview. In the case of a negative decision, the asylum seeker has the right to appeal against it.

Furthermore, the Regulation provided for EU financial support for Member States issuing visas on humanitarian grounds in order to facilitate the implementation of the European visa system[283]. In its resolution, the European Parliament called on the Commission to make a legislative proposal by 31 March 2019. However, this deadline has not been met.

It is, however, important to stress that sixteen EU Member States have so far made provision for the possibility of issuing the so-called humanitarian visas with the aim to facilitate legal and safe entry into their territory. Even if the EU policy has been more

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[281] European Union, *European Parliament resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas* (2018/2271(INL)), 11 December 2018.

[282] Article 225 TFEU provides the European Parliament with the power to stimulate the Commission to submit legislative proposals on issues for which it considers it necessary.

[283] European Association for the defence of Human Rights, *Humanitarian visas: the Parliament calls for the adoption of a European regulation*, 23 July 2018, available at http://www.aedh.eu/en/humanitarian-visas-the-parliament-calls-for-the-adoption-of-a-european-regulation/

focused on strengthening border controls and preventing entries, the European Union provides asylum seekers with other means, such as humanitarian channels, temporary protection covered by Directive 2001/55/EC, resettlement programmes[284] that will be analysed in the following chapter of this work.

With that being said, the *X and X v. Belgium* case could have represented a turning point in the European asylum policy, creating new legal paths of access to international protection in the Member States.

However, as Adele Del Guercio asserts, the most effective way for asylum seekers to apply for international protection still remains the practice of reaching the borders or the territory of the Member States. With its judgement on the *X and X case,* the CJEU has endorsed the perception that the values that the European Union claims to protect, are on the contrary applied only within its borders, thus missing an opportunity to demonstrate the European Union can be an effective area of law and protection for people fleeing war, persecution, torture and other serious violations[285].

[284] A. Del Guercio, *La sentenza X. e X. della Corte di Giustizia sul rilascio del visto umanitario: analisi critica di un'occasione pers*a, European Papers, Vol 2, European Forum, 12 May 2017, pp. 288-289.

[285] *Ibid,* pp. 291.

CHAPTER 4
THE INTERNAL AND EXTERNAL MIGRATION POLICY OF THE EUROPEAN UNION: A CONTROVERSIAL APPROACH

1. A controversial approach to migration

After having analysed in detail the system provided by the Visa Code and the Dublin regulation, it is important now to focus on the strategies and policies that the European Union, as well as EU Member States on their own, have developed over the years on the topic of migration.

The following chapter will deal with the internal and external dimension of the European policy. More specifically, the aim of this final part is to investigate on the measures and instruments adopted up to now as concerns the creation and the implementation of the legal pathways for asylum seekers.

The question of the integration of the immigration issues into the EU foreign policy rose during the 1990s. Indeed, policy makers and governments started to be more and more concerned about the incoming flow of immigrants from Central Europe after the collapse of the Berlin Wall. The first Schengen Agreement was signed 1990 following the will of states to improve their policy as result of a sense of inadequacy of controls at domestic borders[286]. However, during the 2000s the feeling of inadequacy transformed rather into a sense of hostility. This feeling started to spread within all the European countries, mainly due to the economic crisis, the events of 11 September 2001, and the increasing the flows of people, both migrants and asylum seekers, fleeing towards Europe[287].

[286] L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale,* G. Giappichelli Editore, Torino, 2011, pp. 164-165.

[287] E. Guild, *Controlling Frontiers: Free Movement Into and Within Europe*, Routledge, London, 15 May 2017, pp. 4-5.

2. The lack of agreement in the internal policy

The European Union has always been subject to immigration of people seeking for international protection as well as for people looking for better economic conditions. According to a study provided by the UNHCR, the number of persons who had to leave their country of origin reached 70.8 million in 2018, and 13.6 million people were obliged to flee because of conflicts and persecutions. Among these, 25.9 million individuals can boast the status of refugees and 20.4 of these refugees are under the competence of the UNHCR. Moreover, 41.3 are the so-called internally displaced persons, whereas 3.5 millions are asylum seekers. Furthermore, it is interesting to stress that the vast majority of the refugees live in a country near the country of origin while only 16% of the total amount of refugees find themselves in developed countries[288].

The UNHCR also investigates the countries of origin of the flux of refugees. The report shows that the greatest number of refugees come from Syria, Afghanistan, South Sudan Myanmar and Somalia. As concerns Syrian refugees, the countries hosting the vast majority are Turkey, Lebanon, Jordan, Iraq and, within the European Union, Germany and Sweden[289].

As we have seen in the Second chapter, the Common European Asylum system have been challenged by the increasing flux of individuals applying for international protection. Although the aim of EU States was providing for the harmonisation of legislation in the field of asylum through the proposal for a common reception and management system for refugees in all EU Member States, the EU policy have proved not to be so effective.

Firstly, in spite of the EU legal framework that have been created over the years with the aim to reach a common policy[290], harmonisation and coordination among EU States still appears to be difficult to achieve. Although Member States have accepted to lose controls on borders in favour of the freedom of movement within the territory of the European Union for EU citizens, they appear not to be inclined to lose their sovereignty in favour of

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[288] UNHCR, *Global Trends: forced displacement in 2018, Trends at glance*, available at https://www.unhcr.org/5d08d7ee7.pdf

[289] *Ibid.*

[290] See chapter 2.

all third-country nationals[291] but are willing to do so only if the European Union provides for a better management.

Secondly, European policy must be seen as a two-level system: the international (or European) level and the domestic level. These two systems are different but somehow also very similar. According to Robert D. Putnam, political leaders try at international level to achieve their best result in order to satisfy their national needs[292]. As a result, these two systems have to interact in order to develop a common internal policy. Scholars have developed a theory, according to which European policy makers try to influence the EU negotiations according to their national policy in order to achieve the best outcome[293].

Thirdly, the Dublin system have been subject to many criticism, especially as concerns the unfairness of this distribution criteria as it concentrates the burden on asylum seekers on few states. In addition, the reception conditions in the most exposed countries and the quality of the procedures are affected when the flux pressure increases. Secondly, there is still a need for harmonisation among the EU Member States legislation. Indeed, the levels of protection as well as the procedures remain different from one state to another[294].

Unfortunately, EU internal policy has appeared to be unable to respond to the migration questions. Despite the numerous attempts, the EU policymakers are not able to tackle the issue of migration flux and create a common policy. Indeed, Member States continue to be not so willing to give up their national sovereignty and open borders to persons seeking for international protection. This results in a lack of participation in the fight against illegal immigration and in the cooperation for legal pathways to enter the territory.

As concerns the external policy, cooperation with third-countries is more and more perceived as an effective solution not only by authorities, but also by the public opinion. However, this solution provides instant effects whereas in the long term it cannot be considered as a response to the issue.

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[291] E. Guild, *Controlling Frontiers: Free Movement Into and Within Europe*, Routledge, London, 15 May 2017, p. 7

[292] R. D. Putnam, *Diplomacy and domestic politics: The logic of two-level games,* International Organization, Vol. 42, No. 3, 1988, p. 434.

[293] *Ibid*, p. 459.

[294] S. Sarolea, *Asile et Union Européenne face à la crise: d'une gestion interne à une gestion externe, Revue québécoise de droit international*, Revue québécoise de droit international, Hors-série-novembre 2018 – L'union européenne et les 60 ans du Traité de Rome : Enjeux et défis contemporains, November 2018, pp. 289-290.

2.1. European Union policy regarding borders crossing

The European Union has implemented policies based essentially on the problem of the management of the different migration flows, including the management of the legal migration on the one hand and the prevention of illegal immigration on the other.

Member States are more and more concerned about the question of irregular immigration and about people who cross their borders without documents and without an authorisation to do so.

As we saw in the first part of this work, States renounced to some prerogatives by becoming a member of the European Union, and at the same time, they are required to respect the principle of *non-refoulement* provided by the international human rights law. Under this principle, nobody can be returned to a country where his life is threatened. Moreover, it is important to stress that crossing a border without authorization with the aim to seek asylum cannot be considered as a crime[295]. Indeed, the UN Geneva Refugee Convention states that refugees who arrive on the territory of another country cannot be subject to sanctions because of their irregular entry, as long as they come directly from the country in question, they report themselves without delay to the authorities and they give valid reasons for their irregular entry or presence[296].

The Council Framework Decision of 28 November 2002 on strengthening the penal framework to prevent the facilitation of unauthorised entry, transit and residence and the Council Directive 2002/90/EC[297] provides a definition of unauthorised entry, transit and residence.

At the same time, Member States have engaged in promoting the freedom of movement of persons and goods across national borders, strengthening at the same time its external

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[295] F. Nicholson, J. Kumin, *Guide pour la protection internationale des réfugiés et le renforcement des systèmes d'asile nationaux*, Guide à l'usage des parlementaires N° 27, 2017, Union interparlementaire et le Haut-Commissariat des Nations Unies pour les réfugiés, 2017.pp. 69-71.

[296] Article 31, *Convention Relating to the Status of Refugee*.

[297] European Union, *Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence*, 28 November 2002.

borders and implementing police control and criminal laws[298]. Article 79 of the TFEU states as follows:

> "The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings"[299]

However, according to statistics[300], in recent years the migratory pressure has been affecting more and more the European Union, in particular the European southern countries like Italy, Spain, Greece and Malta. In addition to the Balkan route, the Mediterranean constitutes another way largely used by thousands of people every year to reach the European territory. This is primarily due to geographical reasons, namely the contiguity of these country of the African and Asian continent with the south-eastern part of the Europe[301]. Besides, the relatively advanced legislation in the field of migration and humanitarian protection constitutes another attracting factor. In order to face with the massive flow of people, the European Union adopted in 2001 the Directive 2001/55/CE aiming at creating a legal basis. Not only did the Directive provide a system of international protection in case of emergency of the length of one year and extendible for another one, but also the creation of a mechanism of supportive repartition among Member States[302].

Furthermore, the abolition of all forms of control at the internal borders, as provided by the Schengen agreement with the aim of implementing the freedom of movement within the

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[298] G. Cellamare, *La disciplina dell'immigrazione clandestina nell'Unione Europea*,G. Giappichelli Editore, Torino, 2006, pp. 198-204.

[299] Article 77, *Treaty on the Functioning of the European Union*.

[300] For data consult https://migrationdataportal.org/themes/international-migration-flows and https://data2.unhcr.org/en/situations/mediterranean

[301] M. Tissier-Raffin, *Le Droit D'asile*, Institut Universitaire de Varennes, 2018, pp. 8-9.

[302] *Ibid*, pp. 10-11.

territory of the Member States, allows third-country nationals holding a valid document to freely move within the territory of the European Union for the duration of three months[303]. Together with the Schengen Agreement, a system of governmental database Schengen Information System AIM has been put into place. This database allows judicial authorities can have borders controls through a mutual system of information exchange between countries that are part of the agreement.

Unfortunately, the lack of a European common policy able to deal with the increasing migration flows has contributed to the spread of illegal migration by land and by sea.

The European Parliament has been encouraging the strengthening of existing legal mobility solutions, such as resettlement, for the implementation of which Member States may benefit from EU funding and economic support measures. The Parliament has adopted in 2014 a resolution on the situation in the Mediterranean in order to call governments to take greater responsibility[304]. The EP reaffirmed in another resolution on the EU external action its commitment in creating adequate legal ways for safe migration and stressed the importance of developing inclusive and coherent policies.[305]

The Commission as well engaged in the question of finding legal pathways for asylum seekers. Following the rising migratory pressure between 2014 and 2015 and the increasing attention of public opinion to the tragic situation in the Mediterranean, the Commission has expressed its political will to provide asylum seekers for possible safe solutions. Firstly it promoted feasibility studies on the notion, characteristics and possible types of the procedures for safe and protected entry aiming at fighting against trafficking in human beings. Secondly, it called for the promotion of cooperation programmes between Member States and third countries, especially focusing on the development of a human-right based common European policy[306]. This resulted in the adoption of the European Agenda on Migration 2015. Stressing the need for immediate actions in response to the tragedy of the Mediterranean, the Commission called for the strengthening of the

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[303] L. Salomone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale,* G. Giappichelli Editore, Torino, 2011, pp 162-164.

[304] European Union, *European Parliament resolution of 17 December 2014 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2014/2907(RSP)).*

[305] European Union, *European Parliament resolution of 5 April 2017 on addressing refugee and migrant movements: the role of EU External Action (2015/2342(INI)).*

[306] *Ibid*.

channels for the legal access to international protection, focusing in particular on resettlement programmes and the creation of a joint programme funded by EU founding[307]. The Commission has consistently reaffirmed the importance of developing legal pathways. Not only did the Commission reiterate its engagement on promoting resettlement programs as a central strategy in the management of the refugee crisis, but it also encouraged protected admission schemes specifically targeted at certain humanitarian crisis situations, like in Syria[308].

The implementation of actions and politics is important as the phenomenon of migration involves delicate aspects, not only in Europe but in all countries. Firstly, the humanitarian aspect, as migrants seeking to enter the territory of the European Union in the hope of finding better living conditions, have to face many risks and violence. Secondly, the social and political aspect as this phenomenon is subject of debate both in the countries of origin as well as in the receiving countries. Thirdly, the criminal aspect as migrants are often victims of the trafficking in organs and human beings[309]. The characteristics of this phenomenon and its transnationality make it difficult to acknowledge and finding the means to repress it also appears problematic. This is due to the difficulty of agreement, coordination and cooperation between Member States and the discrepancies of their sanctions systems and investigative instruments.

Unfortunately, the debate on migration and the protection of borders has intensified following the terrorist attacks that have hit Europe in the recent years and the developing of far-right politics, such as Matteo Salvini's in Italy or Marine Le Pen's in France. As a matter of fact, immigrants, especially illegal immigrants, are seen more and more as a threat to public security rather than an added value from an economic or cultural point of view.

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[307] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, COM(2015)* 240 final, Brussels, 13 May 2015.

[308] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission contribution to the EU Leaders' thematic debate on a way forward on the external and the internal dimension of migration policy, COM(2017)* 820 final, Brussels, 7 December 2017.

[309] L. Salomone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale,* G. Giappichelli Editore, Torino, 2011, p. 164.

2.2. Measures to prevent unauthorised entry to the territory of the European Union

In order to prevent and combat the increasing phenomenon of immigration, Member States have decided to undertake a policy of closing borders and have made this objective one of the cornerstones of the European policy. As a matter of fact, the European Union engages in stemming the phenomenon of illegal immigration through the strengthening of the control of all borders, in particular of the maritime ones being the most exposed and accessible by migrants[310].

From the legal point of view, unfortunately there is no adequate European territorial and maritime jurisdiction yet and, as I will deeper analyse in the following chapters, the actual system presents some limits. As a matter of fact, the priorities of the European agenda on migration have proved to be focused on combating irregular flows, strengthening internal security measures, border control and border surveillance, such as the establishment of a revised regulation for FRONTEX, namely the European Border and Coast Guard Agency, in 2019[311].

Firstly, not only does the migratory crisis in the Mediterranean area affect the territory of the European union. Indeed, countries such as Africa and Asia must be considered as actors[312]. Secondly, it is important to stress that sovereignty still belongs to Member States[313], although they have agreed to have some powers transferred to the European Union, forming the so called Exclusive EU competences[314]. Consequently, the European Union cannot take measures regarding the fields that are not under its exclusive competence. Thirdly, the principles of hierarchy of the sources and the principle of legally

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[310] *Ibid*, pp 172-173.

[311] F.L. Gatta, *Vie di accesso legale alla protezione Internazionale nell'Unione Europea: iniziative e (insufficienti) risultati nella politica Europea di asilo, Diritto Immigrazione e Cittadinanza*, Fascicolo n. 2/2018, pp. 1-2.

[312] L. Salomone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale*, G. Giappichelli Editore, Torino, 2011, pp 174-176.

[313] Article 4 of the TFEU defines the areas in which the European Union and EU Member States can legislate: area of freedom, security and justice, development cooperation and humanitarian aid, and others.

[314] Article 3 of the TFEU sets out the Exclusive EU competences in the following areas: establishment of competition rules in the internal market, custom union, commercial policy, monetary policy of the euro countries, the conservation of the marine biological resources under the common fisheries policy, conclusion of international agreements under certain conditions.

do not allow European institutions to independently introduce incriminating provisions with validity in the EU territory and therefore make it impossible to introduce new legal instruments in the field of immigration[315].

The European Union has adopted some measures in order to prevent the unauthorised entry to the EU territory and to define the illegal conduct of facilitating illegal immigration. Among the others, the Carriers Sanctions Directive 2001/51/EC provides sanctions for people transporting undocumented migrants. The Facilitation Directive 2002/90/CE defines facilitation of unauthorised entry, transit and residence. The Directive nonetheless states that Member States may decide not to adopt sanction in the cases in which the help was given to provide humanitarian assistance to the migrant.

The European measures put into place by the European Union have been criticised by the Special Procedures body of the United Nations Human Rights Council because they believed that irregular immigrants cannot be treated as criminals, therefore States should respect the human rights obligations and they should not be put in detention or imposed sanctions[316]. As regards the respect of human rights obligations during border controls, Protocol No 12 of the European Convention on Human Rights provides the States Parties with the duty not to discriminate one person against another unless under justification[317].

The prohibition of sanction is enshrined in the UN Geneva Convention. Article 31 states that:

> "States shall not impose penalties, on the account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened (...) enter or are present in their territory without authorisation"[318].

However, sanctions can be applied against persons who transport illegal migrants into the territory of the European Union according to the Carriers Sanctions Directive

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[315] L. Salomone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale*, G. Giappichelli Editore, Torino, 2011, pp 175-176.

[316] Commissioner for Human Rights of the Council of Europe, *Criminalisation of Migration in Europe, Human Rights Implication*s, Issue Paper, 2010, p.3-4.

[317] *Ibid*, p. 7.

[318] Article 31, *Convention Relating to the Status of Refugees*.

2001/51/EC[319]. Nonetheless, the Council Framework Decision of 28 November 2002 enlists all the measures at disposal of the states and state and the Facilitation Directive 2002/90/EC stipulates that they must be "effective, proportionate and dissuasive"[320].

3. The external policy and the cooperation with non EU countries

As we have seen previously, the recent increasing in the flux of migrants have led the EU Member States to focus on the management of external borders.

Before the 1980s, the question of migration was managed at national level and there was not an European approach to the issue and Member States were concerned about the question of controlling the access of third-country nationals. Indeed, EU governments started to be concerned about the external aspect of the EU policy during the Tampere Council of 1999 and focused on promoting readmission agreements with third-countries in order to combat illegal immigration[321].

Over the years the European Union has made several attempts to find solutions to combating illegal immigration and trying to prevent people from leaving their countries by implementing controls at borders and promoting programmes. However, these solution appears not to be so efficient as asylum seekers benefit from the principle of *non refoulement*. This means that once they arrive in the European territory, no matters if it is at the borders, in the sea or through rescue operations, the European Union becomes responsible for them. Moreover, the system for international protection, namely the Dublin system, provides assistance only for individuals that find themselves already in the territory.

The attempts of the European Union were not only focused in developing programmes. As a matter of fact, the lack of cooperation among EU governments have led the European

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[319] European Union Agency for Fundamental Rights, Council of Europe, *Handbook on European law relating to asylum, borders and immigration*, Luxembourg, 2014, p. 30.

[320] Article 3, Directive 2002/90/EC.

[321] S. Lavenex, R. Kunz, *The Migration-Development Nexus in EU External Relations,* Journal of European Integration, Volume 30, Issue 3: Policy Coherence and EU Development Policy 26 July 2008, pp- 445-446.

Union towards an "EU borders externalisation", namely to sign agreements with external partners, namely neighbouring countries or other non EU-countries with common interest. The aim of these agreement is management of the migration flux, as well as for preventing arrivals on the European territory in exchange for the promise of an European candidacy[322].

Bilateral agreement allow to make third countries in charge of controlling borders and preventing individuals from fleeing towards Europe, thus shifting the burden of migration. The main reasons why the European Union decides to cooperate with third-countries is that, after the migratory crisis, Member States have fear of this increasing flux of migrants both from an economic and from a security point of view and find internal policy instruments to be insufficient.

In addition, these agreements allowed the EU to circumvent the obligations provided by the CFR and the judicial control of the CJEU, even if the question of the legality of these programmes have been challenged[323].

The EU-Turkey statement or the compacts with the Mediterranean and sub-Saharan African countries represent two major examples. The agreement with Turkey, which will be described more in detail in the following section, has contributed to a significant reduction in the number of asylum seekers arriving in the Union. Moreover, the jurisprudence on the refusal of humanitarian visas establishes the impossibility of applying for international protection from a third country on the basis of the EU law.

In addition to this, the European Union has also tried to help third-countries through aid programmes such as the establishment of funds, such as the EU Emergency Trust Fund for Africa. The EUTF for Africa was established in September 2015 in order to help 26 African countries in the management of migration and instability in an effective way, through the action of development agencies, international and local NGOs, international organisations and UN agencies[324].

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[322] M. Casas, *Stretching borders beyond sovereign territories? Mapping EU and Spain's border externalisation policies*, Geopolitica(s): Revista de estudios sobre espacio y poder, vol.2, No. 1, 2010, p. 77.

[323] S. Sarolea, *Asile et Union Européenne face à la crise: d'une gestion interne à une gestion externe, Revue québécoise de droit international*, Revue québécoise de droit international, Hors-série-novembre 2018 – L'union européenne et les 60 ans du Traité de Rome : Enjeux et défis contemporains, November 2018, p.298.

[324] European Commission The EU Emergency Trust Fund for Africa, available at https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/facsheet_eutf_short_17-01-2020.pdf

However, these aids are migration-sensitive tools. Therefore, they are given to third countries only if these countries meet the conditions imposed by the European Union.

3.1. Already existing means and programmes

Since the entry into force of the Treaty of Amsterdam, Member States have engaged in developing a Common European Asylum System through the adoption of Directives and a Regulations[325]. The Hague Programme provided some instruments so as to facilitate the access to international protection[326]. Among the others, resettlement, regional protection programmes, humanitarian admission programmes and the issuance of LTV visas issued on humanitarian grounds[327].

Despite the many efforts to open new legal pathways to asylum seekers[328], the European system still presents some limits in terms of effective and well-organised solutions. This is mainly due to several legal, political and practical reasons. As a matter of fact, the creation and implementation of a coordinated system of legal ways of access has proved to be particularly complex and difficult, for example because of the difficulties in achieving an effective coordination between the numerous actors involved. Another difficulty may arise from the insufficient preparation and the lack of economic resources of the national authorities. Moreover, from a political point of view, the lack of a solid and real consensus on migration policy strategies does not encourage Member States to engage themselves in

[325] For further information about the Regulation and Directives adopted by the EU up to now see chapter 2 of this work.

[326] European Parliament, *Current Challenges for International Refugee Law, with a focus on EU policies and cooperation with the UNHCR*, Directorate-General for External Policies, December 2013, p.21.

[327] For an overview see: UNHCR, *Legal avenues to safety and protection through other forms of admission*, UNHCR, 18 November 2014

[328] See for example UNHCR, UNHCR proposals to address current and future arrivals of asylum-seekers, refugees and migrants by sea to Europe, March 2015, available at: http://www.refworld.org/docid/55016ba14.html

the programmes. Many Member States appear indeed to be more focused on other aspects, such as the internal security and the strengthening of borders controls[329].

Since 2016 the European Commission and the European Council have tried to give new impetus to the resettlement policy through partnership projects with third countries. These partners are countries of origin or transit of migration, or countries with a very large number of migrants, mainly belonging to the West Africa, the Horn of Africa and the Maghreb. The peculiarity of these programmes is that they are not treaties. The first pact was signed between the European Union and Lebanon in November 2016, followed by Jordan, Nigeria and Afghanistan[330].

3.1.1. Resettlement and relocation programmes

In the recent years, the EU has put into place several programmes for the resettlement and the relocation of asylum seekers.

Resettlement provide for a form of organised, secure and legal mobility from one State to another. In addition to this, resettlement is also an instrument of international solidarity. As a matter of fact, it allows Member States to share the responsibility as concern the management of refugees and it can be used to give support to the countries who have to deal with migratory pressure[331].

The debate on the efficiency of these resettlement programmes started in 2000s during the preparation of the first actions of the external dimension of asylum policy[332].

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[329] F.L.. Gatta, *Vie di accesso legale alla protezione Internazionale nell'Unione Europea: iniziative e (insufficienti) risultati nella politica Europea di asilo*, Diritto Immigrazione e Cittadinanza, Fascicolo n. 2/2018, 12 June 2018, pp. 39-41.

[330] European Union, *Joint Way Forward on migration issues between Afghanistan and the EU*, available at eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf

[331] F.L. Gatta, *Vie di accesso legale alla protezione Internazionale nell'Unione Europea: iniziative e (insufficienti) risultati nella politica Europea di asilo*, Diritto Immigrazione e Cittadinanza, Fascicolo n. 2/2018, 12 June 2018, pp. 12-13.

[332] European Union Agency for Fundamental Rights, *Legal entry channels to the EU for persons in need of international protection: a toolbox*, FRA Focus, February 2015 p.7.

The European Commission, in particular, has always considered it a positive and effective instrument. In 2009, the Commission identified the strategy and key elements for the creation of a new coordinated system, thus setting up a joint EU resettlement programme, which became effective in 2012[333]. The Commission strongly believed in the importance of the cooperation of the European Union with the major international partners, namely the UNHCR and the IOM.

Furthermore, following the migratory crisis of 2015, the Commission decided to implement the resettlement projects[334] calling on the Member States to engage in a European reception programme for the reception of 20,000 people in need of international protection. The project provided for distribution criteria, based on four indices: population, GDP, average of asylum applications submitted spontaneously and number of refugees resettled per million inhabitants, unemployment rate. Moreover, the Commission provides the EASO office with specific supervisory tasks over the overall development of the programme and targeted assistance to States, in particular those which have never taken part in resettlement initiatives.

The Commission has been publishing regular reports concerning the readmission and reallocation programmes. In its first report of March 2016, the Commission already highlighted a number of issues on the overall functioning of resettlements at European level, mainly regarding the discrepancies on participation and availability of the economic resources among EU states[335]. Even if some progress have been achieved, in 2017 the Commission highlighted once again the problem of the different approach of the Member States: while some have already fully fulfilled their commitments, others have not yet carried out resettlement actions, such as Bulgaria, Cyprus, Croatia, Greece and others[336].

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[333] The system became effective with the Decision No 281/2012/EU of the European Parliament and of the Council of 29 March 2012 amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows'. European Parliament, Current Challenges for International Refugee Law, with a focus on EU policies and cooperation with the UNHCR, Directorate-General for External Policies, December 2013, p. 21.

[334] European Commission, *Commission Recommendation of 8.6.2015 on a European resettlement scheme*, C(2015) 3560 final, Brussels, 8 June 2015.

[335] European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council, First report on relocation and resettlement*, COM(2016) 165 final, Brussels, 16. March 2016.

[336]European Commission, *Report from the Commission to the European Parliament, the European Council and the Council, Fifteenth report on relocation and resettlement*, COM(2017) 465 final, Brussels, 6 September 2017.

The Council communication of 2018[337] on the status of the EU Agenda on Migration stressed again the disequilibrium among Member States. In a nutshell, the report pointed out that countries such as France, Sweden and Germany strongly engaged themselves in the resettlement projects, whereas other such as Hungary, Poland and Slovakia did not and achieved any resettlement.

According to data, in 2018, of the 1.2 million refugees in need of resettlement worldwide, including survivors of violence and torture, people with legal and physical protection needs and women and girls at risk, only 55,700 (or 4.7%) have been resettled[338]. However, the number of people needing resettlement in more and more increasing[339] and, even if it is perceived as a common and shared solution, resettlement is still not so frequently used.

As concerns relocation, the TFEU recognises at Article 78 that when one or more Member States find themselves in an emergency situation following a sudden influx, the European institutions can adopt provisional measures in order to help them.

The objective of this programme is to increase the aid to Member States in case of emergency on a voluntary basis and to deploy the European Asylum Support Office competence in ensuring joint processing application for the States who find themselves on the front line. According to the system, an applicant who has submitted the application for international protection in Italy or Greece, and in respect of whom those Member States would have been competent under the criteria for determining the Member State covered by the Dublin Regulation, can be the subject of the relocation programme and therefore transferred to another EU Member State according to the distribution criteria. The criteria provide that relocation is a priority for vulnerable people[340].

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[337] European Commission, *Communication on Progress report on the implementation of the European Agenda on Migration*, COM(2018)301 final, Brussels, 16 May 2018.

[338] UNHCR, *Less than 5 per cent of global refugee resettlement needs met last year*, 19 February 2019. Available at: https://www.unhcr.org/news/briefing/2019/2/5c6bc9704/5-cent-global-refugee-resettlement-needs-met-year.html

[339] Council of Europe, *Vite salvate. Diritti protetti., Colmare le lacune in materia di protezione dei rifugiati e migranti nel Mediterraneo*, June 2019, p. 49.

[340] S. Sarolea, *Asile et Union Européenne face à la crise: d'une gestion interne à une gestion externe, Revue québécoise de droit international*, Revue québécoise de droit international, Hors-série-novembre 2018 – L'union européenne et les 60 ans du Traité de Rome : Enjeux et défis contemporains, November 2018, pp. 289-290.

The relocation system has been validated by the Council in two decisions, namely the Council Decision 2015/1601 and the Council Decision 2015/1523[341], both adopted in 2015 as part of a series of support measures for Italy and Greece.

The relocation programme has proved to be effective. Between 2015 and 2017 the relocation project has led to a total of 28% of asylum seekers relocated from Italy and Greece. However, with the exception of Finland and Ireland, which achieved 80-115% of their commitments, the other Member States have partially met or have not met their commitments[342]. Besides, in June 2017 the Commission launched infringement procedures against Czech Republic, Hungary and Poland and not having complied with their obligations, despite the repeated calls for action[343].

The relocation system has been subject to opposition and criticism especially from the so-called Visegrad group. The Slovak Republic and Hungary filed an appeal before the CJEU in to challenge the compliance of these relocation measures with the treaties. The states claimed that Article 78 TFEU does not constitute an adequate legal basis for the Decision 2015/1601 because the latter would be a legislative act of a non provisional nature adopted in response to a sudden influx of asylum seekers. In his judgement, the CJEU affirmed that the relocation programme has a temporary nature as Italy and Greece, have been subject to a sudden influx of asylum seekers as provided by the TFEU. Moreover, the Court affirmed that the provisional measures authorized by Article 78 have the power to derogate from legislative acts[344].

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[341] European Union, *Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece;* European Union, *Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*. Both of them are no longer in force.

[342] S. Sarolea, *Asile et Union Européenne face à la crise: d'une gestion interne à une gestion externe, Revue québécoise de droit international*, Revue québécoise de droit international, Hors-série-novembre 2018 – L'union européenne et les 60 ans du Traité de Rome : Enjeux et défis contemporains, November 2018, pp. 296. For data regarding Italy see: https://www.asylumineurope.org/reports/country/italy/asylum-procedure/relocation

[343]European Commission, Relocation: *Commission launches infringement procedures against Czech Republic, Hungary and Poland,* press release, Brussels, 14 June 2017, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1607

[344] CJEU, 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, C-643/15 et C-647/15.

3.1.2. Humanitarian Admission programmes

Humanitarian Admission programmes include different types of procedures according to which a State admits on its territory a third-country national in order to grant him/her a form of international protection based on humanitarian reasons, through the use of already existing EU legal instruments.

Humanitarian Admission programmes differ from the humanitarian visas which were analysed in chapter 2. Rather, they are more similar to resettlement, with which they are often integrated.

These types of programmes consist in a short-term solution that may provide legal channels for specific population groups or groups of persons in situations of particular vulnerability or urgent need for protection. Besides, they offer additional opportunities for a safe and legal access to international protection to those individuals who do not bear the necessary requirement and therefore are not eligible for the UNHCR resettlement programmes or other legal initiatives[345].

Many Member States have developed Humanitarian Admission programmes in response to the Syrian crisis, such as Germany and Austria[346].

Humanitarian corridors represent one type of humanitarian admission programmes. Since 2015 Italy has launched a humanitarian corridor projects on the basis of a joint project between the Italian Government and various civil society organisations, i.e. the Community of Sant'Egidio, the Federation of Evangelical Churches in Italy, the Waldensian Table.

The aim of these humanitarian corridors is to provide persons in a particularly vulnerable position with protected and legal access to the Italian territory. It is addressed in particular to nationals of countries that have particular migratory conditions, namely Lebanon, in particular with regard to the Syrian refugee flux, Morocco and Ethiopia. Preliminary procedures for monitoring and selecting the beneficiaries of humanitarian corridors are carried out by non-governmental organisations, religious associations and other bodies.

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[345] F. L. Gatta, Vie di accesso legale alla protezione Internazionale nell'Unione Europea: iniziative e (insufficienti) risultati nella politica Europea di asilo, Diritto Immigrazione e Cittadinanza, Fascicolo n. 2/2018, Febuary 2018, pp. 34-35.

[346] J. van Selm, *Humanitarian Admission Programmes, Expanding and Increasing Pathways to Protection*, the European Resettlement Network, April 2018 p. 22.

Subsequently, the competent authorities, such as the Italian Ministry of Foreign Affairs, carry out the necessary checks for the issue of the VTL visa in accordance with art. 25 of the Visa Code[347].

Once in the Italian territory, the programme also provides for a second phase aimed at facilitating successful integration of the refugees into the territory and the progressive integration into the Italian society through language courses, mobility, cultural mediators, connection to public services, training programmes and job placement[348].

The Italian initiative is a positive example, because it takes care not only with the management of the admission and entry of beneficiaries into national territory, but also of their integration in the society. Similar programmes have been put into place in France, in Belgium, in Ireland.

The creation of these human corridors had positive consequences because it allows access to vulnerable persons who do not meet the requirements of other programmes, but at the same time provides the advantage of reducing costs. On the other hand, the modalities of the selection process are not entirely clear[349].

3.1.3. Regional Protection Programmes

The Regional Protection Programmes projects "are international protection instruments that aim to improve refugee protection in target regions through the provision of durable solutions."[350]. These project were developed with the aim of ensuring better capacity to deal with issues related to the presence or transit of refugees to specific geographic areas in third-countries.

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[347] F. Gatta, *Vie di accesso legale alla protezione Internazionale nell'Unione Europea: iniziative e (insufficienti) risultati nella politica Europea di asilo*, Diritto Immigrazione e Cittadinanza, Fascicolo n. 2/2018,February 2018, pp. 34-35.

[348] C. Mandalari, *La questione delle vie di accesso legali e sicure dei rifugiati nell'Unione europea: problemi e prospettive del programma "corridoi umanitari*", Diritti Comparati, 12 April 2018.

[349] *Ibid*.

[350] European Resettlement Network, http://www.resettlement.eu/page/regional-protection-programmes

Since 2007 many programmes have been launched. The first RPPs examples took place in the Great Lakes Region in Tanzania and, as concerns Europe, in Ukraine, Moldova and Belarus. In 2010 a RPP was launched for the Arab Spring[351]. However, the first attempts resulted to have some imperfections regarding the low degree of flexibility of the programmes, the limited availability of financial resources, the insufficient involvement of third countries and the difficulties of coordination with other actions in the field of humanitarian and international protection[352].

Since 2013, the European Union has developed new programmes, namely the Regional Development and Protection Programme, characterised by a stronger assistance to refugees, more effective support and more active involvement of third-countries' authorities. Indeed, the European Union launched in 2014 a PSPR in order to provide specific and long-term support to countries bordering Syria, namely Lebanon, Jordan and Iraq, and to strengthening their capacity to manage the large flows of refugees caused by the Syrian conflict through local integration and resettlement programmes[353].

The European Commission is strongly engaged in extending and strengthening the existing regional programmes, as well as in setting up new programmes in regions which are particularly sensitive from the point of view of migratory flows, such as the Western Balkans and Asia[354]. However, because of the inflexibility of the programme and of the lack in coordination among EU Member States, results are difficult to achieve[355].

3.2 The EU-Turkey Statement

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[351] European Parliament, *Current Challenges for International Refugee Law, with a focus on EU policies and co-operation with the UNHCR*, Directorate-General for External Policies, December 2013, p.21.

[352] F. L. Gatta, *Vie di accesso legale alla protezione Internazionale nell'Unione Europea: iniziative e (insufficienti) risultati nella politica Europea di asilo, Diritto Immigrazione e Cittadinanza,* Fascicolo n. 2/2018, February 2018, p. 27.

[353] European Resettlement Network, http://www.resettlement.eu/page/regional-protection-programmes

[354] European Commission, *Communication on Progress report on the implementation of the European Agenda on Migratio*n, COM(2018)301 final,16 May 2018 p. 5.

[355] European Parliament, *Current Challenges for International Refugee Law, with a focus on EU policies and co-operation with the UNHCR*, Directorate-General for External Policies, December 2013, p.22.

The statement between the Turkish government and the European Council with the aim of encouraging cooperation between the two countries concerning the management of migration flows was signed on 18 March 2016. This agreement is part of a broader framework for the management of Syrian refugees that has been achieved after long negotiations.

The text of the agreement provided the commitment of the Turkish government to take back in its territory all the migrants, which were not entitled to international protection, that were trying to reach Greece through Turkey. In return, the European Union committed 3 billion Euros in order to finance projects for refugees in Turkey and accepted to receive some Syrian refugees living in Turkey[356].

The agreement set up the criteria for defining irregular migrants according to the EU Procedure Directive, namely all those who have not applied for international protection in Greece or whose application has already been judged as inadmissible. In addition, the criteria for the selection must take into account the UN vulnerability criteria, and priority is given to migrants who have not already irregularly entered, or have not attempted to enter, into the territory of the European Union. Furthermore, the Turkish government engaged itself to take all necessary measures to prevent the origin of new irregular migration routes, both by sea and by land[357].

The statement was not only focused on the willing to cooperate on the question of migration and asylum seekers, but it also focused on the accession process of Turkey to the European Union. Indeed, the EU promised to open new chapters of the negotiation process. Moreover, the agreement provided for the abolishment of the visa requirements. However, Turkey had to meet all the requirements before the European Union fulfils its promises. The Commission set up a list of 72 requirements by classifying them in five categories: document security, migration and border management, public order and security, fundamental rights, readmission of illegal migrants. However, at the time of the statement, Turkey managed to complete only 7 requirements[358].

The Turkish application process in order to become a member of the EU has a long history. As a matter of fact, Turkey applied for the first time in 1959 but its application

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[356] EU Council, Press Release 144/16, EU- Turkey Statement 18 March 2016.

[357] *Ibid.*

[358] European Commission, First/Second/Third/Fourth/Fifth/Sixth/Seventh report on the progress made in the implementation of the EU-Turkey Statement.

was formalised a few years later, in 1963 with the Treaty of Ankara. However, it is only in 1999 that Turkey has been officialised as a candidate state. Albeit, Turkey's committed to reform its legal system, the negotiations started a few years after in 2005. Many EU Member States opposed to its membership, but its geographical and economical position makes it a strategic partner to the European Union[359].

The European Parliament questioned the legal nature of the EU-Turkey Statement on several grounds. The answer to this question is nonetheless still not clear.

Firstly, apparently the statement did not respect Article 218 of the TEU which states that a text may be subject to the approval of the European Parliament in order to be binding. Secondly, the nature of the document is unclear. The Vienna Convention of 1969 and the TEU provide for different definitions of the statement. Thirdly, the statement provides for the confirmation of previous commitments, but the intentions of the European Union and of Turkey are not explicitly written[360].

In addition to this, the compliance of the statement with the protection of human rights has also been challenged. On the one hand, the increasing number of individuals reaching the territory of the EU through Greece has put even more pressure on the country and all the efforts of the Greek government have proved to be insufficient. According to a report published by Amnesty International in 2017, the situation in Greece has worsened since the adoption of the statement because the number of individuals applying for international protection in Greece has augmented. As a result, the number of migrants blocked in the Greek territory has grown, thus making the reception centres more like detention centres[361].

On the other hand, the conditions in Turkey do not appear to be good. As a matter of fact, Turkey cannot be considered a safe country according to the concept provided by Article 39 of the Asylum Procedure Directive[362] and the ECHR.

because some basic rights and liberties as well as the principle of *non-refoulement* are not respected. Mariana Gkliati highlights that the Turkish government has been found in

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[359] European Neighbourhood Policy And Enlargement Negotiations, available at https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/turkey_en

[360] A. Ott, *EU-Turkey cooperation in migration matters: A game changer in a multi-layered relationship?,* Cleer papers 2017/4, The Hague: Centre for the law of EU external relations, 2017, p. 28.

[361] Amnesty International, *A blueprint for despair. Human rights impact of the EU-Turkey Deal*, 14 February 2017.

[362] Article 39, Directive 2013/32/EU.

violation of the principle of *non-refoulement* as well as having violent behaviours several times. Moreover, the access to the registration procedures have become more and more difficult. Some persons have been forced to return to their country of origin and sometimes even forced to sign documents without having the right to being informed[363].

The CJEU was asked to rule on the legality of this agreement after three similar applications[364] for annulment were lodged by two Pakistani nationals and an Afghan national.

The applicants claimed that the pact exposed them to risks of *refoulement* to Turkey or of "chain *refoulement*" to their country of origin.

However, the CJEU claimed not to be competent to challenge the statement, considering the agreement not as an act of an European Institution and therefore being outside its jurisdiction. The European Council, as an institution, did not adopt a decision to conclude an agreement with the Turkish Government in the name of the European Union. As the agreement was not concluded following the provisions of Article 218 TFEU, the Court claimed the agreement was an act signed by the Heads of State and Government of the EU Member States and that therefore it has non-binding nature. Indeed, Article 263 of the TFEU provides the CJEU with the competence to the review the legality of acts adopted by an institution, body, office or agency of the European Union, but not those by the Member States[365].

By declaring inadmissible the three actions brought before it on grounds of lack of competence, the CJEU *de facto* deprived the parties concerned of judicial protection under Union law.

The European Commission published many reports assessing the positive results of the EU-Turkey Statement. At the beginning the statement appeared to be very effective as many people were readmitted to Turkey and at the same time fewer arrived in Greece. However the return process appeared to be slower and more problematic than what the European Union believed. This was mainly due to the need for competent authorities for

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[363] M. Gkliati, *The EU-Turkey Deal and the safe third country concept before the Greek Asylum Appeals Committees*, Movements - Journal for critical migration and border regime studies, Issue 2, Volume 3, 2017, pp. 213-224.

[364] CJEU, *NF, NG and NM v European Council*, 28 February 2017, T-192/16, T-193/16 and T-257/16.

[365] M. den Heijer, T. Spijkerboer, *Is the EU-Turkey refugee and migration deal a treaty?,* EU law analysis, 7 April 2016.

the examination of the applications. In addition, other routes, more specifically the Balkan and the Central Mediterranean routes started to suffer from greater flux[366].
Furthermore, the Commission published a report in 2017 stressing that Member States were not enough engaged in the resettlement programmes because only 15 countries had resettled Syrian refugees[367].

3.3. The Italy-Libya Agreement

Italy, together with Greece and Spain, is one of the countries which is most subject to the flux of migrants from the Mediterranean route. Unfortunately, the Italian government has proved to be unable to deal with the amount of migrants and asylum seekers arriving everyday on the Italian coasts.
Since 2000, a close collaboration on the question of irregular migration has been developed between the Italian and the Libyan government. Starting from an agreement aiming at fighting against terrorism, the collaboration has developed including the sign of readmission agreements, the construction of detention centres and deportation schemes[368].
In December 2007 two Protocols were signed between the Italian and the Libyan government. They resulted in the sign of an agreement between the Italian Prime Minister Silvio Berlusconi and Muammar Gaddafi in 2008. The main objective was to put an end to the historical colonial question with a large compensation from Italy. The treaty was not limited to that. As a matter of fact, it included some provisions on the question of immigration. In particular, recalling the Rome Agreement of 2000 and the cooperation protocols of 2007, the treaty promoted the establishment of a system of control by the Italian authorities on the Libyan border coasts.

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[366] European Commission, First/Second/Third/Fourth/Fifth/Sixth/Seventh report on the progress made in the implementation of the EU-Turkey Statement

[367] European Commission, *Seventh report on the progress made in the implementation of the EU-Turkey Statement*, COM(2017) 470 final, Brussels, European Commission, 6 September 2017.

[368] R. Andrijasevic, *Deported: The Right to Asylum at EU's External Border of Italy and Libya,* International Migration, Vol. 48, Issue 1, 4 January 2010, p. 154-155.

following Italy's participation in the NATO war against Libya, the treaty was suspended in March 2011. The reason was that it also provided for a prohibition of military intervention between the two countries. However, this suspension did not include the provisions on combating illegal immigration. Therefore, the Italian Prime Minister Mario Monti decided to start the cooperation again in December.

Following the death of Gaddafi and the Arab Spring and the judgement on the *Hirsi Jamaa* case condemning Italy for violating the International law principle, the agreements were suspended from 2014 until December 2015 due to growing instability in the country.

on the basis of the EU-Turkey Statement.

A memorandum has been signed at the beginning of 2017 between the Italian and the Libyan government with the aim of implementing cooperation in the fight against illegal immigration, including providing training and resources to the Libyan coastguards as well as funds for the detention centres.

In 2018 the UN has condemned Libya stating that "migrants and refugees are being subjected to "unimaginable horrors" from the moment they enter Libya"[369]. However, the attitude of the European Union with regard to rejections has not been clear. In 2013 the EU showed support to the border security management in Libya. Since the adoption of this agreement, Italy started to have a policy of *refoulement*. In this context, the *Hirsi Jamaa and Others* case of 2012 represents an historic judgement of the ECtHR. The case concerns a ship with more than 200 migrants which was intercepted on the high seas by the Italian Coast Guard in an area of competence of the Malta. After the refusal to intervene by the Maltese authorities, the Italian ones decided to intervene but brought back the people to Libya[370].

In its judgement, the ECtHR firstly verified the existence of Italian jurisdiction as the facts had occurred in international waters. The events took place on board Italian military ships, therefore the applicants were under the exclusive control of the Italian authorities. It is important to stress that for the first time the ECtHR has admitted that, in exceptional

[369] United Nations Support Mission in Libya, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Lybia*, 20 December 2018.

[370] ECtHR*, Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl No. 27765/09.

circumstances, the acts of the Contracting States may constitute an exercise of their jurisdiction even if they have been or are having an effect outside their territories[371].

The ECtHR found the Italian authorities violating Article 3 of the CFR. Not only were the immigrant at risk of being subjected to inhuman or degrading treatment, but they were also at risk of *refoulement* as the Libyan authorities could reject them to their country of origin. As a matter of fact, the Italian authorities could not be aware of the precarious human rights conditions in Libya as the conditions in the detention centres were denounced by numerous reports of the UNHCR, Human Rights Watch and others.

The Italian government stated that these operations were provided for by the bilateral agreements. Moreover, they claimed that the persons had not expressed their fear of the risks they would face in Libya as they had not applied for asylum.

Italy's justifications were rejected by the Court, which affirmed that a country party to the CFR remains in any case responsible.

As regards the risk of *refoulement*, the ECtHR affirmed that it is the responsibility of the refusing State to ensure that the rejected persons are not then further returned to their country of origin from the country of transit.

The Court also affirmed that the right to an effective remedy was also infringed, as a consequence to the violation of Article 3.

The *Hirsi* case is very important because of many elements. Firstly, the court affirms that states cannot fail to fulfil their obligations under human rights treaties when they operate outside their territory. Moreover, by declaring the prohibition to reject immigrants to unsafe countries and prohibiting collective expulsions, also outside territorial waters, it introduces a new jurisprudence for the ECtHR. The Court also deals with the question of the application of the ECHR to other cases of outsourcing of borders, where there is authority and control over an individual by a State party to the Convention[372].

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[371] A. Liguori, *La Corte Europea Dei Diritti Dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: Il caso Hirsi*, Rivista di Diritto internazionale 2012/2, 2012, p. 424.

[372] M. B. Dembour, I*nterception-at-sea: Illegal as currently practiced – Hirsi and others v. Italy,* Strasbourg observers, 1 March 2012.

4. The benefits of opening legal pathways to reach the EU territory

Since the years 2000s, Member States started to discuss about implementing the legal access of asylum seekers to the EU territory.

The report of the EU Agency for Fundamental Rights published in 2015 aims at encouraging the European Union to engage in a common and structured system of protected pathways, thus giving effectiveness to the right of asylum protected by Article 18 of the CFR. The report takes into account the advantages and disadvantages of opening legal routes for asylum seekers. According to the FRA, the opening of legal channels would have many positive effects for Member States as well as for refugees. Among the others, the improvement of the protection of the rights of asylum seekers, the increasing solidarity and cooperation among EU Member States in the crisis management, as well as significant progress in the fight against migrant trafficking, improvement in controls and security levels, increased opportunities of integration in the society and in the labour market for refugees. On the other hand, the report stresses the negative effects, such as the possible emergence of movements of people opposing to the policy, the need for more economic resources for the opening and the functioning of the legal pathways. Moreover, the report it highlights the problem of the absence of a common and structured approach at European. To conclude, the FRA calls the European Commission to take action in order to establish coordinated programmes for an effective and credible system of legal entry to the EU territory[373].

Following the tragedy in Lampedusa in 2013, the EU Member States have engaged themselves in the creation of the Task Force Mediterranean. The TFM identified five main priority areas of work, including the establishment of "Regional Protection Programmes, resettlement and reinforced legal ways to access Europe"[374] with the aim of better addressing migratory and flows and reducing migrants' deaths in the Mediterranean..

There is a general agreement that there is a lack of efforts made by the European Union so far as regards the implementation of measures aiming at providing solutions for the legal and secure access of individual to the international protection.

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[373] European Union *Agency for Fundamental Rights, Legal entry channels to the EU for persons in need of international protection: a toolbox,* FRA Focus, February 2015.

[374] European Commission, *Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean*, COM(2013) 869 final, Brussels, 4 December 2013, pp. 12-13.

Francesco Gatta points out that, even if the European Union boasts a rather articulated system to for citizen of third country on the territory, Member States appear to be more concerned in defining what they are required to do after the entry of applicants for international protection, rather than defining how they can access the EU in order to request protection in a legal, dignified and safe way[375].

The UN Special Rapporteur on the rights of migrants, François Crépeau, during his office from 2011 to 2017, focused himself in the migration situation in the European Union. He claimed that the EU policy based on security was negative not only to migrants, but also to States themselves, causing the side-effect of encouraging and increasing the irregular flows to Europe and contributing to the prosperity of criminal organisations. Therefore, the European Union should promote the safe and regular migration, through resettlement programmes and the implementation of visa opportunities[376].

The Council of Europe stressed the importance of encouraging the opening up and development of legal pathways for persons seeking international protection. In particular, it recommends greater efforts as concern the resettlement of asylum-seekers and calls for a common approach to humanitarian visas[377]. Moreover, the Special Representative on Migration and Refugees of CoE Secretary General, pointed out that the issue of the opening of legal access routes for asylum seekers represents a central element in the solution for the so-called migrant crisis[378].

The LIBE Commission has carried out a study, called "Humanitarian Visas: option or obligation?" on the topic of the legal pathways with specific reference to the visas issued for humanitarian reasons. The study provides for an analysis of the existing legislation as well as of the custom at European level as regards humanitarian visas, focusing in particular on the possible use of these type of visas for the purposes of mobility or international protection. Moreover, the study questions whether a humanitarian visa could be a safe and authorised mean to allow third-country nationals to enter the territory of the

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[375] F.L. Gatta, *Vie di accesso legale alla protezione Internazionale nell'Unione Europea: iniziative e (insufficienti) risultati nella politica Europea di asilo*, Diritto Immigrazione e Cittadinanza, Fascicolo n. 2/2018, February 2018, p. 3.

[376] F. Crépeau, *we need a long term strategy for human migration, UN special rapporteur on the human rights of migrants*, 10 September 2017, available at http://www.europeanmigrationlaw.eu/en/articles/points-of-view/the-un-rapporteur-we-need-a-long-term-strategy-for-human-migration.html

[377] Council of Europe, *the "left-to-die-boat": actions and reactions*, Resolution 1999 (2014).

[378] T. Boček, *First report on the activities of the Secretary General's Special Representative on Migration and Refugees*, Council of Europe, February 2018.

European Union while they are still outside of it. The LIBE Commission concludes affirming that Member States have a genuine obligation, under certain conditions, to respect the provisions of the CFR as well as their human rights obligations by issuing visas on humanitarian grounds in accordance with the EU Visa Code[379].

[379] U.I. Jensen, *Humanitarian visas: option or obligation?,* study for the LIBE Committee, European Parliament, Directorate General for Internal Policies, Policy department C: citizens' rights and constitutional affairs, Justice, Freedom and Security, European Parliament, Brussels, 2014.

CONCLUSION

The aim of the initial part of this thesis was to explore the recognition of the right to asylum as a fundamental human right and the existence of the legal instruments for the protection of this right. After the analysis, it is possible to say that for the moment, the International law recognises the right to seek and enjoy asylum, but this right does not correspond in an obligation for States to let people freely enter their territory and provide them the status of refugee The right to asylum finds expression in the UN Geneva Refugee Convention. At the same time, there are a series of other rights and obligations that are recognised by the International law as corollary to it. For instance, the principle of *non-refoulement* guarantees individuals the right not to be refused from the receiving country and returned to their country of origin where they would be at risk of persecution and violence.

The CFR and the ECHR do not explicitly guarantee the right to asylum but enshrine the prohibition of torture and inhuman or degrading treatment or punishment. Following the conclusions of the AG Mengozzi on t*he X and X case*, the CFR would require the issuance of a visa if there is ground to believe that the refusal of a visa would expose the applicants to such acts of violence.[380] Besides, the present work aimed at analysing whether the provisions of the ECHR and the CFR could be applicable outside the borders of the European Union. The position of the Court on two judgements, namely the *X and X, Al Chodor and others*, and *Hirsi Jamaa* cases, are however a clear example of the controversy of the question and indecision of the jurisprudence on the issue.

European governments are concerned about security issues related to international terrorism, thus increasing hostility towards foreigners. This results in restrictions on migration policies and the implementation of barriers to counter irregular migration. In reality, these policies have negative consequences on all the people seeking international protection. It is important to underline, however, that border management and security and refugee protection are not interrelated. Despite the harmonisation process that has been consolidated through the adoption of Regulations and Directives that have been analysed

[380] J.Y. Carlier, L. Leboeuf, *Le visa humanitaire et la jouissance effective de l'essentiel des droits : une voie moyenne? À propos de l'affaire X. et X.*, EU Immigration and Asylum Law and Policy, 27 February 2017.

in the second chapter of this work, there is a need for greater cooperation among Member States to create a system to check arrivals and distinguish between individuals seeking for international protection and those who could be a threat to the internal security.

The present dissertation also aimed at highlighting the positive and the negative aspects of the Dublin System, being considered the cornerstone of the Common European Asylum System. The first Convention, then implemented by the following Regulations II and III, was created because of the need to harmonise the asylum policy of the EU Member States. Despite its implementation throughout the years, the Dublin system has proven to still have some limits. Firstly, the system is not fair for the Member States as it puts a disproportionate burden on a few States because of the concept of "state of arrival". A report issued by ECRE shows that Greece and Spain are the main receiving States, but Germany and France are the two countries that receive and process the greatest number of asylum applications[381]. At the same time, the Dublin system is unfair for asylum seekers because it does not take into account the preferences of the applicants and only a minimum number of rights are guaranteed[382]. Moreover, it is important to stress that the Dublin system can be triggered only when the asylum seekers reach themselves the territory of the EU.

Even if a proposition for a Dublin IV Regulation is being discussed, as far as we know the reform does not introduce new elements. For the time being, the proposal is to include criteria such as the GDP, its territorial size, the number of inhabitants, the population's unemployment rate, and the number of refugees already hosted. However, a change in the core principles of the system needs to be done, for example by providing a fairer system for the distribution of the responsibility among the EU States as well as a system that takes into account the wishes but also the needs of the asylum seekers. In 2013 a model for distribution more focused on the applicants, consisting in replacing the notion of the country of entry with the country of the applicant's first choice, has been submitted[383].

The present thesis aimed at investigating whether visas with limited territorial validity could represent a legal solution for asylum seekers. The Visa Code provides at Article 25

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[381] ECRE, *The Dublin System in the first half of 2019*, 27 August 2019. Available at https://www.asylumineurope.org/news/27-08-2019/dublin-system-first-half-2019

[382] ECRE, *To dublin or not to dublin? ECRE's assessment of the policy choices undermining the functioning of the Dublin Regulation, with recommendations for rights-based compliance*, Policy note 16, 2018, pp. 1-2. Available at https://www.ecre.org/wp-content/uploads/2018/11/Policy-Note-16.pdf

[383] B. Garcés-Mascareñas, *Why Dublin" doesn't work",* notes internacionals CIDOB, November 2015, p. 4.

that States can issue visas with a territorial limitation under specific circumstances, such as humanitarian grounds. However, the provisions of the Visa Code do not explicitly precise when these types of visas can be issued and who are the people or categories of people eligible. The Commission has been encouraging the Member States to set up common guidelines for the issuing of such types of visas. Among the European Union, 16 Member States already provide for the issuance of visas for humanitarian reasons.

Moreover, the present thesis has gone further in the attempt to answer the question of whether the international obligations referred to in Article 25 of the Visa Code that allow States to derogate from the conditions to issue an exceptional visa. More specifically, the question concerned if the obligations arising from the European Convention on Human Rights, adopted in Article 3 thereof prohibiting inhuman or degrading treatment, may be raised by the national authorities in order to decide to grant such a visa. Not only do Article 3 of the ECHR and Article 4 of the Charter prohibit the above-mentioned treatments, but it also imposes a positive obligation on States to take measures to prevent people from being exposed to such abuses. AG Mengozzi clearly affirms it in its opinion on the *X and X* case, asserting that in order to comply with the Charter, the European Union must include a legal route of access to its territory for those who are exposed to inhuman or degrading treatment where they are located. As a matter of fact, the rule of law is a *sine qua non* condition for these people to find protection in other countries.

However, one may conclude that the protection remains at a theoretical level. The research question has then gone further to explore the possible legal pathways for people wishing to reach Europe. In recent years the European Union has tried to prevent migrants from reaching its territory through the bilateral agreements and the other programmes, whose legality has been questioned. Unfortunately, the number of people tending to favour irregular, but especially dangerous routes, to flee dramatic war, conflict, and persecution to reach the European Union by land and by sea, appears not to be decreasing. This choice may be motivated essentially by two factors: on the one hand, the scarcity of legal avenues offered by the European Union as well as by the various Member States; on the other hand, the fear of being rejected once in the territory.

In the hope for a long-term strategy for a more controlled system and the opening legal pathways to reduce the irregular and dangerous journeys that lead to numerous deaths every day, this thesis has focused on some of the most immediate aspects of the issue, but

there are other areas, not described here, which in turn require the attention of Member States.

After the analysis, one should assert that unfortunately, the lack of other ways and programmes make it difficult for individuals not to choose to reach Europe illegally and that the only possibility that individuals have to apply for international protection is to reach the borders or the territory relying on unscrupulous traffickers, challenging the sea, suffering violence and abuses. AG Mengozzi describes it in his opinion by stating

> "What alternatives did the applicants in the main proceedings have? Stay in Syria? Out of the question. Put themselves at the mercy of unscrupulous smugglers, risking their lives in doing so, in order to attempt to reach Italy or Greece? Intolerable. Resign themselves to becoming illegal refugees in Lebanon, with no prospect of international protection, even running the risk of being returned to Syria? Unacceptable."[384].

However, scholars agree to say the judgment of the CJEU does not take this into account. Indeed, the point of view of the CJEU is that that the Syrian family had applied for a visa for international protection that should have been qualified not as a short-term visa but as a long-term visa, therefore the Court declared that the facts fell outside EU law and the CFR cannot be applied in this specific case.

In addition to the obvious failures of internal solutions, the European Union is focusing its action on the outside, privileging the so-called externalisation over prevention. Despite the many efforts, the European Union has still not been able to present an effective and well-organised system to provide legal and safe solutions. The implementation of a coordinated system of legal channels of access to international protection has proved to be particularly complex to put into place, mainly because of the difficulties in achieving effective coordination between the various actors involved at international, European and national levels.

On the one hand, admission programmes appear to be unattractive and not providing a real alleviation to the migratory pressure for some Member States. On the other hand, some

[384] Paragraph 157, Opinion of Advocate General Mengozzi, delivered on 7 February 2017 (1), Case C-638/16 PPU, X,X, v Etat Belge.

States appear to be concerned about their sovereignty on the control of national borders and the entry of foreigners into their territory. Indeed, the imposition of quotas or additional obligations concerning admission or reception is viewed with reluctance and hostility. Indeed, 14 EU Member States strongly opposed to the obligation to admit asylum seekers on their territory, highlighting that a positive decision of the CJEU would lead to several negative consequences, such as the creation of a precedent. It is interesting to show how the intervention of the governments provides with a clear idea of the will of governments to defend their sovereign prerogatives and national interests[385].

Even if the CJEU has essentially stated that there is no obligation for Member States to grant a humanitarian visa, it has led the door open stating that they remain free to issue such type of visa if they deem it necessary. It is important to remind that several EU Member States already provide for the possibility to release the so-called humanitarian visas to facilitate legal and safe entry into their territory for asylum seekers. In addition to this, some European governments have in recent years put into place a series of initiatives and programmes of humanitarian admission, especially devoted to Syrian nationals fleeing from their country. Besides, humanitarian corridors are another attempt to open up channels of legal entry through the use of legal instruments already provided for the existing EU legislation. Bilateral agreements, such as the EU-Turkey Statement have furthermore been adopted by the European Union and by Member States and have proven to be effective.

That being said, the *X and X* case offered the European Union an opportunity for opening its policy on the subject. The opening of channels of regular entry constitutes a solution in the fight against traffickers of human beings, as well as in the fight against the abuse of the right of asylum. However, the CJEU and the European Union decided to maintain a more prudent approach, because of the pressure from EU Member States but also in the attempt to safeguard the common European asylum system, in particular the already fragile Dublin system.

Despite the growing attention on the topic, the Member States are still not able to agree on a safe and organised management. The EU policy on migration and asylum appears to be more and more focused on strengthening borders controls and preventing entry,

[385] J.Y. Carlier, L. Leboeuf, *Le visa humanitaire et la jouissance effective de l'essentiel des droits : une voie moyenne? À propos de l'affaire X. et X.*, EU Immigration and Asylum Law and Policy, 27 February 2017.

undermining the needs and rights of the persons seeking international protection and neglecting their human rights obligations deriving from the International law.

For the time being, the lack of solutions for legal and secure access to European territory means that the right to international protection and the respect of human rights which are so expressly protected by EU law, it *de facto* remains only theoretical.

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