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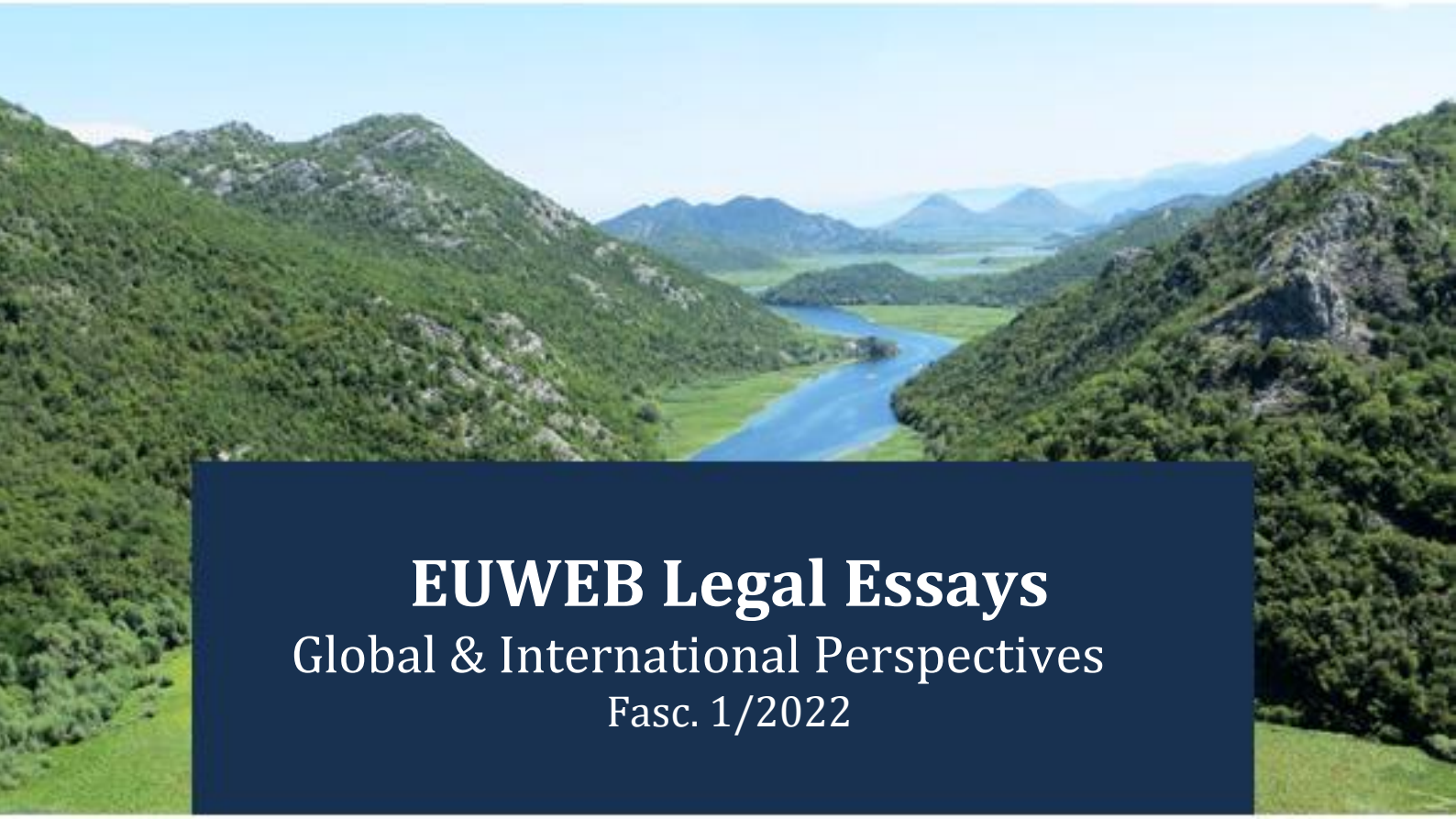

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MIGRATION MANAGEMENT IN EUROPE: SOVEREIGNTY VS. HUMAN RIGHTS-BASED APPROACH

di Rossana Palladino[*]

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1. Introduction. The Sovereign Rights of States to Manage Migration and Its Limits

In the present historical era, the need of control and management of migratory flows represents one of the crucial nodes of the policies of the States *uti singuli* and of the European Union as a whole, placed at the centre of the "tightness" of the European integration process, extremely affected by a prolonged phase of crisis.

This paper aims to examine the balance between the dual approach at the core of migration and asylum management at the European level: sovereignty and human rights-based approaches, namely assessing the contribution of the supranational Courts (the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR)), as well as the perspectives set out in the New European Pact on Migration and Asylum[1].

As a preliminary remark, it is worth to point out that, as a matter of well-established International law, States have the right to control the entry, residence and expulsion of aliens. This should be intended as an "*undeniable sovereign right*", as stated by the European Court of Human Rights, *inter alia*, in *Amur v. France*[2].

However, such an undeniable right encounters limits set by the obligations assumed by the States under International law and European law. In this regard, the main limitation to the prerogatives of the States come from the principle of *non-refoulement*, as enshrined

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[1] European Commission, Communication from the Commission, *on a New Pact on Migration and Asylum*, of 23 September 2020, COM(2020) 609 final.

[2] European Court of Human Rights, judgment of 25 June 1996, application no. 19776/92, *Amur v. France*, and, among the recent judgments, 5 March 2020, application no. 3599/18, *M.N. and Others v. Belgium.* See also judgment of 7 April 2009, application no. 1860/07, *Cherif and Others v. Italy*; judgment of 29 January 2008, application no. 13229/03, *Saadi v. the United Kingdom*; judgment of 21 October 1997, application no. 25404/94, *Boujlifa v. France*; judgment of 28 May 1986, applications nn. 9214/80, 9473/81, 9474/81, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*. The Court has also underlined the lack, in the European Convention, of any right of entry or residence in the territory of a State of which an individual does not enjoy the status of citizen. Cfr., *ex pluribus*, judgment of 4 December 2012, application no. 31956/05, *Hamidovic v. Italy*; judgment of 23 febbraio 2012, application no. 27765/09, *Hirsi Jamaa and Others v. Italy*. The European Court has also stated on the absence of any right to political asylum, see judgment of 17 December 1996, application no. 25964/94, *Ahmed v. Austria*; judgment of 30 October 1991, applications nos. 13163/87, 13164/87, 13165/87, 13447/87 e 13448/87, *Vilvarajah and Others v. the United Kingdom*. On the issues raised by this state-centric model and by the "sedentary bias", see M.B. DEMBOUR, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford, 2015.

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in the 1951 Refugee Convention (Geneva Convention), that guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm[3].

This principle is also traditionally considered as a corollary of art. 3 of the European Convention on Human Rights (ECHR). As one of the fundamental values of democratic societies, the prohibition of inhuman or degrading treatment presents an absolute character, since it cannot be subject to derogation[4].

Finally, art. 4 of the Charter of Fundamental Rights of the European Union corresponds to art. 3 guaranteed by the ECHR: this entails that the meaning and the scope of art. 4 shall be the same as those laid down by the said Convention as interpreted by the Court of Strasbourg[5].

Both the Charter of Fundamental Rights of the European Union and the ECHR represent a "platform" of principles and rights common to the EU Member States, which the development of the European Common Immigration and Asylum Policies – governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, among the Member States (art. 80 of the Treaty on the Functioning of the European Union, TFEU) – required to comply with. They are, in fact, parameters of legality of the secondary EU legislation, guiding not only the granting of international protection, but also the returns of third-country nationals who do not have the right to stay. Significantly, the EU returns Directive[6] pivots on common standards to return third-country nationals in a human manner and with full respect for their fundamental rights and dignity.

2. The Judicial Activism of the European Courts and the Human Rights-Based Approach

How effectively is State sovereignty limited by EU immigration and asylum policies grounded on the protection of fundamental rights of migrants and asylum-seekers?

In order to bring out these issues, a few of judgments of both the ECJ and the ECtHR are to be taken into consideration, as emblematic of their judicial activism leading to the enhancement of fundamental rights in the migration and asylum areas.

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[3] Considered as expression of a customary rule having a non-derogable nature. See J. ALLAIN, *The Jus Cogens Nature of Non-Refoulement*, in *International Journal of Refugee Law*, 2001, p. 533; N. COLEMAN, *Renewes Review of the Status of the Principle of* Non-Refoulement *as Customary International Law*, in *European Journal of Migration and Law*, 2003, p. 23; G.S. GOODWIN-GILL, J. MCADAM, *The Refugee in International Law*, Oxford, 2007, p. 201; K. HAILBRONNER, *Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, in *Virginia Journal of International Law*, 1986, p. 866; E. LAUTERPACHT, D. BETHLEHEM, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in E. FELLER, V. TÜRK, F. NICHOLSON (eds.), *Refugee Protection in International Law*, Cambridge, 2009, p. 87 and p. 487; R.M.M. WALLACE, *The Principle of* Non-Refoulement *in International Refugee Law*, in V. CHETAIL, C. BAULOZ (eds.), *Research Handbook on International Law and Migration*, Cheltenham, 2014, p. 417.

[4] Art. 15 of the ECHR clarifies that the rights enshrined in art. 3, as well as in art. 2 (right to life), are absolute and cannot be derogated from even in time of emergency.

[5] By effect of the "correspondence clause" contained in the art. 52.3 of the Charter of Fundamental Rights of the European Union.

[6] Directive 2008/115/EC of the European Parliament and of the Council, *on common standards and procedures in Member States for returning illegally staying third-country nationals*, of 16 December 2008, in OJ L 348/188, of 24 December 2008, p. 98-107 (Return Directive). As regards the effective compatibility of the Return Directive with human rights, see *infra*, especially paragraph 4 in this essay. *Amplius*, see I. MAJCHER, *The European Union Returns Directive and its Compatibility with International Human Rights Law*, Leiden, 2019.

Indeed, whereas the ECtHR has stated on the States "*undeniable sovereign right*" to control the entry, residence and expulsion of aliens, it has been the protagonist of a broader process aimed at reconciling this right with the protection offered to migrants and asylum-seekers by virtue of a plurality of International and European sources[7].

Namely, the ECtHR has remarkably contributed to the protection of fundamental rights of the third-country nationals by widening the scope of the principle of *non-refoulement*, especially in the cases of interception on the high seas that involved Italy.

Although aware of the difficulties related to the phenomenon of migration by sea, involving for States additional complications in controlling the borders in southern Europe, the ECtHR has stressed the absolute character of the rights secured by art. 3 of the European Convention.

For instance, this principle has been stated in the case *Hirsi*[8], where the Court of Strasbourg has also emphasized the European Convention as a "*living instrument*"[9], in order to specify the scope of application and the ambit of art. 4 of Protocol No. 4 (which enshrines the prohibition of collective expulsions of aliens), as a notion outside the territorial scope.

In this case, involving the removal of aliens to a third State carried out outside the national territory taking the form of collective expulsion, according to the ECtHR, Italy has exercised its jurisdiction outside its national territory.

Even through the lens of the jurisprudence of the Court of Luxembourg the impact of EU law and human rights on States sovereignty can be appreciated. In this regard, we just limit to consider the criminal legislation in the area of illegal immigration and illegal stays: although this is a matter for which the Member States are responsible, this branch of the law may nevertheless be affected "indirectly" by EU Law, as stated by the Court of Justice of the EU.

The *El-Dridi* case is emblematic[10]. According to Italian law, criminal penalties were imposed during administrative procedures concerning the return of foreign nationals to

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[7] On this issues, see V. CHETAIL, *Migration, Droits de l'Homme et Souverainneté: le Droit International dans tout ses états*, in ID. (cur.), *Mondialisation, migration et droits de l'homme: le droit international en question*, Brussels, 2007, p. 13; B. NASCIMBENE, *Le migrazioni tra sovranità dello Stato e tutela dei diritti della persona*, in M. CARTA (a cura di), *Immigrazione, frontiere esterne e diritti umani: profili internazionali, europei e interni*, Roma, 2009, p. 29; R. PISILLO MAZZESCHI, *The Relationship Between Human Rights and the Rights of Aliens and Immigrants*, in U. FASTERNATH, R. GEIGER, D.E. KHAN, A. PAULUS, S. VON SCHORLEMER, C. VEDDER (eds.), *From Bilateralism to Community Interest. Essay in Honour of Judge Bruno Simma*, Oxford, 2011, p. 552; I. ATAK, *L'Européanisation de la lute contre la migration irrégulière et les droits humains*, Bruxelles, 2011.

[8] See R. PALLADINO, *La tutela dei migranti irregolari e dei richiedenti protezione internazionale (artt. 3, 5, 8 e 13 CEDU; art. 4, Protocollo 4)*, in A. DI STASI (a cura di), *CEDU e ordinamento italiano. La giurisprudenza della Corte europea dei diritti dell'uomo e l'impatto nell'ordinamento interno*, Padova, 2016, p. 168, especially para. 2.3.

[9] It entails that the European Convention is to be interpreted and applied in a manner which renders the guarantees practical and effective and not theoretical and illusory.

[10] Court of Justice of the European Union, judgment of 28 April 2011, case C-61/11 PPU, *Hassen El Dridi*, ECLI:EU:C:2011:268. See, A. DI PASCALE, B. NASCIMBENE, *La sentencia del Tribunal de Justicia El Dridi y la inmigración irregular. Problemas y perspectivas en el derecho de la Unión Europea en el derecho italiano*, in *Revista española de Derecho* Europeo, 2012, p. 107; O. ANDREINI, *Quand la CJUE s'immisce dans le droit pénal des étrangers*, in *L'Europe des libertés: revue d'actualité juridique*, 2011, p. 28; M. AUBERT, E. BROUSSY, F. DONNAT, *Chronique de jurisprudence de la CJUE. Directive Retour et peine d'emprisonnement*, in *L'actualité juridique: droit administrative*, 2011, p. 1617; P. DE PASQUALE, *L'espulsione degli immigrati irregolari nell'Unione europea: a valle di El Dridi*, in *Il Diritto dell'Unione europea*, 2011, p. 927; L. LEBOEUF, *La directive retour et la privation de liberté des étrangers. Le rappel à l'ordre de la Cour de justice dans l'arrêt El Dridi*, in *Revue du droit des étrangers*, 2011, p. 181; K. PARROT, *Un étranger ne commet pas un délit du seul fait qu'il se trouve en situation irrégulière*, in *Revue*

their countries of origin. By applying the principle of the *effet utile*, the Court of Justice of the EU has stated that, although Directive 2008/115/EC only sets common standards and procedures in Member States for returning illegally staying third-country nationals non precluding the Member States from having competence in criminal matters, "they must adjust their legislation in that area in order to ensure compliance with European Union law".

It follows that Directive 2008/115/EC (in particular arts. 15 and 16 thereof) must be interpreted as precluding a Member State's legislation which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.

This principle even arises by considering detention as the most serious constraining measure allowed under the European Directive[11], strictly regulated, pursuant to arts. 15 and 16 of Directive 2008/115/EC, in order to ensure observance of the fundamental rights of the third-country nationals concerned.

3. A Descending Parable? Sovereignty Rationale Permeating the European Courts

The analysed judgments are meaningful examples of the judicial activism of both the Court of Luxembourg and the Court of Strasbourg, which however has been marking a descending parable.

In the case of *X.X. v. Belgium*[12], the EU Court of Justice has not followed an interpretation of the Visa Code[13] in accordance with fundamental rights, as guaranteed by EU law and other international obligations which EU law refers to.

In the visas sector, despite the Opinion of Advocate General Mengozzi[14], the Court of Justice of the EU has not recognized that a Member State, to which application for visa with limited territorial validity was made, is required to issue the visa applied for, where a risk of infringement of art. 4 or art. 18[15] of the Charter of fundamental rights of the EU or another international obligation by which it is bound is established.

The issue regarded applicants submitted applications for visas on humanitarian grounds, based on art. 25 of the Visa Code, at the Belgian embassy in Lebanon, with a view to applying for asylum in Belgium immediately upon their arrival in that Member State and, thereafter, to being granted a residence permit with a period of validity not limited to 90 days.

The core issue assessed by the Court of Justice regards the qualification of such a kind of request. According to the Court of Luxembourg, since the applicants submitted (at the Belgian embassy in Lebanon) for a visa for international protection that should have been qualified as a long-term visa, instead of a short-term visa, the issue falls outside

critique de droit international privé, 2011, p. 824; R. RAFFAELI, *Criminalizing Irregular Immigration and the Returns Directive: An Analysis of the El Dridi Case*, in *European Journal of Migration and Law*, 2011, p. 467.

[11] In proclaiming the "right to liberty", paragraph 1 of art. 5 contemplates the physical liberty of the person. It corresponds to art. 6 of the Charter of Fundamental Rights of the EU.

[12] Court of Justice of the European Union, judgment of 7 March 2017, case C-638/16 PPU, *X and X v. État belge*.

[13] Regulation (EU) 810/2009 of the European Parliament and of the Council, *establishing a Community Code on Visas (Visa Code)*, of 13 July 2009, in OJ L 243/1 of 15 September 2009, p. 1-58.

[14] Delivered on 7 February 2017.

[15] That explicitly guarantees the right to asylum.

EU law, and consequently the Charter of Fundamental rights (especially, arts. 4 and 18 thereof) does not apply.

More recently, the Court of Strasbourg has faced a similar complaint, concerning the risk of torture or inhuman treatment (incompatible with art. 3 ECHR) in case of refusal to issue a humanitarian visa[16].

Despite its previous broader interpretation on the extension of State's jurisdiction outside its territorial limits, the Court of Strasbourg has delivered a restrictive interpretation of such notion. By stressing the absence of any connecting link between the applicants (which have never been within Belgium's national territory and which do not claim to have any pre-existing family ties or private life with that country) and the Belgian State not exercising *de facto* control, the Court has excluded the case to fall within the State jurisdiction[17].

The descending parable, in common to both Courts, as characterized by mitigation of their human rights-based approach, is outlined by preservation of States prerogatives to control the entry, residence and expulsion of aliens.

This fits in a wider recent trend especially by the Court of Strasbourg case law, featured by mitigation of its human rights-based approach, in favour of State sovereignty rationale. As a matter of fact, the ECtHR has stressed the importance of managing and protecting borders and of the role played in that regard, for those States concerned, by the Schengen Borders Code, as well as it has underlined the challenges facing European States in terms of immigration control as a result of the economic crisis and recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East. Moreover, the ECtHR has not established the Convention violation, emphasizing the infringement of rules by aliens, as in its previous judgment in case *N.D. and N.T.*[18], considering that the lack of individual removal decisions can be attributed to the fact that the applicants did not make use of the official entry procedures existing for that purpose, and it was thus a consequence of their own conduct. Accordingly, the Court stated there has been no violation of art. 4 of Protocol No. 4.

In the Court's reasoning, in essence, the conduct maintained by migrants takes on particular importance, as emerges also in the judgment *Ilias and Ahmed v. Hungary*[19], concerning the deprivation of asylum-seekers' liberty in the Röszke transit zone. According to the Grand Chamber, deprivation of the liberty within the meaning of art. 5 ECHR is not configured at all. Among the arguments, the security rationale is particularly prominent, according to which the "*conditions of a mass influx of asylum-seekers and migrants at the border, which necessitated rapidly putting in place measures to deal with what was clearly a crisis situation*" (para. 228)[20], as well as the consideration that the

[16] European Court of Human Rights, judgment of 5 May 2020, application no. 3599/18, *M.N. and Others v. Belgium*.

[17] A. LIGUORI, *Two Courts but a Similar Outcome – No Humanitarian Visas*, in G. CATALDI, A. DEL GUERCIO, A. LIGUORI (eds.), *Migration and Asylum Policies Systems Challenges and Perspectives*, Napoli, 2020, p. 159.

[18] European Court of Human Rights, judgment of 13 February 2020, applications nos. 8675/15 and 8697/15, *N.D. and N.T v. Spain.* See A. FAZZINI, *The Protection of Migrants against Collective Expulsions between Restriction and Uncertainty: reading the ECtHR's* ND and NT v. Spain *Judgment*, in G. CATALDI, A. DEL GUERCIO, A. LIGUORI (eds.), *op. cit.*, p. 271.

[19] European Court of Human Rights, judgment of 21 November 2019, application no. 47287/15, *Ilias and Ahmed v. Hungary*. See S. PENASA, *Paese Terzo Sicuro e Restrizione della libertà delle persone richiedenti asilo*, in *Quaderni Costituzionali*, 2020, p. 180; V. STOYANOVA, *The Grand Chamber Judgment in Ilias and Ahmed v Hungary: Immigration Detention and how the Ground beneath our Feet Continues to Erode*, in *Strasbourg Observer*, 23 December 2019.

[20] The recent jurisprudence of the Court matches with the idea according to which the faculty of States to make use of detention instruments is qualified as a "*corollaire indispensable du droit dont jouissent les*

applicants entered the Röszke transit zone "of their own initiative", and they were free to walk to the border and cross into Serbia.

In essence, it looks like to be taking place a process of "relativization" of fundamental rights, consisting in the attenuation of their absolute character under the pressure of the strengthening of State sovereignty. This process is, paradoxically, more evident before the Court of Strasbourg[21] than before the Court of Luxembourg. As a matter of fact, facing a similar complaint[22], the latter Court has defined the deprivation of liberty as "*a coercive measure that deprives that applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter*" (para. 223), highlighting that the placing of the applicants "*in the Röszke transit zone cannot be distinguished from a regime of detention*" (para. 227). Finally, the circumstance that the applicants were free to return to Serbia cannot change this conclusion, in the light of the consequences that this would have entailed in Serbia (the applicants would be exposed to penalties there) and in Hungary (by leaving Hungarian territory they would risk losing any chance of obtaining refugee status)[23].

4. Some Considerations in the Light of the New Pact on Migration and Asylum

In the current stage of development of migration and asylum policies in Europe, it is worth making this kind of assessment also in the light of the "*New Pact of Migration and Asylum*". Presented by the European Commission on 23 September 2020, the New Pact aims at putting in place a predictable and reliable migration management system, implementing fair sharing of responsibility and solidarity. The new system should be based on cooperation between Member States, as well as on a stronger cooperation with non-EU Countries[24].

Although this paper does not aim to address a comprehensive analysis of the New Pact, we should investigate whether it marks a new stage in the management of migration and asylum in Europe, being an expression of the EU identity values, such as solidarity and the respect for the human rights, or whether sovereignty rationale prevails.

Beyond the statement concerning a paradigm shift in the management of migration and asylum at European level, the contrast to irregular migration and to secondary

États de contrôler souverainement l'entrée et le séjour des étrangers sur leur territoire". Cfr. European Court of Human Rights, *Amuur v. France*, cit., para. 73; judgment of 4 April 2017, application no. 39061/11, *Thimothawes v. Belgium*, para. 58.

[21] The following judgment also fits into this trend: European Court of Human Rights, judgment of 2 March 2021, application no. 36037/17, *R.R. and Others v. Hungary*. See P. PINTO DE ALBUQUERQUE, *La tutela (negata) dei migranti e dei rifugiati nella giurisprudenza della Corte dei diritti dell'uomo*, in *Freedom, Security & Justice: European Legal Studies*, no. 2, 2021, pp. 4-8.

[22] Court of Justice of the European Union, judgment of 14 May 2020, joined cases C-924/19 PPU and C-925/19 *FMS, FNZ and SA, SA junior*. See P. DUMAS, *L'arrêt FMZ, FNZ, SA, SA junior: l'harmonisation à la hausse du standard de protection des droits fondamentaux et le renforcement du contrôle juridictionnel en matière d'asile et d'immigration*, in *Revue des affaires européennes*, 2020, p. 499.

[23] The detention regime in the Röszke and Tompa transit zones has been declared contrary to EU law at the end of an infringement procedure. See Court of Justice of the European Union, judgment of 17 December 2020, case C-808/2018, *European Commission v. Hungary*.

[24] *Amplius*, F. MAIANI, *A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact*, in *EU Immigration and Asylum Law and Policy*, 20 October 2020; D. THYM, *European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum*, in *EU Immigration and Asylum Law and Policy*, 28 September 2020; S. PEERS, *First analysis of the EU's new asylum proposals*, in *EU Law Analysis*, 25 September 2020; S. CARRERA, *Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum*, in *CEPS Policy Insights*, September 2020.

movements remains at the core of the New Pact, in spite of the regulation of legal migration and of legal access channels in the territory of the EU member States.

The entire package of reforms is led by a transversal purpose, namely a more efficient management of irregular immigration. As a specific measure, it is planned to restart from the recast of the Return Directive, as proposed by the Commission in 2018[25], that show the strengthening of State sovereignty rationale. *In primis*, the definition of the risk of absconding (art. 6), concretely declined through 14 hypotheses listed, including: "*lack of documentation proving the identity*", "*lack of residence, fixed abode or reliable address*", "*lack of financial resources*", and "*illegal entry into the territory of the Member States*". Thus the listing seems to be in contrast with the system of the Directive in itself, as based on the gradation of the instruments of coercion, resulting in a less extensive application of voluntary departure[26] and in a symmetrical widening of the scope of detention.

Indeed, detention can in particular be ordered when there is a risk of absconding. As a measure affecting seriously the migrants' liberty, this should be a measure of last resort, i.e. only where less invasive alternative measures are not effective. Such a wide range of amendments concerning the risk of absconding seems to be difficult to reconcile with the use of detention as a generalized and widespread measure.

Furthermore, art. 18 of the proposed recast introduces the risk to public policy, public security or national security as a ground for detention. Thus, the scope of detention is extended also through the reference to notions which do not find a unique definition within the Directive. As a matter of fact, it is the State that determine public order and public security in relation to the variable national needs. The wide margin of discretion left to national authorities has also been stressed by the Court of Justice of the EU, considering that non every reference, by the EU legislator, to the notion of "threat to public order" must necessarily be intended as referred exclusively to individual conduct that represents a real, present and sufficiently serious threat to a fundamental interest of the society of the Member State concerned[27].

It is therefore of fundamental importance to contextualize detention as an exceptional compression of personal liberty to conceive the needs of public order and national security in a restrictive sense. To this end, the teaching of the Court of Justice of the EU should be recalled according to which the scope of the requirements of public order and national security "*cannot be determined unilaterally by each Member State withour any control by the institutions of the European Union*"[28].

If the 2018 recast proposal represent the "*starting point*" for the definition of the new rules on returns, it is expected that a re-balancing of the different instances under the European Directive will come up thanks to the European Parliament, as co-legislator. A

[25] European Commission, Proposal for a Directive of the European Parliament and of the Council, *on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)*, of 12 September 2018, COM(2018) 634 final.

[26] Since the Member States shall not grant a period for voluntary departure where there is a risk of absconding determined in accordance with art. 6 (art. 9.4.a)).

[27] With reference to art. 6, para. 1, of the Schengen Borders Code, see Court of Justice of the European Union, judgment of 12 December 2019, case C-380/18, *Staatssecretaris van Justitie en Veiligheid v. E.P.*, para. 31.

[28] Court of Justice of the European Union, judgment of 11 June 2015, case C-554/13, *Z.Zh. v. Staatssecretaris voor Veiligheid en Justitie and Staatssecretaris voor Veiligheid en Justitie v. I.O.*, para. 48.

line of guarantee of the rights of illegal staying third-country nationals has actually emerged by the European Parliament Draft Report of February 2020[29].

Finally, a real re-balancing of the need of effectiveness and those of protection of the rights of migrants would derive from the more complete discipline, at European level, of the detention of migrants – which at the time of the adoption of Directive 2008/115/EC earned it the appellation of "*directive of shame*" – and especially of less coercive alternative measures. A more precise definition of the latter, as well as the introduction of careful scrutiny regarding their prior application, would in fact limit the use of a measure limiting personal freedom enshrined in the EU Charter of Fundamental Rights (art. 6) and subject to compliance with the principles of necessity and proportionality (art. 52, para. 1, of the Charter of Fundamental Rights).

Among the measures to be introduced, a central role is attributed to screening and border procedures. In specifying third-country nationals who the screening procedure applies (those apprehended in connection with an unauthorised crossing of the external border of a Member State, and those disembarked in the territory of a Member State following a search and rescue operation) the proposed screening Regulation[30] expressly encompasses those persons "*regardless of whether they have applied for international protection*", considering that the screening shall also apply to all third-country nationals who submit for international protection at external border crossing points or in transit zones and who do not fulfil the entry conditions (art. 3). Under this new regime, even those who are asylum-seekers are not authorised to enter the territory of a Member State, during the screening which shall be conducted at locations situated at or in proximity to the external borders[31]. These screening activities imply that asylum-seekers are generally detained[32] in principle for a maximum period of five days, that may be extended by a maximum of an additional 5 days, in case of need to carry out screening on a "*disproportionate number of third-country nationals*"[33].

Following the screening, third-country nationals are routed to the appropriate procedure, be it a normal asylum procedure – that applies mainly to people coming from countries for which the rate of positive asylum decisions is higher than 20%, according to the last available yearly EU-wide average Eurostat data – or a border procedure for certain categories of applicants. The latter procedure entails serious detritment of the rights of migrants and asylum-seekers, in terms of restriction to their mobility and

[29] European Parliament, Draft Report on the Proposal for a Directive of the European Parliament and of the Council, *on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)*, of 21 February 2020.

[30] Proposal for a Regulation of the European Parliament and of the Council, *introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817*, of 23 September 2020, COM(2020) 612 final.

[31] See I. MAJCHER, *Creeping Crimmigration in CEAS Reform: Detention of Asylum-Seekers and Restrictions of Their Movement under EU Law*, in *Refugee Survey Quarterly*, 2021, no. 40, pp. 82-105; L. MARIN, *The 2020 Proposals for Pre-Entry Screening and Amended Border Procedures: A System of Revolving Doors to Enter (and Leave) Europe?*, in *ADiM Blog, Analyses & Opinions*, November 2020.

[32] In contrast to art. 8 (*Detention*) of the Reception Directive 2013/33/EU ("*Member States shall not hold a person in detention for the sole reason that he or she is an applicant*").

[33] The Commission remarks in the explanatory memorandum to the new Proposal for a Screening Regulation that "the legal effects concerning the Reception Conditions Directive should apply only after the screening has ended". This also seems to follow from art. 9(2) and (3) of the Proposal for a Screening Regulation that oblige Member States to identify special reception needs and provide adequate support.

increasing use of detention[34], of restrictions on legal remedies[35], no protection from the safeguards of the Return Directive[36]. As it generalizes the border procedure and the migrants' detention, the triggering of the "*state of crisis*", under the proposed Regulation addressing situations of crisis and force majeure[37], entails even more serious restrictions on the fundamental rights of asylum seekers, whereas – according to the explanatory memorandum to the Asylum Procedure Regulation – the purpose of the border procedure is to quickly assess "*abusive asylum requests*" by applicants coming from third countries with a low recognition rate in order to "*swiftly return those without a right to stay in the Union*"[38].

In essence, the wide scope of the border procedure, as laid down in the proposed Regulation establishing a common procedure for international protection in the Union, repealing Directive 2013/32/EU, will normally entails the use of detention throughout the procedure. As well as the accelerated examination procedure will almost become the rule because it might be applied in practice in so many cases (e.g. in case the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity or nationality), with consequent risks from the point of view of the protection of fundamental rights because there is no in-depth examination of the applications and procedural guarantees are undermined.

To these elements is associated the partial reform in order to the "solidarity mechanisms": as laid down in arts. 45-56 of the proposed Asylum and Migration Management Regulation[39], they will not be provided on a mandatory basis, and they do not concern reception profiles but returns profiles, with the provision of the "*sponsored returns*"[40]. In essence the reform is based on a principle of "flexible solidarity" as clear expression of intergovernmentalism[41], confirming that the entire Pact's notion of

[34] According to art. 41(13) of the proposed Asylum Procedure Regulation (Proposal for a Regulation of the European Parliament and of the Council, *establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, of 13 July 2016, COM(2016) 467 final) all applicants will be kept at or in proximity to the external border or transit zones.

[35] Pursuant to art.53(9) of the proposed Asylum Procedure Regulation, applicants will be provided with only one level of appeal.

[36] Art.41a (7) of the proposed Asylum Procedure Regulation.

[37] European Commission, Proposal for a Regulation of the European Parliament and of the Council, *addressing situations of crisis and force majeure in the field of migration and asylum*, of 23 September 2020, COM(2020)613 final.

[38] The European Committee of the Regions has highlighted that asylum-seekers would not remain in transit zones (as the situation in the transit zone is a situation of deprivation of liberty) for an "unreasonably long" timeframe of 20 weeks. It reminds the judgment on the Hungarian transit zone of 14 May 2020, where the Court of Justice of the European Union (CJEU) stated that the "*specific procedures [at the border] must be carried out within a reasonable time*" and states that already after four weeks, entry to the regular procedure must be granted. See European Committee of the Regions, 143rd plenary session, Opinion *New Pact on Migration and Asylum*, 17-19 March 2021.

[39] European Commission, Proposal for a Regulation of the European Parliament and of the Council, *on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]*, of 23 September 2020, COM(2020) 610 final.

[40] Under return sponsorship, a Member State commits to returning irregular migrants with no right to stay on behalf of another Member State, doing this directly from the territory of the beneficiary Member State.

[41] S. CARRERA, *op. cit.*, at. p. 9. *Amplius*, on the New Pact on Migration and Asylum and the solidarity mechanisms provided for therein, see M.C. CARTA, *Il "nuovo" Patto europeo sulla migrazione e l'asilo: recenti sviluppi in materia di solidarietà ed integrazione*, in *Freedom, Security & Justice: European Legal Studies*, no. 2, 2021, pp. 9-42, and T. RUSSO, *Quote di ricollocazione e meccanismi di solidarietà: le soluzioni troppo "flessibili" del Patto dell'Unione europea su migrazione e asilo*, ivi, pp. 281-304.

solidarity pays no attention to solidarity towards individuals, including undocumented migrants and applicants for and beneficiaries of international protection[42].

ABSTRACT

At the core of migration and asylum management at the European level, a double rationale unfolds between State sovereignty and respect for the human rights of migrants and asylum-seekers. This paper aims to assess the balance between such a twofold approach, in light of the recent jurisprudence both of the Court of Justice of the European Union and the European Court of Human Rights, especially regarding the management of migration in the transit zones, as well as in the perspective of the New Pact on Migration and Asylum launched by the European Commission on 23 September 2020.

KEYWORDS

Court of Justice of the EU, Europe, European Commission New Pact, European Court of Human Rights, Human Rights, Migration Management, State Sovereignty.

[42] G. MORGESE, *La "nuova" solidarietà europea in materia di asilo e immigrazione: molto rumore per poco?*, in *Federalismi.it*, 2020, no. 35, pp. 16-47; F. MAIANI, *A "Fresh Start" or One More Clunker?*, *op.cit.*