Freedom, Security & Justice: European Legal Studies

Rivista quadrimestrale on line
sullo Spazio europeo di libertà, sicurezza e giustizia

2017, n. 1

EDITORIALE SCIENTIFICA
ES

EDITORIALE SCIENTIFICA

Rivista giuridica on line "Freedom, Security & Justice: European Legal Studies"
www.fsjeurostudies.eu
Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017

Indice-Sommario

2017, n. 1

FORCED MIGRATION MANAGEMENT AND THE RIGHT TO ACCESS TO AN ASYLUM PROCEDURE IN THE AREA OF FREEDOM, SECURITY AND JUSTICE: HUMAN RIGHTS BETWEEN RESPONSIBILITY AND SOLIDARITY

Sílvia Morgades-Gil*

SUMMARY: 1. Introduction. – 2. The confusion between border-control management and the fulfilment of the State duties according to the International legal regime on refugee and asylum: The *Dublin system*. – 3. The implicit delegation of migration management tasks to private actors: The provisions on carrier sanctions as a tool for curtailing illegal arrivals of migrants. – 4. The extraterritorial exercise of sovereign jurisdictional powers in the fight against illegal immigration *vis-à-vis* human rights. – 5. Final reflections.

1. Introduction

Since the Amsterdam Treaty came into force[1], which established the objective of a European Area of Freedom, Security and Justice, the management of forced migration[2] combines instruments of the Common European Asylum System (CEAS) and the common European immigration and borders policy in a delicate balance between security and human rights. Although the CEAS is theoretically based on respecting the 1951 Geneva Convention on the status of refugees, the European Convention of Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union

Blind peer reviewed article.

* Lecturer in Public International Law and International Relations, Department of Law, Pompeu Fabra University (Ramon Trias Fargas, 25-27, 08005 Barcelona). Member of the Research Group on Public International Law and International Relations <www.upf.edu/orbis> and the Interdisciplinary Research Group on Immigration (GRITIM-UPF) < www.upf.edu/gritim>. E-mail: silvia.morgades@upf.edu

[1] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, in OJ C 340, 10 November 1997.

[2] "Forced migration" refers to a kind of migration "in which an element of coercion predominates", and "can be conflict-induced, caused by persecution, torture or other human rights violations, poverty, natural or man-made disasters", according to A. MEYER (ed.), *People on the Move. Handbook of selected terms and concepts. Version 1.0*, UNESCO, 2008, p. 45. Refugees and asylum seekers are forced migrants who fear persecution or serious violations of human rights and are outside their country of origin.

(CFREU)[3], in practice, when combined with the policies on immigration and border control, the rights of asylum seekers to accede to a procedure able to determine their legal status as refugees or beneficiaries of protection in a safe country may be hindered. The right to be protected against *refoulement*[4], or violations of human rights (for instance, the right not to be subjected to torture or inhuman treatment; the right to respect for private and family life; and the right to benefit from effective remedies) in this sense, may be curtailed by public agents or private actors that apply these policies. In the current second phase of the CEAS two norms regulate access to a procedure in order to determine the merits of a claim of international protection[5]: the *Dublin III* Regulation 604/2013/EU on procedures and criteria for determining the Member State responsible for examining an application for international protection lodged in one of the Member States, and the Directive 2013/32/EU on common procedures for granting and withdrawing international protection. These legal instruments show an advance in terms of human rights protection, particularly for the protection of vulnerable people, but they are still based on the same principles and the overall system still lacks an effective mechanism of solidarity able to provide fairness both for States and individuals.

The aim of this paper is to analyse, first, the main foundations and principles governing the *Dublin system* for the allocation of the responsibility for examining each

[3] *Convention Relating to the Status of Refugees*, 189 UNTS 150, 28 July 1951, (entry into force: 22 April 1954); *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Council of Europe Treaty Series Nº 5 (entry into force: 3 September 1953); *Charter of Fundamental Rights of the European Union* (2016/C 202/02), in OJ C 202, 7 June 2016 (entry into force: 1 December 2009).

[4] The principle of *non-refoulement* is included in the International refugee regime, in article 33 of the 1951 Geneva Convention. It also forms part, explicitly or implicitly, of the main international instruments protecting human rights: the 1966 International Covenant on Civil and Political Rights; the 1984 UN Convention against torture; and the 1950 European Convention on Human Rights. See on this principle, G. S. GOODWIN-GILL, *International Law and the Influx of Aliens: Sanctuary and the Right to Exclude*, in *ASIL Proceedings of the 80th Annual Meeting*, 1986, vol. 80, pp. 95-120; ID., *The Principle of* Non-Refoulement*: Its Standing and Scope in International Law*, Geneva, 1993; H. LAMBERT, *Protection against* refoulement *from Europe: Human Rights law comes to the rescue*, in *International & Comparative Law Quarterly*, 1999, n. 3, pp. 513-544; 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. UNHCR's Global Consultations on International Protection*, Cambridge, 2003, pp. 87-177; R.L. NEWMARK, Non-Refoulement *Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, in *Washington University Law Quarterly*, 1993, n. 71, pp. 833-865.

[5] The first phase of the CEAS took place during the first five years following the coming into force of the Treaty of Amsterdam (1999-2005), in accordance with the Tampere Programme, and consisted of the adoption of legal instruments on different issues on asylum: the determination of the Member State responsible for examining an application for asylum lodged in the territory of one of the Member States participating in the system (*Dublin* system, Regulation (EC) 343/2003, in OJ L 50, 25 February 2003); the harmonisation of the standards for the qualification of third-country nationals as beneficiaries of international protection (Directive 2004/83/EC, in OJ L 304, 30 September 2004); the harmonisation of the rules concerning the procedures applicable to applications for international protection (Directive 2005/85/EC, in OJ L 326, 13 December 2005); the harmonisation of the rules concerning the reception of asylum seekers (Directive 2003/9/EC, in OJ L 31, 6 February 2003); and on minimum standards for giving temporary protection in the event of a mass influx of displaced persons (Directive 2001/55/EC, in OJ L 2012, 7 August 2001).

asylum application lodged in the common European area of freedom of movement. The aim of the first part is to assess whether the system effectively allows the exercise of the right to accede to a procedure of international protection. Second, the paper will examine the consequences that the delegation of migration management tasks and normative powers to non-State actors has for asylum seekers and for the asylum regimes of States. The paper will focus on carrier sanctions as one of this set of measures that are used in the management of migration. Finally, in the third part, the exercise of extraterritorial jurisdiction by the EU Member States in the fulfilment of their aims of controlling borders and fighting against illegal immigration will be discussed. On this topic, the application of international jurisdictional supervision of the extraterritorial activities of the States carrying out border controls or migration management tasks will be analysed. Some final reflections will propose elements which set out a more equitable balance between responsibility and solidarity in the fulfilment of the right of refugees to accede to a procedure on international protection based on the International refugee and asylum regime.

This article aims to analyse the extent to which political and legal instruments aimed at managing migrations in general and at avoiding the arrival and the presence of illegal migrants in the EU territory indirectly affect the rights of refugees and asylum seekers. Within this framework we witness the clash of two perspectives: the first one is based on the idea that States have a *quasi* absolute sovereign power to control their borders and to prevent the arrival of illegal migrants into their territory; the second one considers the human rights of refugees and other forced migrants and posits that they have a right to flee from their country of origin and are entitled to ask for protection from the authorities of a safe foreign country. Many authors have already dealt with the legality and the adequacy of instruments used by States in order to fight against illegal migration from the perspective of human rights. The main contribution of this article is to examine the extent to which policies and legal instruments aimed at keeping illegal migrants under control can undermine respect for the rights of forced migrants from the perspective of refugee rights.

2. The confusion between border-control management and the fulfilment of the State duties according to the International legal regime on refugee and asylum: The *Dublin system*

The Dublin Convention on determining the State responsible for examining applications for asylum lodged in the Member States of the European Communities of 15 June 1990 was the first instrument which the Member States of the European Union (EU) enacted with regard to asylum[6]. With the Treaty of Amsterdam, the free

[6] *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities* (97/C 5254/01), in OJ C 254, 19 August 1997, pp. 1-12.

movement of persons fell within the objective of the Area of Freedom, Security and Justice. The conferral of competence to the European Community to adopt measures for an emerging European asylum policy resulted in the replacement of the Convention by a Community Regulation[7]. The new regulation *Dublin II* was based on the same principles and objectives as the Convention, although some improvements were introduced. With the second phase of the CEAS, a new regulation, the so-called *Dublin III*, was approved[8]. The Dublin system consists of this regulation and other legal instruments intended to ensure its correct functioning[9].

The main objective of the Dublin system is to identify which State should take responsibility for each of the asylum-seekers present in the territory of the participating States and to examine their claims. The system is intended to avoid secondary movements of asylum seekers, which are considered to be distorting in an area without internal borders (enabling the submission of multiple or subsequent asylum claims under the same or different identities in different Member States; the existence of asylum seekers *in orbit*, whom no State admits because a *first country of asylum* or a *safe third country* is considered to be responsible for them; or strategies of *asylum-shopping*). The *Dublin II* Regulation establishes a series of objective and hierarchical criteria, mainly based on the "principle of authorization" in order to designate the Member State responsible for examining an asylum application and to take responsibility for the applicant[10]: the first set of rules seek to preserve the family unit; the second set assigns responsibility to the State that issued a residence permit or visa that allowed the applicant to enter into the Schengen area; and the third set places responsibility with the State through whose external borders the asylum applicant

---

See for instance, C. BRUSCHI, *Le droit d'asile: l'Europe a l'heure des choix*, in *Migrations Societé*, 1990, n. 12, pp. 56-64; P. STEFANINI, F. DOUBLET, *Le droit d'asile en Europe: la Convention relative à la détermination de l'état responsable de l'examen d'une demande d'asile présentée auprès d'un état membre des communautés européennes*, in *Revue du Marché Commun*, 1991, n. 347, pp. 391-399.

[7] Council Regulation (EC) 343/2003, of 18 February 2003, *establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, in OJ L 50, 25 February 2003, pp. 1-10.

[8] Regulation 604/2013/EU of the European Parliament and the Council, *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, of 26 June 2013, in OJ L 180, 29 June 2013, pp. 31-59.

[9] Regulation 603/2013/EU of the European Parliament and of the Council, *on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast)*, of 26 June 2013, in OJ L 180, 29 June 2013, pp. 1-30; and Commission implementing Regulation 118/2014/EUof the European Parliament and of the Council *amending Regulation (EC) 1560/2003 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*, of 30 January 2014, in OJ L 39, 8 February 2014, pp. 1-43.

[10] A. HURWITZ, *The Dublin Convention: A Comprehensive Assessment*, in *International Journal of Refugee Law*, 1999, n. 4, p. 648.

entered into the territory of the common area of freedom of movement[11]. The system ends with an article that establishes that "Member States shall normally keep or bring together the applicant" with his or her dependent people or with people in respect of whom he or she is dependent[12]; and with two "discretionary clauses" that enable some flexibility in the application of the criteria[13].

From the point of view of its legitimacy, the Dublin system was seriously questioned for the first time when the European Court of Human Rights (ECtHR) heard the case *M.S.S. versus Greece and Belgium* in January 2011[14]. In this judgment, the ECtHR had to address whether the effective functioning of the system could breach the human rights enshrined in the European Convention in specific cases. The judgment considered that both States infringed M.S.S.'s right not to be submitted to torture or to inhuman treatment enshrined in article 3 of the ECHR: in the case of Greece, due to the conditions of two short periods of detention and for the extreme living conditions suffered by the victim as an asylum-seeker; and in the case of Belgium, for having submitted the applicant to ill-treatment in Greece through his expulsion from Belgium via the application of a *Dublin* decision. The Court considered that both States breached article 13, protecting the right to benefit from an effective remedy against "arguable claims" of violation of the substantive rights of the ECHR. In the case of Greece, the Court examined "whether effective guarantees exist (…) to protect the applicant against arbitrary removal directly or indirectly back to his country of origin"[15] . The Court stressed several failures in the asylum procedures in Greece, such as the lack of access to information[16]; the short time limit (three days) given to the applicant to present his application; the absence of reliable means for the administration to communicate with the applicant; the lack of legal advice available; and the malfunctions of the notification procedure. Finally, the Court considered that the failures in the procedure of asylum and the inaccessibility to recourse in practice did not ensure protection against a *de facto refoulement*[17]. In its examination of the accusation *vis-à-vis* the Belgian procedure, the Court considered that a limitation of the examination "to verifying whether the persons

[11] Articles 7-15 Regulation 603/2013/EU, cit.
[12] Article 16.
[13] Article 17. The "humanitarian clause" enables States to ask other States to take charge of applicants on cultural, family or other humanitarian grounds; and the "sovereignty clause" establishes that all States "may decide to examine an application for international protection lodged with it".
[14] European Court of Human Rights, Grand Chamber, judgment of 21 January 2011, application no 30696/09, *M.S.S. v. Belgium and Greece*. On this judgment, see V. MORENO-LAX, *Dismantling the Dublin System: M.S.S. v. Belgium and Greece*, in *European Journal of Migration and Law*, 2012, n. 14, pp. 1-31; S. MORGADES-GIL, *The discretion of States in the European Dublin III system for determining responsibility for examining applications for asylum: what remains of the sovereignty and humanitarian clauses after the interpretations of the European Court of Human Rights and the Court of Justice of the European Union?*, in *International Journal of Refugee Law*, 2015, n. 3, pp. 433-456.
[15] European Court of Human Rights, Grand Chamber, *M.S.S.*, cit., par. 298.
[16] For the Court, access to information is a crucial element in having effective access to procedures: European Court of Human Rights, Grand Chamber, judgment of 23 February 2012, application no. 27765/09, *Hirsi Jamaa and Others v. Italy*, par. 204; European Court of Human Rights, judgment of 21 October 2014, application no. 16643/12, *Sharifi and others v. Italy and Greece*, par. 169.
[17] European Court of Human Rights, Grand Chamber, *M.S.S.*, cit., parr. 301-321.

concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of article 3" hindered the examination of the merits[18]. In order to limit the scope of the examination, the Court considered that the effectiveness of a remedy "imperatively requires *close scrutiny* by a national authority" of any claims regarding a risk of treatment contrary to article 3[19]. For the Court, the limitations of the scope of the possible grounds that an internal court can examine when a risk of violation of article 3 is claimed undermine the *effectiveness* of a recourse. The right to benefit from an effective remedy against a removal is crucial for refugees and other forced migrants who fear being subjected to persecution or to serious violations of human rights abroad. This judgment showed that EU Member States did not respect the right to an effective remedy in their judicial systems and that they were likely to indirectly breach the *non-refoulement* principle though the removal to a country that did not ensure protection against a second removal to the country of origin or to an unsafe third country.

For its part, the Court of Justice of the European Union (CJEU) considered in December 2011 that the possibility of presenting an appeal against a *Dublin* decision was limited to cases of "systemic flaws" in the procedure and reception asylum systems in the country of destination in the *N.S. and M.E.* case[20]. Following this decision, the Member State where the applicant is present is not obliged in these cases to examine the application itself: the State "must continue to examine the criteria set out (…) in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application"[21]. The State must also ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, that Member State must itself examine the application in accordance with the procedure laid down in article 3(2) of Regulation No 343/2003[22]. This reasoning was strengthened in the judgment *Abdullahi*[23].

[18] *Ibid*. par. 389.
[19] European Court of Human Rights, judgment of 6 June 2013, application no. 2283/12, *Mohammed v. Austria*, par. 72 (emphasis added).
[20] Court of Justice, Grand Chamber, judgment of 21 December 2011, *N. S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, joined cases C-411/10 and C-493/10, par. 86.
[21] *Ibid*., par. 96.
[22] *Ibid*., par. 98.
[23] Court of Justice, Grand Chamber, judgment of 10 December 2013, *Shamso Abdullahi v. Bundesasylamt*, case C-394/12, par. 60: "the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of article 4 of the Charter".

The judgments of the CJEU contained a more restrictive interpretation than the *M.S.S.* judgment of the ECtHR[24]. Nevertheless, the later maintained and reinforced its jurisprudence with the judgment in the *Tarakhel* case. The ECtHR directly addressed the interpretation made by the CJEU and considered that "The source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person's removal"[25]. For the ECtHR, the extreme vulnerability of the applicants (a family with six children) had to be taken into account, in order to assess whether they could be transferred to the Member State responsible for the examination of their application (Italy). In the end, the ECtHR established that only if the Swiss authorities received enough assurances from the Italian government that the *Tarakhel* family would benefit from reception conditions that respect their right to family unity after their arrival, the removal from Switzerland to Italy would not breach article 3 of the ECHR.

The CJEU softened its jurisprudence in two judgments issued on 7 June 2016 in the cases of *Mehrdad Ghezelbash v. Staatssecretaris van Veiligheiden Justitie*[26], and *George Karim v. Migrationsverke*[27]. They do not deal directly with the issue of the illegitimacy of transfers made on the basis of the Dublin system, but with the scope of the right to benefit from an effective remedy against such decisions. In these judgments, the CJEU accepts the thesis that the reforms concerning the right to a remedy in the *Dublin III* Regulation ((EU) 604/2013), interpreted in light of the CFREU, granted the individuals the right to an effective remedy against the decisions of removal even though a pattern of "systemic flaws" in the asylum reception and procedures is absent in the receiving EU State.

On the one hand, the judgments of the ECtHR call into question the quasi-automatic application of the criteria for attributing responsibility for examining an asylum claim; and, on the other hand, imply that the presumption that all EU Member States are safe for asylum seekers is rebuttable. For the EU, the Dublin system should function as a tool for quickly identifying the Member State responsible for examining each asylum application; for the ECtHR, the examination of the risk *vis-à-vis* the right to be free from torture and inhuman and degrading treatment should be made taking into account

[24] Authors have criticised this restricted approach. See, in this sense, S. PEERS, *The Dublin Regulation*, in S. PEERS AND OTHERS (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 3: EU Asylum Law*, Leiden-Boston, 2015, p. 382.

[25] European Court of Human Rights, Grand Chamber, judgment of 4 November 2014, application no. 29217/12, *Tarakhel v. Switzerland*, par. 104. In this case, the extreme vulnerability of the applicants (a couple with six minor children) was crucial in the consideration that their transfer from Switzerland to Italy would breach article 3 if the Swiss authorities did not obtain prior assurances from Italian authorities that the applicants would be received with their particular needs taken into consideration. On this judgment, see S. MORGADES-GIL, *El sistema de Dublín y la garantía del respeto del derecho a no sufrir tratos inhumanos o degradantes: Límites más allá de la pérdida de la confianza mutua. TEDH- sentencia de 4.11.2014 (Gran Sala)*, Tarakhel c. Suiza, *29217/12*, in *Revista de Derecho Comunitario Europeo*, 2015, n. 51, pp. 749-768.

[26] Court of Justice, Grand Chamber, judgment of 7 June 2016, *Mehrdad Ghezelbash v. Staatssecretaris van Veiligheiden Justitie*, case C-63/15.

[27] Court of Justice, Grand Chamber, judgment of 7 June 2016, *George Karim v. Migrationsverket*, case 155/15.

not only "the overall situation with regard to the reception arrangements for asylum seekers" but also "the applicants' specific situation"[28]. That is, an individual assessment should be made on a case-by-case basis.

The system is based on the idea that States have the "duty" to take responsibility for asylum applicants if (leaving aside the criteria related to the right to preserve the family unit or to dependent persons) they have entered into their territory or they have managed to come under their jurisdiction. The underlying basis of the system is that Member States have the "responsibility" to control their external borders on the behalf of all Schengen participants, and that if they do not fulfil this responsibility, they will have to take responsibility for foreigners having entered illegally, even if they are asylum seekers. The European policy on asylum reveals the idea that international protection is subordinated to the management of migratory influxes[29]. This hardly permits the fulfilment of the statements of the Preamble of the Dublin Regulation, which states that it should be made possible to "guarantee effective access to the procedures for granting international protection" (paragraph 5) and that the criteria on which the system is based are "fair (…) both for the Member States and for the persons concerned" (paragraph 5). The system is based on the idea that States are "responsible" for not doing enough to avoid arrivals of migrants through illegal channels. This "responsibility" for not effectively controlling the access of migrants to the European area of freedom of movement through the external borders is the main criteria for allocating the "duty" to take responsibility for asylum seekers who have illegally entered the EU and to examine its application. Nevertheless, this disregards the obligations of States under International Law to respect the principles of *non-refoulement* and basic human rights when individuals come under their jurisdiction. From the perspective of rights, this system also disregards the fundamental right to flee from persecution and situations of serious or widespread violations of human rights. The main criteria of the Dublin system lead to unfair situations for both States and individuals, even though the Preamble of the Regulation establishes that its intention was otherwise[30]. The main responsibility of States of first arrival has not been compensated by efficient systems of burden-sharing either at the EU level or at the universal international level[31].

As burden-sharing is connected with the implementation of solidarity, it is possible to argue that article 80 of the Treaty on the Functioning of the EU should be used in this field. It establishes that: "The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of

[28] European Court of Human Rights, Grand Chamber, *Tarakhel*, par. 105.
[29] M.-L. BASILIEN-GAINCHE, *La norme et l'exception. L'effectivité en péril du droit d'asile en Europe*, in *Annuaire de Droit de l'Union Européenne*, 2013, p. 4.
[30] In this sense the Dublin System "creates winners and losers": F. MAIANI, *The Dublin III Regulation: A New Legal Framework for a More Humane System?*, in V. CHETAIL, P. DE BRUYCKER; F. MAIANI (eds.), *Reforming the Common European Asylum System. The New European Refugee Law*, Leiden-Boston, 2016, p. 110.
[31] J. HATHAWAY, *A Global Solution to a Global Refugee Crisis*, in *European Papers*, 2016, n. 1, p. 96.

responsibility, including its financial implications, between the Member States"[32]. Until now, leaving aside the additional financial support given to the most affected States by the larger influx of asylum seekers arriving in the EU since 2015, the main tool for managing the solidarity among States has been the strategy of relocation. Two decisions of the EU Council taken in September 2015 establish the commitment of States to admit a total number of 160,000 asylum seekers in their territory coming from Greece, Italy and Hungary, in order to alleviate the pressure that these countries suffer in their asylum and social and welfare systems[33]. By 8 November 2016, only 6.925 people had been relocated since the launch of the scheme[34]. At the EU level, the tension between responsibility and solidarity in this area of the Common European Asylum System have not so far been successfully resolved by compensating the Dublin system with working tools providing for some solidarity. As pointed out by Madeleine Garlick "solidarity must be coupled with responsibility" instead of only being activated when the Dublin system and the integrated external-border controls approach fail[35]. From the EU point of view the resettlement strategy should work in medium or long term, and a prospective revision of the Dublin Regulation would seek to enhance these tools[36].

The relocation strategy should alleviate the situation of stress which is prevalent in the asylum systems of a number of States and assure the well-being of the asylum seekers present in these countries. Nevertheless, the ineffectiveness of the relocation strategy, combined with the application of the main criteria of the Dublin system for allocating responsibility to one Member State, reveals that States continue to deal with asylum with a logic based on border controls and sovereign responsibility. The human rights of forced migrants are thus relegated into the background and the management of large influxes of migrants to the EU disregards the universality of these rights. The judgments of the ECtHR indicate the limits of EU policy concerning the management of forced migration. Nevertheless, it has not managed to counterbalance the orientation of the management of migration based on a State-centred idea of territorial jurisdiction and sovereignty.

[32] In OJ C 202/78, 7 June 2016.

[33] Council Decision 2015/1523/EU, *establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, of 14 September 2015, in OJ L 239, 15 September 2016, pp. 146-156; Council Decision 2015/1601/EU, *establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, of 22 September 2015, in OJ L 248, 24 September 2016, pp. 80-94.

[34] Communication from the Commission to the European Parliament, the European Council and the Council, *Seventh report on relocation and resettlement*, of 7 November 2016, COM(2016) 720 final.

[35] M. GARLICK, *The Dublin System, Solidarity and Individual Rights*, in V. CHETAIL; P. DE BRUYCKER; F. MAIANI (eds.), *op. cit.*, p. 185.

[36] Proposal for a Regulation of the European Parliament and of the Council, *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, of 4 May 2016, COM(2016) 270 final 2016/0133 (COD).

3. The implicit delegation of migration management tasks to private actors: The provisions on carrier sanctions as a tool for curtailing illegal arrivals of migrants

One of the first tools that European States implemented in order to try to avoid illegal entries of third country nationals into their territory was the provision of carrier sanctions in their legislations. Carrier sanctions consist of administrative fines imposed on carriers for transporting persons without the required documentation for being admitted to the territory of one concrete State. Carriers are also charged with the duty to remove migrants who have been refused entry and to bear all expenses incurred by reason of the "illegal" presence of these migrants[37].

For the main part of the EU countries, the adoption of internal legislations laying down carrier sanctions in the case that they brought undocumented migrants took place in the Schengen *acquis* framework, even though these kinds of measures were not new, since they had been applied from the beginning of the XX[th] century by a number of countries[38]. As they are applied indiscriminately and formally, even if these measures do not target forced migrants such as refugees and asylum seekers, they affect them, and prevent them from exercising rights related to international protection[39].

Carrier sanctions are covered by some international treaties[40] and in the Schengen area have the aim of "curbing migratory flows and combating illegal immigration"[41]. They apply to air, vessel or land carrier bringing to the external border of one of the European countries participating in the Schengen area third country nationals whose entry is prohibited. As the Schengen Borders Code establish five requirements for third country nationals being admitted into the territory of the Member States (passport, visa – if required by the EU policy on visas-, object and means of the displacement, not being targeted by the SIS, and not representing a threat to internal order and security), what carriers do, in fact, are controls similar to border controls before allowing migrants to embark.

The first aim of these controls is to prevent the transport of undocumented migrants to the borders of countries which would most likely refuse their entry. However, they

[37] In a broad sense, the three components can be considered "carrier sanctions": T. RÖDENHAUSER, *Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control*, in *International Journal of Refugee Law*, 2014, n. 2, p. 226.
[38] For instance, the USA. *Ibid*., p. 226. See also E. FELLER, *Carrier Sanctions and International Law*, in *International Journal of Refugee Law*, 1989, n. 1, pp. 51-53.
[39] Carrier sanctions have been considered as "passive interception" of migrants by V. MORENO-LAX, *Must EU Borders Have Doors for Refugees? On the Compatibility of Schengen Visas with EU Member States' Obligations to Provide International Protection to Refugees*, *CRIDHO Working Paper*, 2008, n. 3, p. 7.
[40] The 1944 Chicago convention on International civil Aviation; the 2000 Protocol against the Smuggling of migrants by Land, sea and Air, supplementing the UN Convention against Transnational Organized crime; and the 2000 Protocol to prevent, Suppress and Punish Trafficking in Persons especially Women and Children, supplementing the UN Convention against Transnational organised crime.
[41] Directive 2001/51/EC of the Council, *supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985*, of 28 June 2001, in OJ L 187, 10 July 2001, pp. 45-46. See also K. HAILBRONNER, C. CARLITZ, *Directive 2001/51 Carriers Liability. Synthesis Report*, in *Odysseus Network for legal Studies on immigration and Asylum in Europe*, 2008.

affect all third country nationals including forced migrants who are searching for a safe way to escape and obtain international protection. By contrast, the first aim of border controls made by State agents at the point of entry is to assess the situation of each third country national who is *de facto* present in the territory of the State, and to decide whether to admit him/her following the requirements of the national immigration regulations or following other International or national laws related to asylum and international protection.

Carriers' embarkation controls are made by private agents outside the territorial jurisdiction of the State, on the behalf of which controls are ultimately carried out. The first controls facilitate the second ones and prevent undocumented migrants (including asylum seekers) from gaining entry. Carrier controls can substitute border controls for forced migrants and, in this sense, they are like anticipated border controls made by private agents at the point of departure (hence the point of entry is being moved back to the point of departure)[42]. Carrier sanctions result in the *outsourcing* and privatisation of border controls and[43], also, in the *offshoring* of these controls. The deterrence of illegal immigration through carrier sanctions leads to the privatisation of the exercise of a State's function (to control the entry of people into the territory) and entails an implicit delegation of exercising State's jurisdiction outside the territory (extraterritorial exercise of jurisdiction, by private agents).

It is obvious that the position of asylum seekers is worse in the first case than in the second one, because they are only entitled to some rights enshrined in International Law by a third State when they are outside the jurisdiction of their country of origin. Only States are able to give an alternative territorial protection to the lack of protection of the country of origin. Nevertheless, even if States are not fully responsible for private actions made outside their territory, they continue to be responsible for exercising public functions in accordance with the international rules on refugees and human rights.

Two EU Directives implemented the Schengen mandate (article 26.1 and 2 of the Schengen Convention) on this issue and established an EU system on carrier sanctions. The first one (2001/51/EC) aimed at harmonising the sanctions foreseen in European countries in order to ensure its deterrent effect, effectiveness and proportionality, and establishes fines between 3,000 and 5,000 €[44]. The second one (2004/82/EC) extends

[42] See on this, E. GUILD, *The Border abroad-Visas and Border Controls*, in K. GROENENDIJK, E. GUILD, P. MINDERHOUd (eds.), *In Search of Europe's Borders*, *The Netherlands*, 2002, pp. 87-104.

[43] ON T. BLOOM, V. RISSE, *Examining hidden coercion at state borders: why carrier sanctions cannot be justified*, in *Ethics & Global Politics*, 2014, n. 2, p. 65; S. SCHOLTEN, *The Privatization of Immigration Control through Carrier Sanctions. The Role of Private Transport Companies in Dutch and British Immigration control*, Leiden-Boston, 2015.

[44] Directive 2001/51/EC of the Council, cit. On this issue, see A. OLESTI RAYO, *La inmigración irregular y el control de los flujos migratorios en la Unión Europea*, in A.J. RODRÍGUEZ CARRIÓN, E. PÉREZ VERA (coord.), *Soberanía del Estado y Derecho internacional. Homenaje al Profesor Juan Antonio Carrillo Salcedo*, Tomo II, Sevilla, 2005, pp. 951-954.

and defines the obligations of carriers to send information concerning people who are being transported to a country of destination[45].

The Chicago Convention on International Civil Aviation (1944) finds a balance between the legitimate interests of States to fight against illegal immigration and the legitimate private interests of carriers. It establishes the duty of carriers to take measures on the point of embarkation in order to assure that all passengers are carrying the necessary documents, but establishes also that fines should not be imposed when they "can demonstrate that they have taken adequate precautions to ensure that these persons had complied with the documentary requirements for entry into the receiving state"[46]. Carrier sanctions, therefore, should not have to be applied immediately after the refusal of the entry of a third country national, but only when carriers neglect to control passengers[47]. The European Parliament has argued for this interpretation several times. If carriers carry out controls, but at the border point of entry border guards refuse the admission of an immigrant by exercising the governmental discretionary power on this issue, carriers ought not to be sanctioned[48]. The application of this precautionary principle would allow carrier employees to permit the embarkation of immigrants who want to seek asylum even if they are not in possession of all the required documents. The EU Directives on carrier sanctions do not provide waivers in order to release carriers from their responsibility to pay sanctions if they can prove that they have been diligent in the controls made in the country of origin or that they have transported asylum seekers (even if they did not have the documentation required of the rest of foreigners in order to be admitted). For this reason, in the EU, this balance between fighting illegal migration and allowing asylum seekers to seek protection abroad (based on human rights) is not fairly respected. The aim of fighting illegal migration is prevailing and endangers the rights of asylum seekers[49].

[45] Directive 2004/82/EC of the Council, *on the obligation of carriers to communicate passenger data*, of 29 April 2004, in OJ L 261, 6 August 2004, pp. 24-27.

[46] Convention on International Civil Aviation, *Facilitation*, Annex 9, ICAO, Section E "Custody and care of passengers, crew and baggage", *B. Inspection and control of persons*, par. 3.41.

[47] This has been argued by the European Parliament, *Resolution on the entry into force of the Schengen Conventions of 19 November 1992*, in OJ C 337, 21 September 1992, pp. 214-218, par. 12; *Resolution on the harmonisation, in the European Communities of the legislation and policies on asylum*, of 18 November 1992, in OJ C 337, 21 December 1992, pp. 97-102, §17; *Resolution on the general principles for a European policy on refugees*, 19 January 1994, in OJ C 44, 14 February 1994, pp. 106-110, par. 11.

[48] E. MAPELLI, *La inadmisión del extranjero en el Acuerdo de Schengen. Gravamen a las compañías aéreas*, in *Anuario Hispano-Luso-Americano de Derecho Internacional*, 1997, vol. 13, p. 417.

[49] The application of sanctions by national tribunals is not always sensitive to the individual rights affected by carrier sanctions. Before the French *Conseil d'Etat*, *Air France* invoked the ICAO Convention in contesting a fine of 5.000 FRF (the first decision established a fine of 10.000 FRF –the maximum possible amount- which was reduced in the appeal procedure) for having bring to France an individual with fake documents. The *Conseil d'Etat* considered that the picture on the document did not reflected the appearance of the individual, and that the airline could not maintain that the document did not show a "clear irregularity". Conseil d'Etat (Fr), decision of 23 November 2001, *Compagnie nationale Air France*, n. 195550, in *Revue française de droit administratif*, 2002, n. 1, pp. 188-189.

A number of rights can be affected by the refusal to allow embarkation by private agents in the country of departure[50]. First, the right to leave the country of origin (prescribed in article 12.2 of the International Covenant on Civil and Political Rights)[51]. Second, the right to seek asylum enshrined in article 14 of the Universal Declaration of Human Rights[52]. Third, indirectly, the right of refugees not to be criminally sanctioned for an illegal entry into the territory where they seek asylum is endangered[53]. Carrier sanctions usually are administrative rather than criminal sanctions, but article 31 of the Geneva Convention on the status of refugees, which prohibits criminal sanctions for illegal entries of refugees, reveals that flight from persecution is enough to avoid sanctions, and carrier sanctions go against this perception. Finally, carrier sanctions can be interpreted as an extraterritorial breach of the principle of *non-refoulement*, because asylum seekers are impeded from presenting themselves at the borders of a safe foreign country in order to ask for international protection.

As carrier staff determine before embarking if an individual would be admitted in case of application for asylum, EU Member States try to uphold human rights by posting airport liaison officers at some immigration hotspots[54]. With the aim of preserving human rights, the European Parliament proposed in vain that carrier sanctions should not be applied under the following circumstances: a third-country national seeks asylum immediately after arriving in the territory of the State of destination; the person carried is granted refugee status or allowed to remain under a subsidiary form of protection; or the person is admitted to the asylum determination procedure[55].

---

[50] On Visa and carrier sanctions policy, as a tool that could prohibit the exercise of the right of asylum: European Parliament, *Resolution on the asylum policy contrary to Human Rights that some Member States practice*, 18 June 1987, in OJ C 190, 20 July 1987, pp. 105-106.

[51] "Everyone shall be free to leave any country, including his own". *International Covenant on Civil and Political Rights*, 999 UNTS 171, 16 December 1966 (entry into force: 23 March 1976).

[52] "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

[53] Article 31 of the Geneva Convention on the status of refugees establishes that "1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

[54] T. RÖDENHAUSER, *Another Brick in the Wall*, cit.

[55] European Parliament, *Report on the initiative of the French Republic for adoption of a Council Directive concerning the harmonisation of penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission - Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (2000/0822(CNS))*, (14074/2000-C5-0005/2001-2000/0822 (CNS)); Timothy Kikhope (rapporteur), PE 294.263, A5-0069/2001, 27 February 2001, 8/12. "In order to safeguard the institution of asylum, carriers who transport foreigners who request asylum after their arrival and whose requests are subsequently turned down must be exempt from penalties. If a carrier is required to assess the motives of an asylum-seeker, this will adversely affect the latter's rights and mean that the carrier wrongly takes on the role which is proper to the State in asylum procedures, for the State alone is responsible for examining requests for asylum. /With regard to manifestly unwarranted requests for asylum by foreigners transported without the relevant documents, States may lay down other mechanisms which do not involve transferring to carriers responsibility for making prior checks on the motives for seeking asylum. /Carriers' personnel cannot be expected to decide which passengers have a valid claim for protection. Given the length of procedures, a carrier may expect

A refugee is someone who is outside his/her own country, who has a well-founded fear of being persecuted, and for whom the normal protection provided by the national state is lacking. A refugee is someone who is "between sovereigns": outside the country of origin, and seeking protection in the territory of a receptor country[56]. Carrier's sanctions can be seen as "forms of pre-admission *refoulement*", and for this reason can be taken as incompatible with article 33 of the Geneva Convention[57]. For Tilman Rödenhauser "Effectively barring asylum seekers from benefiting from the fundamental principle of *non-refoulement* is difficult to reconcile with the spirit, object and purpose of refugee and human rights law"[58]. An interpretation of articles 31 and 33 of the Geneva Convention on the status of refugees "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" would lead to oblige States not to hamper asylum seekers access to the country[59].

In all the International[60] and European[61] legal instruments, as well as in the national legislation[62], a caveat is included for preserving the International refugee regime, especially highlighting that the 1951 Geneva Convention on the status of refugees should be respected. Nevertheless, considering the potential risk of being sanctioned, carriers would prefer, in general, not to embark asylum seekers if guarantees that they would not be sanctioned are lacking.

Through carrier sanctions States elude their international obligations towards refugees and asylum seekers by avoiding their presence within their territorial jurisdiction[63]. However, following international standards, each time that an asylum

---

to wait years to be refunded a fine already levied. Waiver rather than refund is fairer on carriers as well as applicants, and may also put pressure on administrations to make decisions more quickly./ Faced with a would-be asylum-seeker with inadequate documentation, the carrier would err on the side of caution and refuse to carry such a person, leading, in effect, to *refoulement*".

[56] S.B. YOUNG, *Between Sovereigns: A Reexamination of the Refugee Status, Transnational Legal Problems of Refugees, Michigan Yearbook of International Legal Studies*, New York, 1982, p. 339.

[57] E. LAUTERPACHT, D. BETHLEHEM, *The Scope and Content of the Principle of Non-refoulement*, in E. FELLER, V. TÜRK, F. NICHOLSON (eds.), *op. cit.*, 2003, p. 82.

[58] T. RÖDENHAUSER, *Another Brick in the Wall*, cit.

[59] *Ibid*., p. 295. See also A. CRUZ, *Compatibility of carrier sanctions in four Community States with international civil aviation and human rights obligations*, in H. MEIJERS AND OTHERS, *Schengen. Internationalisation of central chapters of the law on aliens, refugees, privacy, security and the police*, Utrecht, 1991, pp. 52-53.

[60] Convention on International Civil Aviation, ICAO, Section E "Custody and care of passengers, crew and baggage", *B. Inspection and control of persons*, par. 3.44.

[61] Directive 2001/51/EC of the Council, *supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985*, of 28 June 2001, in OJ L 187, 10 July 2001, pp. 45-46, par. 3: "Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967".

[62] As an example, in the Spanish Foreigners *Ley organica* 4/2000 it is said that the requirements of entry should not be applied to foreigners that apply for asylum when they arrive to Spain.

[63] A. RUFF, *The Immigration (Carriers' Liability) Act 1987: its Implications for Refugees and Airlines*, in *International Journal of Refugee Law*, 1989, n. 4, p. 499; H. MEIJERS, Refugees in Western Europe 'Schengen' affects the entire Refugee Law, in *International Journal of Refugee Law*, 1990, n. 3, pp. 434-436.

seeker has their rights infringed by carrier agents, the State on whose behalf the controls are made would commit an indirect extraterritorial infringement of its international obligations. The international obligations of States do not disappear by the transfer of their functions to private agents[64]. Some authors, argue that "carrier liability legislation confers parts of the State's authority on private entities by obliging them to carry out this part of the State's sovereign rights" and that "the State remains responsible" for wrongful acts of private companies[65]. In our opinion existing norms on carrier sanctions do not empower private actors to conduct public functions. Quite the contrary, carriers *de facto* perform these functions in order to avoid sanctions[66]. It can be said that there is an indirect delegation of governmental powers (an outsourcing of public functions). However, the *soft law* standards on international responsibility would hardly support the attribution of responsibility to the State of final destination of asylum seekers which should be the only one able to apply the legislation on carrier sanctions. In International Law "States cannot contract out or 'privatize' their legal obligations: they may contract out performance, but not responsibility"[67]. States are more responsible for not carrying out their sovereign powers and responsibilities towards refugees and asylum seekers than for potential wrongful acts committed by carriers. Even if, following international standards, the responsibility of States could be legally determined in some cases, in reality, it would be extremely difficult for asylum seekers who are not able to leave their country of origin to claim violations of their rights.

Carrier sanctions, to sum up, provide States with a tool that allows them to remain out of reach for people fleeing their country of origin. States have a diffused responsibility, as members of the International Community, to provide asylum or substitute protection when a particular State is unable to protect its own population. Nevertheless, this responsibility will only be implemented when foreign people manage to reach the borders of a concrete foreign State or to be placed under its jurisdiction. The controls that private agents make at the point of embarking (in places not subject to the jurisdiction of the destination state), would not be attributed to EU destination States, despite the fact that they may be carried out disregarding human or refugee rights (for instance, the right to flee). A consequence of carrier sanctions is thus a potential violation of the human rights of refugees at the point of departure by private agents.

---

[64] The legal basis for this statement can be found in articles 5 and 8 of the UN General Assembly Resolution 56/83 *Responsibility of States for internationally wrongful acts*, of 28 January 2002. Article 5: "*Conduct of persons or entities exercising elements of governmental authority.* The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance"; article 8: "*Conduct directed or controlled by a State*. The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct".

[65] T. RÖDENHAUSER, *Another Brick in the Wall*, cit., p. 232.

[66] E. GUILD, C. COSTELLO, M. GARLICK, V. MORENO-LAX, *Enhancing the Common European Asylum System and Alternatives to Dublin*, *CEPS Paper in Liberty and Security in Europe*, 2015, n. 83, p. 6.

[67] GUY GOODWIN-GILL, *The Refugee in International Law*, 3rd ed. Oxford, 2007, p. 386.

Essentially, the consequences of the indirect delegation of migration management tasks to carriers through the provision of sanctions are twofold: a) the offshoring of the jurisdiction of States, through the externalisation of the international protection function of States, and of border control tasks[68]; and b) the privatisation or the outsourcing to private actors of the exercise of the sovereign power to control borders, and, therefore, to admit or refuse the entry of immigrants into the Schengen area.

4. The extraterritorial exercise of sovereign jurisdictional powers in the fight against illegal immigration *vis-à-vis* human rights

In principle, only States have the power to control whether foreigners enter or remain within, or are returned from their territory[69], even if this reflects a "persistent illusion of an absolute, exclusionary competence"[70]. To a large extent, International Law and standards of human rights protection have sketched out the limits of the power of the States to deal with migrants, asylum seekers and refugees. Nevertheless, States have progressively searched for ways to circumvent these limits.

One of the strategies used by States has been the externalisation of border controls to areas not submitted to jurisdiction of States. Even though there is still no internationally recognised right to be 'granted asylum' in the sense of formal permission to enter and to remain in the territory of a State territory, human rights do not allow States to completely block the right to flee from the country of origin and to seek asylum. The application of the rule of law must govern all State actions, wherever they take place. In this sense, States must ensure that their international obligations are implemented effectively as soon as their agents come into contact with individuals claiming protection during or immediately after rescue or interception operations[71].

In order to avoid that people arrive illegally at their borders, States with larger external borders, like Spain or Italy, have moved entry controls beyond their territorial and maritime borders through maritime operations of interception of vessels. These

[68] On practices of states having the effect of "externalizing" the problems, see G. NOLL, J. VEDSTED-HANSEN, *Non-Communitarians: Refugee and Asylum Policies*, in P. ALSTON AND OTHERS (eds.) *The EU and Human Rights*, Oxford, 1999, p. 382.
[69] "As a matter of well-established international law and subject to its treaty obligations, a state has the right to control the entry of non-nationals into its territory", European Court of Human Rights, judgment of 28 August 1985, application nn. 9214/80, 9473/81 e 9474/81, *Abdulaziz, Cabales and Balkandali v. The UK*, par. 67.
[70] G. GOOWIN-GILL, *The Dynamic of International Refuge Law*, in *International Journal of Refugee Law*, 2014, n. 4, p. 653.
[71] *Ibid.*, p. 654.

operations are aimed, in principle, at preventing illegal migration, trafficking or smuggling of people. Nevertheless, sometimes these operations carry out activities between the mandate of preventing illegal immigration and the duties set out by the International Law of the Sea regarding the rescuing of people in distress at sea. When the interception is followed by the return of the vessels or of immigrants to the supposed port of departure or to third countries, two main consequences follow. First, the responsibility of States is immediately weakened *vis-à-vis* the aliens affected by these measures. States are responsible for their activities carried out within their territory. For activities carried out outside the areas defined by their borders, additional argumentation is needed in order to attach responsibility to the State[72]. Second, States avoid the difficulties of expelling a great number of immigrants from European countries where they have managed to enter illegally. Wherever deployed, Member States' actions in order to fight illegal migration can endanger International human rights, norms and standards concerning refugees: the right to seek asylum, the right not to be refused entry and removed to a country where there is a risk of suffering persecution or serious violations of human rights. Nevertheless, in order to obtain the recognition of the right to be safe from persecution or violations of human rights, an additional test should be fulfilled: it is necessary to attribute the responsibility to satisfy this right to one specific State.

In general, the three main instruments for the protection of human rights which can benefit asylum seekers and refugees are recognised as being applicable beyond the borders of the State[73]. First, according to the interpretation made by the International Court of Justice, the International Covenant on Civil and Political Rights can be applied to activities that take place in the territory of States and to any conduct or extraterritorial authority action made by public officials or persons acting on behalf of a State[74]. Second, the UN Convention against Torture establishes at article 2.1. that the scope of application reaches any territory under the jurisdiction of States Parties. Article 4 of the

[72] In this sense, for instance, the Vice-President of the European Commission stated in 2009, that the EU acquis on asylum was only applicable to asylum seekers already present in the MS territory: "Firstly, the Community acquis in the field of asylum is intended to safeguard the right of asylum, as set forth in Article 18 of the Charter of Fundamental Rights of the European Union, and in accordance with the 1951 Geneva Convention relating to the Status of Refugees and with other relevant treaties. However, that acquis, including the 2005 Asylum Procedures Directive, applies only to asylum applications made on the territory of Member States, which includes the borders, transit areas and, in the context of maritime borders, territorial waters of Member States. Consequently, it is clear from a legal standpoint that the Community acquis in the field of asylum does not apply to situations on the high seas". Cited in the European Court of Human Rights, Grand Chamber, *Hirsi Jamaa*, cit., par. 34.4.

[73] In reference to the Geneva Convention on the status of refugees, the principle of *non-refoulement* would be applicable to the extraterritorial jurisdiction of states, following the international standards of the UNHCR: Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, Geneva, 26 January 2007.

[74] International Court of Justice, *Legal consequences of the construction of a Wall in the occupied Palestinian territory*, Advisory Opinion of 9 July 2004, n. 131, parr. 109-111. Previously the ICJ had applied the "effective control" doctrine, more in line with the jurisprudence of the ECtHR: International Court of Justice, *Case concerning the military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), judgment of 27 June 1986, parr. 110-115.

Additional Protocol to this Convention contains an additional criterion. It is established that States must allow visits to any place subject to their *jurisdiction* and *control* where individuals are detained. Third, the European Convention on Human Rights has been progressively recognised as applicable to extraterritorial acts of agents acting on behalf of a State[75].

One of the last conclusive judgments on the scope of application of the ECHR and the meaning of the *jurisdiction* of the States[76] is *Hirsi Jamaa versus Italy*, decided by the ECtHR in February 2012. The Court considered in this judgment that the interception and the *push-back* of a vessel with a group of Somali and Eritrean immigrants from international waters to the supposed port of departure, in Libya, carried out by the Italian *Guardia di finanza* and Coastguards entailed a violation of article 3 of the Convention. Libya was considered an *unsafe country* due to the risk for immigrants of indirect refusal to their country of origin and to the standards of treatment of migrants in Libya[77]. The ECtHR refused the Italian argument that the operation had merely been a "rescue operation that only entertained obligations under the Law of the Sea" and that the *push-back* was the exercise of bilateral agreements on this issue between Italy and Libya. For the ECtHR "it is not the nature or the purpose of maritime interdictions, but the exercise of *de jure* or *de facto* control that is dispositive for the application of human rights obligations"[78]. The ECtHR pointed out that: "in the instant case the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities"[79].

The ECtHR considered that Italy breached article 3 of the ECtHR and article 4 of Protocol 4 because the actions of the Italian agents constituted a "collective expulsion"[80].

In the *Hirsi Jamaa*'s wake, the *Sharifi* judgment developed the limits of the automatic removals of foreigners from areas submitted to the jurisdiction of States

[75] See, among others, European Court of Human Rights, Grand Chamber, *Hirsi Jamaa*, cit.; European Court of Human Rights, Grand Chamber, judgment of 20 November 2014, application n. 47708/08, *Jaloud v. The Netherlands*. See on this issue, S. MORGADES-GIL, *La aplicación extraterritorial del Convenio Europeo de Derechos Humanos y Libertades Fundamentales: El concepto de jurisdicción en perspectiva cosmopolita*, in C. GARCÍA SEGURA (dir.), *La tension cosmopolita*, Madrid, 2016, pp. 149-191.

[76] Art. 1 ECHR provides "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention".

[77] Libya was considered an unsafe country for refugees (was not party of the Geneva Convention and did not respect rule on the protection of refugees) and also for immigrants in general (the treatment deserved to clandestine migrants was considered inhuman; European Court of Human Rights, Grand Chamber, *Hirsi Jamaa*, cit., parr. 123-126.

[78] M. DEN HEIJER, *Reflections on* Refoulement *and Collective Expulsion in the* Hirsi *Case*, in *International Journal of Refugee Law*, 2013, n. 2, p. 272; European Court of Human Rights, Grand Chamber, *Hirsi Jamaa*, cit., parr. 79-81.

[79] *Ibid*., par. 81.

[80] *Ibid*., par. 180.

Parties. The *Sharifi* case began with the claim of thirty-two Afghan people, two Sudanese and one Eritrean. On a number of occasions, the applicants embarked illegally as stowaways on ships departing from the port of Patras, and as soon as they arrived at an Italian port on the Adriatic they were intercepted by the police, who immediately handed them over to shipmasters for their return. The ECtHR considered that Greece had breached article 13 in combination with article 3 because of the flaws of asylum procedures. More than three and a half years after the *M.S.S.* judgment, the ECHR still noted "the precarious situation and the absolute destitution of asylum seekers" and that the reception zone in Patras was "a simple camp of fortune"[81]. This case clearly revealed that the EU solidarity and burden-sharing systems were inefficient, and that asylum seekers faced a serious risk of violations of their human rights, as enshrined by the ECHR, particularly in States affected by the economic crisis and that were undergoing greater migratory pressure. The ECtHR considered that Italy was responsible for breaching the prohibition of collective expulsions (article 4, Protocol 4); the right not to be subjected to inhuman or degrading treatment (article 3); and the right to benefit from an effective remedy (article 13) in combination with the other articles violated. The ECtHR supported the reservations formulated by the third intervenient party, the Special Rapporteur of the United Nations Human Rights Council, that Italy carried out a practice of automatic rejection of illegal immigrants intercepted before landing. This rejection consisted in delivering these immigrants to the captains of the ferries without any guarantee or procedure and the detention in a "sterile area" at the port before their return[82]. The Italian authorities could not prove that there had been any sort of identification and individual examination of the situation and of the possible needs for protection of the applicants before the alleged application of the readmission agreement with Greece. This argument was reiterated in response to the claim that return would be justified in the European system: "Aucune forme d'éloignement collectif et indiscriminé ne saurait être justifié par référence au système de Dublin, dont l'application doit, dans tous les cas, se faire d'une manière compatible avec la Convention"[83]. In the case *Khlaifia and others v. Italy*, the Court considered that the procedures of removal of migrants in illegal situations must take into account the specific circumstances of each individual subjected to such a measure[84]. Even though in the first judgment on this case it was established that Italy had committed "collective

[81] European Court of Human Rights, *Sharifi and others*, cit., parr. 176-178.
[82] *Ibid*., par. 104.
[83] *Ibid*., par. 223.
[84] On these judgments, and on the principle of the "effet utile" as a tool for the interpretation of the prohibition of collective expulsions, see R. PALLADINO, *La tutela dei migranti irregolari e dei richiedenti protezione internazionale*, 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 (2010-2015)*, Vicenza, 2016, pp. 178-185.

expulsion" of the applicants, in breach of article 4 of the Protocol 4[85], the Grand Chamber rejected this conclusion in December 2016[86].

These judgments highlight the limits of the strategies of States based on the offshoring of border controls and on trying to repel migrants that have arrived illegally at their borders or at spaces under their jurisdiction through automatic removals or collective expulsions. These strategies are based on a territorial idea of sovereignty and responsibility according to which States are responsible only for protecting the human rights of those who have been admitted into their territory. This idea does not take into account that, usually, refugees and asylum seekers present themselves at the borders of States in order to ask for international protection using irregular channels. Border controls exercised outside the territory of the States, as well as the removal of foreigners made by public agents of EU States must respect human and refugee rights.

5. Final reflections

Essentially, the consequences of the strategies of States aimed at keeping illegal migrants away from their borders represent a violation of the human and refugee rights of people that seek international protection abroad. The main effects of the delegation of migration management tasks and normative powers to non-state actors through carrier sanctions endanger the protection of human rights of people intending to access the territory of a safe country, and lead to the dilution of the State's responsibility because the link between the sovereign function and the State is weakened or severed. The externalisation of the border-control tasks, even if carried out by public authorities (as in the case of interception in high seas) cannot be made at the expense of the protection of human rights. The exercise of authority as the grounds for establishing that jurisdiction exists involves the fulfilment of international obligations set out in human rights instruments *vis-à-vis* potential asylum seekers.

The tension between the principles of responsibility and solidarity in the management of the admission of asylum seekers in the EU in the case of large-scale flows involve challenges both to the Schengen free movement space and to the *Dublin system*. This tension should be resolved in full accordance with respect for human rights. In the case of asylum-seekers, in full respect of their right to seek asylum, as recognised in article 14 of the Universal Declaration of Human Rights; the principle of *non-refoulement*; and the right not to be subjected to inhuman or degrading treatment (article 3 of the ECHR). In this sense, Member States should recuperate the "spirit of Community solidarity" referred to in the Temporary Protection Directive in case of

[85] European Court of Human Rights, Grand Chamber, judgment of 1 September 2015, application n. 16483/12, *Khlaifia and others v. Italy*, parr. 156-157.

[86] European Court of Human Rights, Grand Chamber, *Khlaifia and others*, par. 248. The ECHR argued in this second judgment on the same case that article 4 of Protocol 4 requires that "each alien has a genuine and effective possibility of submitting arguments against his or her expulsion" and considered that this provision was not breached in the concrete case.

mass migratory flows adopted in 2001[87]. Moreover, mechanisms for the management of forced migration flows should seek an equitable sharing of responsibilities rather than building solidarity as a mechanism to alleviate the consequences of the wrongdoing of an unjust system which places greater responsibility on particular States.

ABSTRACT: At the European Union level, the management of forced migration combines elements of the policy on external-border control and instruments of the Common European Asylum System. This article aims to examine how some of the strategies applied by States in order to fight illegal immigration and one of the instruments of the policy on asylum, the *Dublin system*, strike a delicate balance between security and human rights. It will be argued that these strategies and normative instruments may hinder the right to seek asylum in a safe country, and that a fairer and more equitable system for sharing responsibilities should be developed.

KEYWORDS: asylum procedure – illegal immigration – Dublin system – carrier sanctions – refoulement – border controls.

[87] Article 25 of the Directive 2001/55/EC of the Council, *on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, of 20 July 2001, in OJ L 2012, 7 August 2001.