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Commenti e Note

ITALY AS AN UNSAFE PLACE? THE PROTECTION OF MIGRANTS' FUNDAMENTAL RIGHTS AS A SYSTEMIC ISSUE IN THE DIALOGUE BETWEEN COURTS: SOME RECENT DEVELOPMENTS

Elisa Ruozzi*

SUMMARY: 1. Introduction. – 2. (Back to) a non-derogatory approach to human rights breaches in hotspots: the ECtHR ruling in *J.A. and others v. Italy* – 2.1 Italy as an unsafe State: overcoming the emergency approach through a high standard of review – 3. Taking the ECtHR seriously: the judgment by the *Raad van State* – 4. Is Italy an unsafe place? The slippery slope of *non-refoulement*. – 5. Some concluding remarks.

1. Introduction

As it is widely acknowledged, in recent decades, international law has been increasingly concerned with "large movements" of individuals, especially by sea. As emphasized in the New York Declaration on Refugees and Migrants, these movements are often "mixed", meaning they involve the simultaneous presence of refugees and migrants[1]. Consequently, this situation presents intricate legal challenges concerning the treatment of these individuals and their potential transfer to other States. In this context, Article 33 of the 1951 Convention on the Status of Refugees assumes a central role[2]. This article encapsulates the *non-refoulement* principle, designed to prohibit Contracting States from expelling or returning a refugee to any territory where their life or freedom may be endangered due to factors such as their race, religion, nationality, affiliation with a specific social group, or political beliefs.

According to a widespread opinion, the obligation set out by Article 33 can be seen as a logical consequence of the more general prohibition of torture or inhuman or degrading treatment[3], codified by Article 3 of the European Convention of Human

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[1] United Nations General Assembly, *New York Declaration for Refugees and Migrants*, 13 September 2016, A/71/L.1, para. 6.
[2] *Convention relating to the Status of Refugees*, Geneva, 28 July 1951; entry into force 22 April 1954.
[3] S. BARTOLE, P. DE SENA, V. ZAGREBELSKY, *Commentario breve alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2012, p. 61; C. FOCARELLI, *La persona umana nel diritto internazionale*, Bologna, 2013, pp. 147-149; J. VELU, R. ERGEC, *Convention européenne des droits de l'homme*, Bruxelles, 2014, p. 268; E. FRONZA, P. PUSTORINO, *Art. 4*, in R. MASTROIANNI et al. (eds.), *Carta dei diritti fondamentali dell'Unione europea*, Milano, 2017, pp. 75-76; R. PISILLO

Rights[4] (hereinafter ECHR) and Article 4 of the European Charter of Fundamental Rights[5] (hereinafter ECFR) and extending to individuals not having the *status* of refugees. From this perspective, the protection offered by the principle of *non-refoulement* takes on an indirect nature. This is because the alleged violation of human rights would occur in the territory of another State, its rationale being that of preventing such an event due to the transfer of the individual concerned to such a place[6].

Within this complex normative framework − where the protection of human rights, refugees' rights, and aliens' rights tend to overlap and where different territorial levels are involved − the existence of a judicial dialogue between the various courts charged with norm implementation has already been explored by doctrine[7]. The primary objective of this article is to further the exploration of these topics. It seeks to do so not only by transcending a segmented approach rooted in the examination of individual legal systems − a path already pursued in doctrinal discussions on judicial dialogue between courts − but also by highlighting the potential unforeseen and possibly detrimental consequences of such dialogue. Pushing this line of thought to its utmost ramifications, one might begin to question whether what is transpiring in this realm of law can genuinely be characterized as a "dialogue" or whether a certain degree of automatism exists, whereby courts are led to draw specific conclusions based on previous judgments issued by other courts faced with the same situation. As we will demonstrate, this is particularly evident when the legal rationale hinges on the *non-refoulement* principle, which implies the indirect responsibility of one State based on the actions of another.

This reflection will be elaborated upon starting from the recent release of two rulings, both of them having as their object compliance with migrants' rights within Italy. More precisely, our examination will focus on the interplay between the two verdicts: one adopted by an international human rights tribunal (the European Court of Human Rights, hereinafter ECtHR) and the other by an administrative tribunal (the Dutch Council of State) in the framework of the Common European Asylum System (hereinafter CEAS).

MAZZESCHI, *International Human Rights Law. Theory and Practice*, Cham, 2021, pp. 287-289; G. CITRONI, T. SCOVAZZI, *Corso di diritto internazionale*, Seconda edizione, Parte III, *La tutela internazionale dei diritti umani*, Milano, 2022, pp. 503 ss.; D. KRETZMER, *Torture, Prohibition of*, in *Max Plank Encyclopedia of Public International Law*, 2022, para. 38; P. PUSTORINO, *Tutela internazionale dei diritti umani*, Bari, 2022, pp. 153 ss.; ID., *Introduction to International Human Rights Law*, The Hague, 2023, pp. 132-134.

[4] *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4 November 1950; entry into force 3 September 1953.

[5] *Charter of Fundamental Rights of the European Union*, Nice, 7 December 2000; entry into force 1 December 2009.

[6] This point is underlined by L. PANELLA, *L'espulsione dei migranti irregolari viola l'art. 3 della CEDU? Il contraddittorio atteggiamento della Corte europea dei diritti dell'uomo*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (a cura di), *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli, 2022, pp. 737 ss.

[7] H. BATTJES, E. BROUWER, *The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?*, in *Review of European Administrative Law*, 2015, p. 191 ss.; F. IPPOLITO, *A European Judicial Dialogue on Refugee Rights*, in *Human Rights and International Judicial Discourse*, 2015, pp. 184 ss.; F. MAIANI, *Responsibility allocation in the Common European Asylum System*, in E. TSOURDI (ed.), *Research Handbook on EU Migration and Asylum Law*, Cheltenham, 2022, pp. 275 ss.

It is contended that the dynamic interaction between direct and indirect safeguarding of human rights and the involvement of various judicial systems may result in an unforeseen consequence, namely, a scenario resembling a "slippery slope", whereby structural non-compliance with fundamental rights can help rebalance the situation faced by those States that are more exposed to mass migration.

The article is subdivided as follows: a presentation and a reflection on the verdict issued by the ECtHR, alongside a comparative analysis with the well-known *Khlaifia v. Italy* case (para 2), followed by a summary of the decision by the Dutch Council of State, with specific emphasis on the principle of interstate trust and of its evolution (par. 3); the article will subsequently round out the discussion with some considerations regarding the systemic repercussions of the two judgments (section 4), followed by preliminary concluding observations (section 5).

2. (Back to) a non-derogatory approach to human rights breaches in hotspots: *J.A. and others v. Italy*

On 30 March 2023, the First Section of the ECtHR delivered its verdict in the *J.A. and others v. Italy* case, originating from a complaint submitted by four individuals having Tunisian nationality. The claimants left the Tunisian coast by boat and disembarked in Italy on 16 October 2017 after a rescue operation at sea; they were taken to the hotspot in Lampedusa, where they underwent medical check-ups and received documents, the contents of which they claimed they did not fully understand[8]. According to their allegations, the living conditions in the centre were inhuman and degrading; leaving was not officially allowed and any contact with the competent authorities was impossible[9]. After ten days, the applicants were asked once again to sign documents, which they subsequently discovered to be refusal-of-entry orders; they were forcibly transferred to Palermo and then sent back to Tunisia[10].

When examining the national legal framework, the ECtHR primarily referenced Article 13 of the Italian Constitution, which upholds the inviolability of personal freedom, subject to lawful restrictions[11]. Additionally, the Court considered pertinent legislative provisions related to the status of foreign nationals and individuals seeking international protection[12]. The Court also made reference to the reports released by the National Guarantor of rights of individuals held in custody or deprived of their liberty and by an Extraordinary Commission set up within the Italian Parliament[13]. Both these reports documented the dire conditions existing in the hotspot in Lampedusa. The Court also

[8] European Court of Human Rights, judgment made on 30 March 2023, application n. 21329/18, *J.A. and others v. Italy*, para. 5.
[9] Ivi, para. 6.
[10] Ivi, para. 7 ss.
[11] Ivi, para. 12 ss.
[12] Ivi, para. 13 ss.
[13] Ivi, para. 17 ss.

considered the pertinent case law from the Italian Constitutional Court, highlighting the application of Article 13 of the Constitution to the measures implemented in reception and assistance facilities[14]. In the section devoted to international law and practice, mention is made not only of EU normative acts in this policy area[15], but also of documents released by the European Parliament, reporting once again on the deficiencies afflicting Italian hotspots and on the lack of adequate legislative measures[16]. The same negative picture emerges from other reports adopted within the Council of Europe and the United Nations, concerning both the protection of migrants and refugees, and the prevention of torture[17].

Upon deferring any challenge to the claimants' victim *status* to the substantive phase[18], the Court proceeds to evaluate the alleged breach of Article 3 of the ECHR, which establishes an absolute prohibition of torture, inhuman, or degrading treatment or punishment. Probative issues on this kind of breach are rapidly set aside by the reference to the "several pieces of evidence" provided by the claimants[19], to the substantially acquiescent attitude of the Italian Government[20], and to the above-mentioned reports, in particular the one released by the UN Committee Against Torture and by the Italian Senate[21]. It is "in light of all the above" that the Court considered itself satisfied about the "inadequate material conditions" existing in Lampedusa at the time the claimants resided there. Such a conclusion is strengthened by emphasizing the "absolute nature" of the prohibition established in Article 3 and the irrelevance, on the contrary, of the difficulties endured by States, such as Italy, which are most exposed to the impact of migration[22]. Recalling the landmark *Hirsi Jamaa v. Italy* case, the Court highlighted that such difficulties are not sufficient to exonerate Member States from obligations under Article 3 of the European Convention; as a final note, the Court noted that the applicants spent a total of ten days in the hotspot[23].

[14] Ivi, para. 20 ss. In particular, the Italian Constitutional Court established, in its judgment on 22 March 2001, no. 105, that limitations on the liberty of foreign nationals in initial reception and support facilities must adhere to the safeguards outlined in Article 13 of the Italian Constitution (para. 4). Similarly, in its judgment on 8 November 2017, no. 275, the Court set out that deferred refusals of entry executed through the use of force called for a legislative intervention, given their impact on the individual's personal liberty protected by the same provision (para. 3).
[15] Ivi, para. 27 ss.
[16] Ivi, para. 36 ss.
[17] Ivi, para. 38 ss.
[18] Ivi, para. 46. This reasoning will be applied to the alleged violation of Article 5 (para. 72).
[19] Ivi, para. 59. The impact of documents and conclusions adopted by national and international bodies on the court's deliberation is highlighted by P. PUSTORINO, *Hotspot di Lampedusa e gravi violazioni dei diritti umani da parte dell'Italia*, in *Giurisprudenza italiana*, 2023, p. 1005.
[20] Ivi, para. 60.
[21] Ivi, para. 61 ss.
[22] Ivi, para. 64-65.
[23] Ivi, para. 65. European Court of Human Rights, Grand Chamber, judgment of 23 February 2012, application no. 27765/09, *Hirsi Jamaa and others v. Italy*, para. 122. The relevance of the temporal aspect is highlighted by P. PUSTORINO, *Hotspot di Lampedusa e gravi violazioni dei diritti umani da parte dell'Italia*, cit., p. 1004.

The second allegation put forward by the applicants concerns the breach of Article 5 of the ECHR based on the fact that, once in the hotspot, they found themselves in a situation of *de facto* detention. The Court started its analysis by recalling that the general prohibition of restrictions of freedom and security set out by Article 5 finds a limit, *inter alia*, in lett. f) of paragraph 1[24], covering measures concerning the presence of aliens in the territory of the State. This exception unfolds into two distinct options: measures designed to prevent illegal entry and actions aimed at deportation or extradition, both of which must be compliant with the domestic legal order and "protect the individual from arbitrariness". Given the applicability, in this case, of the first kind of measure[25], the Court stresses how the purpose of hotspots as conceived by the European Agenda on Migration and as regulated by Italian legislation is not to act as detention centres but, rather, to identify individuals and direct them to other destinations[26].

In particular, the Court strikes down the argument put forward by the Italian Government about Lampedusa being qualified as an identification and expulsion centre where, according to the law, detention is allowed[27]. The closed nature of the structure, strongly supported by evidence provided by several governmental and non-governmental sources[28], in the absence of any clear legal basis, therefore constitutes an arbitrary deprivation of liberty under the terms of Article 5 of the Convention, "even more so" considering the extended length of the applicants' stay in the facility and the substandard physical conditions they experienced there[29].

Lastly, the Court examines the alleged breach of Article 4 of the Fourth Protocol to the ECHR, prohibiting the collective expulsion of aliens, defined by its previous jurisprudence as any measure "compelling aliens, as a group, to leave a country"[30], and requiring to this effect a reasonable and objective examination of the particular case of each individual[31]. Such a definition is specified by reference to the well-known *Khlaifia v. Italy* case, where the obligation incumbent on States to provide each alien with a "genuine and effective possibility" of submitting arguments against expulsion has been formulated[32]. In the situation at issue, these requirements have not, in the view of the judges, been complied with, given in particular the absence of any interview and the standardised format of refusal-of-entry orders served to the applicants[33]. As already

[24] European Court of Human Rights, *J.A.*, cit., paras. 83-84.
[25] As highlighted by the Court, in the case under consideration, no evidence has been presented regarding a deportation order or any decision denying entry (para. 84).
[26] Ivi, paras. 87-88. On this point, see F. GARELLI, *La Corte EDU torna a pronunciarsi sulla gestione del fenomeno migratorio e sulla detenzione dei migranti nel CPSA di Lampedusa*. *Il caso J.A. e A. c. Italia*, in *Ordine internazionale e diritti umani*, *Osservatorio l'Italia e la CEDU*, 2023, no. 2, p. 419.
[27] Ivi, para. 89 ss.
[28] Ivi, para. 92.
[29] Ivi, para. 93-94.
[30] European Court of Human Rights, Grand Chamber, *Hirsi Jamaa*, cit., para. 166.
[31] Ivi, para. 106.
[32] European Court of Human Rights, Grand Chamber, judgment of 15 December 2015, application no. 16483/12, *Khlaifia and others v. Italy*, para. 248.
[33] European Court of Human Rights, *J.A.*, cit., para. 107-108. The Court also observes that two of the applicants did not receive a copy of the order, and the Government did not furnish any such document.

observed in relations to the previous claims, the conclusion of the Court finds strong support in the reports issued by the Extraordinary Commission of the Senate and by the Guarantor, who specifically invited Italian authorities to suspend these practices[34]. Considering the government's inability to refute the claim regarding the applicants' misunderstanding of the directives and their consequent inability to lodge appeals, the verdict asserted that the failure to demonstrate "due consideration" for the specific circumstances of the applicants results in a breach of Article 4 of the Fourth Protocol[35].

Considering these conclusions and finding it unnecessary to address further arguments put forward by the claimants[36], the Court awarded 8,500 euros to each of them for non-financial damage. Additionally, it ordered the State to reimburse 4,000 euros expenses and costs[37].

2.1 Italy as an unsafe State: overcoming the emergency approach through a high standard of review

One of the most evident features of the *J.A. v. Italy* ruling concerns the rigorous approach adopted by the Court when assessing compliance with Article 3 of the ECHR. As evident from the judgment's wording, the Court's rationale is notably succinct and aligns with the absolute nature of the prohibition in question, which, as commonly recognized, allows for neither exemption nor deviation. Once the degrading conditions of the hotspot were established − based on the several pieces of evidence and on official documents − the Court reached a clear-cut verdict regarding the breach of Article 3, without delving into the specifics of the applicants' individual circumstances. As correctly pointed out, such a *démarche* should not be read as the Court's refusal to take into account the vulnerability of the claimants. Instead, it should be regarded as a direct outcome of the prevailing conditions in the hotspot, which inherently meet the necessary criteria to establish a breach of Article 3[38]. This concept is reinforced by a section of the judgment indicating that the challenges arising from the heightened influx of migrants and asylum-seekers do not exonerate Member States from adhering to their treaty obligation.

By so doing, the judgment established a distinct position in comparison to the *Khlaifia* case, where the consolidated jurisprudence on the prohibition of torture seemed to be put into question or at least balanced against the situation of emergency experienced by Italy and by other States more geographically exposed to mass migrations. In that case, the decision of the Court to consider the "general context" where facts arose (the Arab

[34] Ivi, para. 110 ss.
[35] Ivi, paras. 115-116.
[36] Claimants also asserted that the conduct of Italian authorities breached Article 2 of the Fourth Protocol (freedom of movement) and of Article 13 of the Convention in conjunction with Article 3 and with Articles 2 and 4 of the Fourth Protocol (ivi, paras. 117-118).
[37] Ivi, para. 120 ss.
[38] E. ARDITO, *L'approccio hotspot e la prassi dei respingimenti collettivi nella sentenza J.A. e al. c. Italia*, in *Diritti umani e diritto internazionale*, 2023, p. 419.

spring) and the "situation of extreme difficulty faced by the Italian authorities"[39] were among the factors that led it to exclude that the conditions endured by the applicants surpassed the necessary threshold for identifying a violation of Article 3[40].

The indulgence showed by the ECtHR towards Italy in the *Khlaifia* case has been the object of great criticism, primarily stemming from concerns about potentially diminishing the absolute prohibition of torture and consequently reducing the level of judicial scrutiny in this matter[41]. From the author's perspective, the different outcome of the *J.A. v. Italy* judgement can, to some extent, be attributed to the substantial evidentiary weight of the pieces of evidence, including some from the Italian Senate, that supported the existence of deplorable conditions in the hotspot. With that said, there's no question that the Court's readiness to depart from a line of argument that, aside from receiving strong criticism, is fundamentally at odds with the essence and wording of Article 3 played a significant role, enshrining what is widely recognized as a customary norm[42].

In this regard, a relevant factor could also be associated with the timeframe which elapsed between the two judgments. During the *Khlaifia* case, the circumstances in question could be seen as a transient outcome of the Arab Spring and, consequently, might have justified a somewhat temporary deviation from the norm. However, the same cannot be applied to the case here under examination[43]. On the contrary, what the *J.A. v. Italy* case demonstrates is exactly the long-term nature of mass migrations and of the related violations of fundamental rights, whose justification would be untenable.

Last but not least, it is contended that from the defendant's perspective, reasserting a traditional interpretation of Article 3 of the ECHR was also an essential move in terms of their defensive strategy. The Court's rationale affirmed that claims rooted in this provision can solely be rebutted by refuting the breach directly, with no option to employ a breach-justification line of argument.

The severity of the Court *vis-à-vis* the conduct of the Italian authorities is also evident in the interpretation of Article 4 of the Fourth Protocol to the Convention, setting out the prohibition of collective expulsions of aliens. In this respect, in *J.A. v. Italy* the Court seems to offer a clarification with regard to what was stated in *Khlaifia*, where the substance of the provision was identified in the "effective possibility of submitting arguments against […] expulsion" and in the appropriate examination of these arguments

[39] European Court of Human Rights, Grand Chamber, *Khlaifia*, cit., para. 185.
[40] Ivi, para. 199.
[41] J.I. GOLDENZIEL, *Khlaifia and Others v. Italy*, in *American Journal of International Law*, 2018, no. 2, pp. 279-280; M.R. MAURO, *A Step Back in the Protection of Migrants' Rights: The Grand Chamber's Judgment in Khlaifia v. Italy*, in *Italian Yearbook of International Law*, 2016, p. 314; A. SACCUCCI, *I «ripensamenti» della Corte europea sul caso Khlaifia: il divieto di trattamenti inumani e degradanti e il divieto di espulsioni collettive «alla prova» delle situazioni di emergenza migratoria*, in *Rivista di diritto internazionale*, 2017, no. 2, pp. 555 ss.
[42] G.S. GOODWIN-GILL, J. MCADAM, E. DUNLOP, *The Refugee in International Law*, 4th Ed., Oxford, 2021, pp. 300 ss. The same authors stress how, based on State practice, the principle is not yet considered as having *jus cogens* character (p. 305).
[43] In this sense, see E. ARDITO, *L'approccio hotspot e la prassi dei respingimenti collettivi nella sentenza J.A. e al. c. Italia*, cit., p. 498.

by competent authorities[44]. Without challenging the notion that emerged in that context, suggesting that Article 4 does not ensure an individual interview[45], the *J.A. v Italy* case refines the interpretation of this concept. It clarifies that the fundamental deficiency in the Italian process revolves around the absence of any evaluation of the individual circumstances[46].

This being said, a comparison between the two sets of facts suggests that the outcome of the *J.A. v. Italy* case, rather than be dictated by substantively different circumstances, it is dictated by a combination of probative aspects and judicial policy considerations. In *Khlaifia*, the use of standardised documents and the absence of an individual assessment have been justified based on the relatively straightforward situation[47] and, notably, on the absence of any fear of ill-treatment in the event of a return to the State of origin (Tunisia). In the case of *J.A. v. Italy*, the Court did not employ a comparable rationale, even though the applicants shared the same nationality. Consequently, following the same line of reasoning, the utilization of standardized documents, founded solely on their unlawful entry into the territory, would not have been deemed "unreasonable"[48]. Similarly to what has been observed with respect to Article 3, the finding of a breach of the prohibition of collective expulsion rather seems to be due to such a practice being confirmed − and stigmatised − by national and international sources[49] and acknowledged by the Government itself[50], besides being consistent with the case-law of the Italian Constitutional Court[51]. On top of this, in *J.A. v. Italy* the respondent's position has probably been made worse by the unavailability of the copies of refusal-of-entry orders signed by the claimants and of the documents relating to the identification procedure[52].

Finally, as far as the alleged breach of Article 5 is concerned, the ruling at issue here does not display any fundamental difference with respect to the *Khlaifia* case. In both instances, they arrive at the same conclusion regarding the inconsistency of *de facto* detention with this particular aspect of the ECHR. In *J.A. v. Italy*, the uncertain nature of

[44] European Court of Human Rights, Grand Chamber, *Khlaifia*, cit., para. 248.
[45] Idem. On this point see: A. GIANELLI, *Il divieto di espulsioni collettive di stranieri. Origine storica e portata attuale della norma*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (a cura di), *Migrazioni internazionali. Questioni giuridiche aperte*, cit., p. 730.
[46] On this point, see M. ROCCA, *J.A. and Other v. Italy – Is the European Court of Human Rights turning its focus to maritime migrants?*, in *EJIL: Talk!*, 17 April 2023, who stresses the relevance given by the Court to the short time elapsed between the moment when applicants signed the documents and their removal.
[47] European Court of Human Rights, Grand Chamber, *Khlaifia*, cit., para. 251.
[48] Idem.
[49] European Court of Human Rights, *J.A.*, cit., para. 110-112.
[50] Ivi, para. 107.
[51] Ivi, para. 114. In its judgement n. 275 of 8 November 2017, the Italian Constitutional Court Court called for a legislative intervention in order to provide a legal basis to deferred refusal-of-entry orders when enacted through the use of force, given their interference with Article 13 of the Italian Constitution (para. 4).
[52] European Court of Human Rights, *J.A.*, cit., para. 107-108. On the contrary, in *Khlaifia*, claimants refused to having received and signed the orders which, according to the Court, prevented them from blaming the Government for any lack of understanding (European Court of Human Rights, Grand Chamber, *Khlaifia*, cit., para. 273); the text of these orders had in any case been produced by the Government (para. 19).

the procedure followed by Italian authorities prompted the Court to expand the observations it already made in *Khlaifia* regarding the interconnection between the initial and the subsequent components of Article 5, paragraph 1, letter f). Besides the inadmissibility of any "limbo" between the two situations (prevention of illegal entry or, in the alternative, repatriation)[53], what the Court underlines is the incompatibility of any restriction of liberty in the absence of a sound and clear legal basis with the prohibition of arbitrariness enshrined in Article 5. From this perspective, it is a matter of regret that the Court − though mentioning relevant EU legislation − did not actually assess their impact on the legality of the practices adopted by the Italian Government. As previously outlined in the section dedicated to the "pertinent legal framework", it's important to note that detention, as stipulated in numerous EU regulations, is bound by specific constraints and is generally not an automatic consequence of an individual seeking international protection[54]. The same applies to the Global Compact for Safe, Orderly and Regular Migration[55] which − notwithstanding its non-binding nature − should act as a reference point in this area of law and whose Objective no. 13 qualifies migration detention only "as a measure of last resort" and requires States to work towards alternatives.

As it results from the elements outlined so far, the *J.A. v. Italy* case marks a clear position by the ECtHR that, beyond the single and specific legal arguments, points to a more severe approach towards those situations where migrants' rights are jeopardised and, as a consequence, to a shrinking of the margin of appreciations of States in this respect[56]. This is particularly evident, especially concerning Article 3, where the interpretation reverts to the initial non-derogatory rationale that underlies this provision. This occurs even in the face of real challenges encountered by States most vulnerable to mass migrations.

While the enforcement of the judgment will undoubtedly demand a substantial endeavour on the part of the defending State, its implications reach far beyond this particular dimension. At least within the framework of the ECHR system, Italy is now categorized as an "unsafe State" for migrants, and the adherence to the *non-refoulement* principle carries specific outcomes, such as the rejection by other States of any transfer or expulsion, or the arising of international responsibility. When this matter arises within the context of the CEAS, it could involve a national judge reviewing a decision made by national authorities regarding the transfer of individuals. Despite the judiciary's discretion in its evaluation, one might question whether legal and political factors tend to render the outcome of the process easily predictable.

[53] European Court of Human Rights, *J.A.*, cit., para. 83.
[54] Directive 2013/32/EU of the European Parliament and of the Council, *on common procedures for granting and withdrawing international protection (recast)*, of 26 June 2013, in OJ L 180, 29 June 2013, pp. 249-284, Art. 26.
[55] United Nations General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, A/CONF.231/3, 30 July 2018.
[56] P. PUSTORINO, *Hotspot di Lampedusa e gravi violazioni dei diritti umani da parte dell'Italia*, cit., pp. 1005-1006.

3. Taking the ECtHR seriously: the judgment by the *Raad van State*

On 26 April 2023, the Dutch Council of State adopted a decision in response to a complaint, submitted by an Eritrean citizen. This individual had arrived in Italy in early 2022 and subsequently filed an asylum application with Dutch authorities. The complaint follows the rejection of such request by the Under Secretary of State on November 28, 2022. The decision was grounded in the determination that Italy bore the responsibility for processing the application according to the provisions of Regulation 604/2013/EU, often referred to as the "Dublin III Regulation".[57] In response, the applicant contested this decision, asserting a potential risk of facing inhumane and degrading treatment in Italy. Consequently, they argued that the principle of mutual trust between the two States should not be applicable, and they raised allegations of a breach of Article 3 of the ECHR and Article 4 of the ECFR.

Before assessing the merits of the claims, the Council of State underscores, by referring to the *Jawo*[58] verdict issued by the Court of Justice of the European Union (CJEU) in 2019, that the presumption of individuals receiving treatment in line with the aforementioned provisions is subject to challenge, with the responsibility of providing evidence resting on the applicant. As outlined in Article 3, paragraph 2 of Regulation 604/2013/EU, if the applicant provides "objective information" regarding the operation of the asylum system in the intended destination State, revealing the presence of "systemic deficiencies" that could lead to the risk of torture or inhuman or degrading treatment, the transfer will be withheld, and the relevant Member State will be obligated to designate an alternative destination State.

In the case at stake, the "objective information" submitted by the applicant was a circular letter, sent by Italian Authorities themselves on 5 December 2022, requesting EU Member States to temporarily suspend transfers toward Italy due to "technical problems" linked to the lack of adequate reception facilities. This request was renewed by further circular letters, the last of which was sent on 7 February 2023.

In response to the objection raised by the Dutch Under Secretary of State concerning the transient nature of Italy's difficulties, which were not deemed serious enough to warrant a halt in transfers, the *Raad van State* countered by asserting the presence of a "tangible risk" that foreign nationals might be unable to meet their "fundamental requirements, such as shelter, sustenance, and access to clean water". Based on these elements, the decision adopted by the Under Secretary of State to transfer the applicant to Italy was declared illegitimate due to the inapplicability of the principle of interstate trust with no obligation, in the light of the information provided by Italian authorities, to

[57] Regulation 604/2013/EU of the European Parliament and of the Council, *on 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.
[58] Court of Justice, Grand Chamber, judgment of 19 March 2019, *Abubacarr Jawo*, case C-163/17.

carry out further enquiries in this regard, as requested by Article 3, paragraph 2 of Regulation 604/2013/EU.

The decision at stake represents a clear example of the functioning of the administrative cooperation upon which the CEAS is built: the safeguarding of individual rights *vis-à-vis* the governmental body responsible for handling asylum requests serves the dual purpose of ensuring the proper and consistent implementation of EU regulations across Member State. As explained by the Dutch Council of State, such system is built upon the rebuttable premise of aliens being shielded from torture or inhuman treatment when they find themselves in an EU Member State[59].

Such a hypothetical approach to compliance with Article 3 of the ECHR and Article 4 of the ECFR is not an innate feature of the Dublin system; on the contrary, it was introduced in 2013 through the Dublin III Regulation. It is, in other terms, an acknowledgement of the fictional nature[60] of the interstate trust informing the system and, at the same time, an exit strategy from those situations where serious breaches of fundamental human rights could actually take place in a Member State. This crucial message was central in the *Jawo* case mentioned by the Dutch Council of State: as recalled by the CJEU in that circumstance, EU law and, in particular, the CEAS are based on the "fundamental premise" that each Member State shares, with the other States, a set of common values, which "implies and justifies" the existence of a mutual trust between them as far as compliance with fundamental rights is concerned[61]. Given that it is "not inconceivable" that major problems in a given State expose the applicant to a breach of his or her fundamental rights, an irrebuttable presumption of compliance would run counter the very aim pursued by the Regulation and by the ECFR[62] which, on the contrary, prohibits the transfer of an individual in this kind of circumstance.

In this respect, it is worth highlighting that the idea conveyed by Article 3, paragraph 2 of Regulation 604/2013/EU and recalled by *Jawo* in turn codifies a previous ruling by the CJEU[63], where such a principle has been firstly established and which concerned the potential transfer of some individuals to Greece from the United Kingdom. The CJEU's ruling in the mentioned case was based on the deficiencies apparent in the Greek asylum process. These deficiencies posed a risk of migrants being transferred to unsafe countries like Afghanistan, State of origin of some of the applicants. The decision also took into account the inadequate conditions in the reception facilities to which migrants would be assigned. While highlighting the unequal burden carried by Greece "compared to other Member States", as well as its practical inability to "manage the situation"[64], the CJEU referenced a judgment delivered during the same timeframe by the ECtHR. This ECtHR

[59] Court of Justice, Grand Chamber, *Jawo*, cit., para. 82.
[60] To this end, see M. DEN HEIJER, *Transferring a refugee to homelessness in another Member State: Jawo and Ibrahim*, in *Common Market Law Review*, 2020, pp. 539 ss.
[61] Ivi, para. 80-82.
[62] Ivi, para. 83-84.
[63] Court of Justice, Grand Chamber, judgment of 21 December 2011, *N. S. and Others*, C-411/10 and C-493/10, para. 94.
[64] Ivi, para. 87.

ruling had arrived at a similar conclusion regarding Greece, providing strong support for the CJEU's decision, including from an evidentiary perspective[65]. The significance of the ECtHR's findings in the CJEU's rationale becomes evident in the CJEU's statement: "Information, such as that referenced by the European Court of Human Rights, allows Member States to appraise the operation of the asylum system in the Member State with responsibility. This enables the assessment of potential risks"[66]. This line of argument illustrates not only the interplay between different courts but also the desire to employ one another's findings as a factual foundation and, notably, as the basis for attributing responsibility to the transferring State.

While not entirely identical, as the parties involved are not the same, the process outlined above can provide insights into the dynamics arising from the judgments examined in this article. The outcome of the verdict by the Dutch Council of State, although a temporary measure, involves Italy's exclusion from the EU collaborative framework due to its inability to ensure the adherence to fundamental rights. Even though, formally speaking, such a conclusion has been reached on the basis of the circular letters submitted by Italy itself, chances are that the decision adopted by the ECtHR a few weeks prior might have influenced this outcome, based on a self-strengthening idea of Italy being an "unsafe State". The question that arises in this context is the extent to which such a conclusion is the result of a dialogue or, conversely, a product of an automatism driven by institutional and normative elements.

4. Is Italy an unsafe place? The slippery slope of *non-refoulement*

Before engaging in any general reflection on the wider meaning of the two decisions illustrated above, it is essential to underline the differences between them in terms of both the system they are part of and the norms they give effect to. As far as the first aspect is concerned, the ruling adopted by the ECtHR forms part of a treaty-based judicial mechanism aimed at guaranteeing the protection of human rights by Member States. Consequently, these latter can be held accountable for violations of the ECHR. The decision by the Dutch Council of State is, on the other hand, adopted by an administrative authority within the cooperation framework set up by the CEAS. Its purpose is, on one hand, to protect individuals from public administration decisions having an impact on their rights and, on the other, to guarantee the correct application of EU law on behalf of the concerned State. Another noteworthy distinction between the two verdicts pertains to the type of norm they seek to enforce: the ECtHR's judgment concentrates on the "direct" violation of certain articles of the ECHR within the defendant's territory, while the second

[65] In this regard, refer to the statement by the CJEU, which states that: "The extent of the infringement of fundamental rights described in that judgment shows that there existed in Greece, at the time of the transfer of the applicant M.S.S., a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers" (ivi, para. 89). European Court of Human Rights, Grand Chamber, judgment of 21 January 2011, application no. 30696/09, *M.S.S. v. Belgium and Greece*.

[66] Court of Justice, Grand Chamber, judgment of 21 December 2011, *N. S. and Others*, cit., para. 91.

ruling involves protection *by ricochet* by applying the *non-refoulement* principle. Considering these aspects, the concept put forth here pertains to the possible interplay between the two verdicts and the two systems, which, according to the author, could lead to a kind of slippery slope that bolsters Italy's image as an unsafe destination for migrants, rather than improving it. In other words, in the same way the decision by the Dutch Council of State might have been influenced by the conclusions drawn by the ECtHR in the *J.A v. Italy* case, the opposite might also be true in the future. The decision by the Raad van State may further solidify the notion that migrants who arrive in Italy face a real possibility of being unable to meet their fundamental requirements if Italy becomes a defendant once more, either before the ECtHR or another court.

Such a vicious circle can be traced back, first of all, to the very derivative nature of the *non-refoulement* obligation, entailing international responsibility for the transfer of an individual to a State where serious human rights breaches occur. Consequently, it would be apparent for the second State to adopt such a conclusion as the central basis for its transfer decisions, as an opposite stance would leave it vulnerable to the possibility of being held accountable for the violation of the *non-refoulement* obligation. This issue can arise in any system where the latter applies. For instance, in the case of *M.S.S. v. Belgium and Greece*, the ECtHR found both Greece and Belgium responsible for the breach of Article 3 due to the deplorable living conditions endured by asylum-seekers and the decision to subject them to such circumstances, respectively.[67]

In the scenario delineated thus far, where the impact is predominantly inter-system, the slippery slope phenomenon is intensified by institutional disparities, which, in turn, manifest themselves in the objectives pursued and the stance of the parties involved. In an adversarial mechanism such as that of the ECtHR, where the identification of a responsible State is part and parcel of the aspiration to protect human rights, the defendant will obviously counter the allegations against it in order to avoid being held responsible of a serious breach. In the Dublin system, where protection of the individual is integrated into the overarching interest in the uniform application of EU law, the respective positions of claimant and defendant − in our case, the applicant and the Dutch Under Secretary of State − are less polarised, and resistance to allegations is more nuanced. This divergence also contributes to explaining Italy's apparently paradoxical conduct in the two contexts: if, as a defendant in front of the ECtHR, the Italian Government attempts to counter the allegations, in the second case the very same State – though not a party to the proceedings – admits and declares, through its circular letters, not to be able to guarantee the migrants' fundamental rights.

These elements are also reflected in the attitude of the judicial organs, whose activities show a different rationale. In situations like the ones described above, the Court might struggle between the awareness of the undeniable difficulties encountered by States most exposed to migration flows and its judicial role. As clearly demonstrated by the diverging orientation showed by the ECtHR in the *Khlaifia* and in the *J.A.* case, a different

[67] European Court of Human Rights, Grand Chamber, *M.S.S. v. Belgium and Greece*, cit.

outcome would have been difficult to reconcile with the absolute and cogent nature of the obligation enshrined in Article 3 of the ECHR. On the other hand, the Dutch Council of State, along with anybody in a similar position, does not face the same dilemma. This is primarily because a prospective decision to support a transfer to an unsafe State would, on an international scale, result in the responsibility of the State within which the judiciary operates. This international obligation takes precedence over any endeavour to uphold the "fiction" of interstate trust. In this respect, it is interesting to note the contrasting assessment made by the two organs of the systematic nature of the deficiencies shown by the Italian hotspot. The ECtHR supports its findings by making clear that the problematic situation experienced by Italy does not exonerate it from its obligations − a point that the defendant had not actually raised, but that was at the origin of the much-criticised *Khlaifia* judgment. In the ruling of the Dutch Council of State, the same circumstance simply acts as the premise upon which the decision to deny the transfer is based, consistent with the text of Article 3, paragraph 2 of Regulation 604/2013/EU and without any need for the administrative judge to justify its position. In this respect, it is useful to underline that, in the context of the CEAS, and based on the logic of the principle of *non-refoulement*, the decision not to transfer the applicant to the State where such flaws exist is not a faculty but rather a full-fledged obligation, and as such an integral part of the proper functioning of the administrative cooperation system.

If we adopt a strictly legal approach, it is reasonable to imagine that States which are part of the CEAS − but also any State that considers itself bound by the *non-refoulement* principle − will probably stop transfers towards Italy. At the same time, this latter, in addition to compensating the claimants, should try to rectify the situation so as to be rehabilitated as a safe State again. However, the impression is that the convergence of interests between the State unable to guarantee the fulfilment of fundamental rights and other States called to apply the *non-refoulement* principle might result in a different outcome, *i.e*. the block of the reception mechanism through the creation of a *fait accompli*. In this respect, the ECtHR post-judgment phase will be of extreme interest from the viewpoint both of the defendants' conduct and of the attitude of Council of Ministers, called to assess effective compliance with the ruling and possibly split between the preservation of the judicial role of the Court and the need to avoid a long-term disruption of transfers between Council of Europe Members.

5. Some concluding remarks

In light of the above-mentioned elements, it is possible to outline some concluding remarks about the two judgments and the judicial dialogue characterising migration. In this setting, and although not directly addressed by the relevant verdicts, an initial observation pertains to the longstanding issue of the extent of the *non-refoulement* principle, specifically the potential for it to encompass rights beyond those protected by Article 3 of the ECHR. The relevance of this issue is to be identified in the wide array of

human rights breaches often suffered by migrants and asylum-seekers and the need to expand the scope of the protection offered by Article 3 of the ECHR as much as possible when applied in relation to the *non-refoulement* obligation.

Regarding the *J.A. v. Italy* case, a significant question arises as to whether the detention endured by the claimants in the Lampedusa hotspot, apart from constituting a breach of Article 5, might also give rise to concerns under Article 3. This, in turn, could implicate the accountability of States intending to transfer individuals to Italy. As is known, while part of doctrine rejects such a hypothesis, based on the requirement of covered rights being part of *jus cogens* or having non-derogable nature[68], the opposite opinion is expressed by those arguing that the language used in the *Soering*[69] judgment does not justify any *a priori* exclusion and that therefore, in principle, "all rights laid out in the Convention can control extradition"[70]. An alternative solution might consist in considering the transfer of an individual to a State – in this case Italy – where a practice exists of arbitrarily depriving migrants of their freedom as directly violating Article 3, especially when detention takes place for a long time, by reason of the "dehumanising effect" of such a condition[71].

Widening the sight to the systemic consequences of the interaction between courts and sub-systems of international law, one of the elements emerging from this analysis is the convergence between the logic informing the ECHR and its implementation mechanism, by definition designed to ensure compliance with human rights, and the functioning of the Dublin system where, since the adoption of Regulation 604/2013/EU, protection of applicants prevails on interstate trust in case of systemic flaws. Such convergence could, in turn, strengthen a further systemic effect: while, on the one hand, in both scenarios, the "exclusion" of an unsafe State aligns with the objectives being pursued, on the other hand, it is not hard to perceive it as an indirect means to achieve, through a legal mechanism, the solidarity that has thus far proven challenging to attain on the political front.

The reference is, of course, to the several unsuccessful attempts by those States that are most exposed to migrations influxes to obtain the support of other EU Member States and to adjust the CEAS consequently. It is evident that the interruption of transfers would not suffice to rebalance the condition of concerned States, as the bulk of migrants comes from direct arrivals, especially by sea; notwithstanding this, such disruption would act

[68] T. VOGLER, *The Scope of Extradition in the Light of the European Convention on Human Rights*, in E. MATSCHER, H. PETZOLD (eds.), *Protecting Human Rights: the European Dimension. Studies in Honour of Gerard J. Wiarda*, Koln, 1988, p. 670.

[69] The open nature of the list of rights that can be attracted by Article 3 when applied to cases of extradition is supported by quoting, *inter alia*, para. 86 of the *Soering* judgment, where the Court states that "a Contracting State may not surrender an individual unless satisfied that the conditions […] are in full accord with *each of the safeguards of the Convention* (European Court of Human Rights, judgment of 7 July 1989, application no. 14038/88, *Soering v. United Kingdom*; emphasis added).

[70] S. ZÜHLKE, J.-C. PASTILLE, *Extradition and the European Convention - Soering Revisited*, *Heidelberg Journal of International Law*, 1999, p. 766.

[71] M.-B. DEMBOUR, *The Migrant Case Law of the European Court of Human Rights: Critique and Way Forward*, in B. ÇALI et al. (ed.), *Migration and the European Convention on Human Rights*, Oxford, 2021, p. 35.

both as a symbolic recognition of the problems endured by these people and as a warning against those States traditionally reluctant towards migration management.

Aside from the perplexities raised by a system where breaches of fundamental rights are the only leverage to obtain solidarity with regard to a global problem, one may wonder whether the agreement recently reached within the EU Council will be able to reverse the trend. The possibility for EU Member States to push migrants back to the last safe transit State[72], as well as the so-called "flexible solidarity" mechanism, *i.e.* the possibility of financial compensation in exchange of a refusal of migrants on the territory[73], seems to point to a process unable to satisfy the need for effective burden-sharing between EU Member States. In this regard, it is worth recalling that a commitment towards the creation of a "solidarity mechanism" was already enshrined in Directive 2001/55/CE, "with the aim of contributing to the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx"[74]. According to the same provision, the mechanism should have consisted of two components, a financial one and another concerning "the actual reception of persons in the Member States". Based on the current state of negotiations, it is therefore evident that the original aspiration has been watered down to the mere financial aspect, matched to a "utilitaristic" approach towards *non-refoulement*, that would ultimately be applied as a shield from reception.

Taking into consideration the aspects emphasized thus far, along with the persistent challenges confronting EU border States and the recent choice by other States, which are less geographically exposed, to suspend the voluntary solidarity arrangement established in 2022[75], several suggestions can be put forth. It is proposed that only a compulsory mechanism, establishing specific commitments for each Member State, can alleviate the burden on the most affected States and render relocations more foreseeable. Such a mechanism would help prevent the dynamics described in these pages, where the violation of fundamental rights resulting from substandard conditions in reception facilities becomes a sort of *fait accompli* that the concerned States, as well as other Member States, are hesitant to question. The former group hopes to restore balance in the situation, while the latter group fears being accused of violating the *non-refoulement* principle. Far from diluting the scope and the value of the principle, a system based on "compulsory solidarity" would on the contrary add to the legitimacy of the ECtHR

[72] 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 13 June 2023, Art. 8, para. 5.
[73] Ivi, Art. 7c, para. 2.
[74] Directive 2001/55 /EC of 20 July 2001 *on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, in OJ L 212 of 7 August 2001, p. 12-23, recital n. 20.
[75] On the 22 of June 2022, the Governments of eighteen Member States adopted the so-called "Declaration on solidarity", setting out a total annual relocation volume, based on the population and on the GDP of each pledging State, with the aim of primarily benefitting States confronted with disembarkations following search and rescue operations by sea.

jurisprudence on this point, as it would be harder to cast doubts on the responsibility of the defendant due to a situation of *force majeure*. From this perspective, the obligation to share the burden stemming from mass influxes would allow to apply the *non-refoulement* principle in a manner that is more consistent with the European dimension of the phenomenon, avoiding the risk of presenting serious human rights breaches as an inevitable by-product of migration management, especially when not matched to the necessary burden-sharing mechanisms.

ABSTRACT: The purpose of this contribution is to develop a reflection on judicial dialogue within the framework of migrants' rights, moving from two recent judgments adopted by the ECtHR and by the Dutch Council of State, both relating to the violation of fundamental rights in Italy. While the former ruling held Italy responsible for the violation of Article 3 and 5 of the ECHR by reason of the harsh living conditions in the hotspot of Lampedusa, the second established that these and other systemic deficiencies afflicting reception infrastructures preclude the transfer to Italy of an individual requesting international protection. Following an introduction and analysis of the two rulings, this article will delve into the interconnection between them, with a particular emphasis on the potential emergence of a "slippery slope" mechanism. In this context, the disruption of inter-state trust that underlies the Dublin system tends to solidify the exclusion of a state (in this instance, Italy) from the category of nations where the rights of migrants are considered adequately protected.

KEYWORDS: European Convention of Human Rights – Common European Asylum System – *non-refoulement* – migrants' rights – unsafe State.