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The incident of Bardonecchia: the internal border issue and the Italo-French relationship

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“L’amitié franco-italien est plus que jamais indispensable pour relever les défis qui sont les notres au XXIème siècle”

(Tweet of Ministère de l'Europe et des Affaires étrangères, 7 february 2019)

Contents

Introduction

The biggest and most important country near the Italian borders, France it's also the one sharing the majority of the social, historical, political and economic features with the Peninsula, though its unification took place centuries ago. As well as every rose has its thorns also the Italo-French relationship had to face several difficulties through the centuries. Rivals for the control of the North African regions, the defeat of Italy led the other country to join the Triple Alliance[1]. Nevertheless, the WWI saw Italy and France coming back together, as the former was promised with Italian territories kept in the hand of the Austro-Hungarian Empire and the latter needed an ally to defeat Germany. Since the beginning of WWII, France took the distances from the inevitable bound created between the regimes of Mussolini and Hitler, collecting a strong defeat in 1940. However, the sincere desire of both countries to restore an internal scenario of peace and trust necessary to avoid any other tragic event have kept the two States through centuries.

Components of "the Sixties"[2] States founding the European Community, both Italy and France have been collaborating for the creation of the G7/G8 and NATO. They have been sharing a 400-kilometre border since the Duchy of Savoy ruled in Italy, while the final division only happened in 1860 with the Treaty of Turin. It established the Italian concession of Nice and Savoie in exchange for Lombardy. However, the territorial border doesn't match the linguist border between the two countries. The Italian-speaking country of Corsica is actually a French region, while Valle d'Aosta speaks traditionally French even if it stays within the Italian territorial borders.

The incident of Bardonecchia sets as a piece in the puzzle composed of the several dangerous episodes of illegal trespassing and abuse of power done by the French authority in the Italian territory. It underlines the difference of thought between the two State's migration policies. Especially since the establishment of Italian new 2018 government, the French President has started to critique the measures used to face the migrants' problem. An example of this may be seen in the *Aquarius Dignitus* rescue, where these divergences rose. As a matter of fact, Italy

[1] H. S. W. CORRIGAN, *German-Turkish Relations and the Outbreak of War in 1914: A Re-Assessment*, in *Oxford Journals*, 1967, p. 145, available online.

[2] A. MARWICK, *The Sixties: Cultural Revolution in Britain, France, Italy, and the United States, c.1958—c.1974*, London, 2011, p. 11.

was blamed of being irresponsible and cynic[3] by the Emmanuel Macron. The following analysis of the Bardonecchia case cannot establish a solution but surely provides an understanding of the consequences that may derive from the agent's dangerous behaviour. Hence, the decomposition of chapters that follows stresses the international principles and treaties through which France and Italy have been regulating their interactions since the beginning.

Chapter 1 – Territorial Sovereignty and the Italo-French Relationship – consists of the explanation of the International Law principles shared by both the countries, with a focus on the International and Bilateral Agreements building up their relationship. A brief glance at some historical migration approaches will be discussed in the last sub-paragraphs of the chapter. Chapter 2 – The Incident – provides an in-depth analysis of the incident of Bardonecchia included in the scenario composed of other global examples of illegal border trespassing. It ends with the explanation of the breaches made by the agents responsible for the incident in order to show the seriousness of the fact. Conclusions closes the analysis providing an overall view and a list of the possible consequences and further move from the States.

[3] C. DEL FRATE, *Migranti, Aquarius verso Valencia: Scontro Francia-Italia sui migranti Parigi: "Italia cinica e vomitevole"*, in *Corriere della Sera*, 2018, available online.

CHAPTER 1 – Territorial Sovereignty and The Italo-French Relationship

1.1 Territorial Sovereignty and borders regulation in general international law

International law is composed of different subjects, which can be distinguished between territorial and non-territorial entities. The States are the main subjects among the territorial ones and appears in international law's discussions since many centuries. Their sovereignty can undergo another authority's sovereignty only if the States decide it and, for this reason, States are considered sovereign. It has been questioned for years whether the State is the predecessor of international law. The traditional division of time shows the Peace of Westphalia[4] in 1648 as a turning and a starting point of the contemporary international law, where the State is defined as primary subject.

The Treaty of Westphalia was signed to put an end to the Thirty Years' War[5], which was mostly fought in north-western Germany, but involved a huge number of States, such as: the Holy Roman Empire, France, the Swedish Empire, the Dano-Norwegian Realm, the Polish-Lithuanian Commonwealth, Russia, England and the Ottoman Empire. It started around 1618, after the Austrian failed attempt to impose Catholicism on Protestant areas but gave rise to commercial and political conflicts more than religious ones. It was ended in 1648 with the signature of 194 States and the possibility of Protestantism to be practiced. Moreover, the treaty marked the Spanish decline, while increased the power of France and the Swedish Empire, recognising the independence of the United Provinces (Dutch Republic) and the Swiss Confederation from the Roman Empire. France obtained the possession of Metz, Toul and Verdun, imposed its jurisdiction to Alsace and Pinerolo territories, which before were under the control respectively of Austria and Italy.

The State as a primary subject presupposes two main conditions: the "centrality of the territory"[6] and the "effective deployment of sovereign powers over it"[7]. These two criteria

[4] B. A. SIMMONS and R. H. STEINBERG, *International Law and International Relations*, Cambridge, 2007, p 260.
[5] B. STRAUMANNTHE, *The Peace Of Westphalia (1648) As A Secular Constitution*, in *Institute For International Law And Justice New York University School Of Law*, 2007, Vol. 15, p. 3, available online.
[6] G. DISTEFANO, *Theories on Territorial Sovereignty: A Reappraisal*, in *Journal of Sharia and Law*, 2010, Vol. 41, p. 26, available online.
[7] *Ibidem.*

enable the "sovereign equality"[8] between UN Member States, presupposing the territorial order as a necessary condition for the international one. In particular, the second one establishes the need for the recognition of governments *de jure*[9], by a legitimate way of using power over the territory and population, or *de facto*[10], which implies that another State recognises it as a partner for negotiations or exchanges. Notably, the territory is a fundamental element needed to define a State, its powers and both territorial and sovereign limits. This concept should not be confused with the idea of jurisdiction, also linked to the territory, which relates to the legal capacity to enforce and prescribe laws, as derived by the Latin term it comes from: *juris dicere*. Moreover, according to the Montevideo convention of 1933, there are four requirements that a State should possess to be considered as such: "a population, a territory, a government and a capacity to enter into relations with other states"[11].

State sovereignty is exercised within the geographical limits of territory. The term boundary, or boundary line, was firstly used in 14th century[12] and it derived from the idea of armed front, the line that the enemy cannot cross to enter into the other territory. According to this idea, the boundary should be linear and continuous, even though there is no obligation to put some material objects (stones, walls, etc) to identify the line. The process of identification of State boundaries is governed by law and based on the legal title guaranteeing the proper acquisition of the territory. The natural elements do not have a legal relevance during this process but may be used for practical reasons to create a clearer visibility of the boundary. Moreover, the process of determination of a boundary shared among two or more States triggers the *uti possidetis*[13] principle, which is used to "solve territorial disputes without resorting on the use of force"[14] and to claim that none of the territories involved is *terra nullius*[15], so cannot be potentially acquired by the other State. In the case of delimitation of maritime boundaries, the criteria used is established in Article 12 (1) of 1958 Convention on Territorial Sea and the Contiguous Zone signed in Geneva: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points

[8] Art. 2, para. 1, Charter of the United Nations of 24 October 1945.
[9] B. A. SIMMONS and R. H. STEINBERG, *International Law and International Relations*, Cambridge, 2007, p 208.
[10] *Ibidem.*
[11] J. KLABBERS, *International Law*, New York, 2015, II edition, p. 69-70.
[12] J. R. V. PRESCOTT & G. D. TRIGGS, *International Frontiers and Boundaries: Law, Politics and Geography*, Boston, 2008, p.8.
[13] B. A. SIMMONS and R. H. STEINBERG, *International Law and International Relations*, Cambridge, 2007, p 319.
[14] G. DISTEFANO, *Theories on Territorial Sovereignty: A Reappraisal*, in *Journal of Sharia and Law*, 2010, Vol. 41, p. 46, available online.
[15] M. N. SHAW, *International Law*, New York, 2008, sixth edition, p. 398.

on the baselines from which the breadth if the territorial seas of each of the two States is measured (…)"[16].

As it can be understood from the different methods employed for the determination of a boundary, the State's territory is composed of different parts: the land and its subsoil, territorial waters and their subsoils and the internal water with their soil and subsoil, and the atmospheric space over them. For a territory to be recognised as such, it must hold three features determined by the principle of territoriality: "stability, delimitation and continuity"[17]. The first feature refers to the permanence of people who reside in the state. Secondly, the clear definition of the borders, whose absence may call into question the whole State and its existence.

Finally, the continuity of the State, which includes the presence of island, territories separated by the sea, territories of another State or enclaves. Nowadays, Lesotho is the only case of enclaves as a State's territory surrounded by another State, since it is located in South Africa but belongs to the Commonwealth. This principle was established after the Lotus case of 1926, when a French and a Turkish vessel collided, causing the death of many Turkish people. The Permanent Court of International Justice sentenced France of negligence and stood up supporting the Turkish possibility to accuse the French State even though the accident happened outside Turkish borders, because it provoked a damage and involved mainly its nationals, given that at the time no rule could be invoked to exclude the exercise of Turkey's jurisdiction.

The principle of territoriality[18], according to which States have exclusive authority to deal with criminal issues inside the territory, and the principle of sovereignty, expressing the legal nature of the relationship between State and Territory, are the two pivotal principles making the State the primary subject under contemporary international law. The legal nature of the relationship connecting the States to their territories is based on the effective sovereignty within their borders, meaning the capacity to exercise a "subjective right on the State"[19], excluding others (*ius excludendi alios*).

The relationship between the State and the Territory is explained in different ways in four theories: the "Theory of the territory-object"[20] (*Eigentumstheorie*), the "Theory of the territory-

[16] Art. 12, para.1, Convention on Territorial Sea and the Contiguous Zone of 29 April 1958.
[17] G. DISTEFANO, *Theories on Territorial Sovereignty: A Reappraisal*, in *Journal of Sharia and Law*, 2010, Vol. 41, p. 27, available online.
[18] R. CORNELISSEN, *The Principle of Territoriality and the Community Regulations on Social Security*, in *Common Market Law Review*, 1996, available online.
[19] G. DISTEFANO, *Theories on Territorial Sovereignty: A Reappraisal*, in *Journal of Sharia and Law*, 2010, Vol. 41, p. 28, available online.
[20] *Ibidem*.

subject"[21], the "*Kompetenzentheorie*"[22] and the "Dominant theory"[23]. According to the first, the relationship between the State and the territory may be summed up by the sentence *quisquis est in territorio est de territorio*[24], which reduces it to a mere exclusive possession and disposition of goods. It implies the same legal order in both the municipalities and the State, involving a double possession of the same territory from both the State and its nationals. The relation is described as goods' possession, where both the subjective and the excluding right on the territory and its exploitation make no difference between an *imperium* and a *dominium*. The possession of the same property from two entities is solved creating two different levels of law.

Differently from the aforementioned theory, the one of the territory-subject is based on the essence of the State rather than the possession of a territory. It used to be extremely popular in Germany, though it leaves aside the explanation of the State's changes due to changes in other internal elements, or the personal dimension and the powers that can be exercised on citizens abroad, not related to the territory. Fichte's "Speeches to a German nation" explained and diffused the sense of essence of the State. This author described Germany as the only nation composed of a real population (*Volk*). They are the only one speaking a language which is able to produce not only an elitist culture, but thoughts that can mobilize and unify the population and one single agglomerate of similar people. Unfortunately, these theories also inspired part of the Nazi creed, summed as "Ein Volk, Ein Reich, Ein Führer"[25] (One population, one reign, one leader). For this reason, this theory is largely criticised.

The above-mentioned problem of the citizens abroad and the State exercise of its power is solved by the Kompetenztheory. Here, the territory is defined as a territorial jurisdiction (*ratione loci*) State that, together with the personal one (*ratione personae*), compose the two competences of the State, defining its powers on both. In the Dominant one, the State is perceived as a sum of rights that it holds: exclusive power on the territory, *ratione loci* and *ratione personae* and *imperium*, as a territory conceived as a place, and *dominium* as a good. This theory is employed to explain the possible difference between sovereignty and its exercise, which may occur in situation of split territories.

The other aspects influencing the relationship between the State and the territory are the modes of acquisition of the land, which can be distinguished between original and derived, whether there exists a previous right by another subject (State) or not. According to this idea, the original

[21] *Ibidem.*
[22] *Ibidem.*
[23] *Ibidem.*
[24] *Ibidem,* p.29.
[25] A. HEINRICH, *Ein volk Ein reich Ein führer! Gedichte um Österreichs Heimkehr*, Munich, 1938, p. 1.

modes of acquisition did not presuppose any right from another subject of international law. The occupation of a *terra nullius*, the prescription and the accretion fall into this category. These modes will be discussed hereunder.

The mode of occupation can be identified by the acquisition of an abandoned territory or a territory under no authority (*terra nullius*) from a State willing to establish its sovereignty over it. It is necessary for the recognition of such authority an intention or a real act of sovereignty that "must be peaceful, real and continuous"[26]. According to the principles of International Law, the sovereignty is valid through a legal act or treaty with another Stat, or by an act affecting the territory. The second mode of acquisition, meaning the prescription, is the peaceful and interrupted occupation of a State that originally belonged to another one (not *terra nullius*). The requirement needed for the validation under International Law is a reasonable length of time, which is decided case by case. During the time established, the sovereignty must be continuous, which implies the consent of the previous sovereign, and peaceful, meaning that the prescription will be null in case of protest or violent act. The accretion mode refers to a geographical process of attachment of a land to a pre-existing one because of a natural cause. According to this idea, the translation of sovereignty over the new territory by the acquiring State needs no formal act under International Law. The attachment may happen in different ways, depending on the natural phenomenon involved.

The derived modes are based on a unilateral act or a bilateral or multilateral (treaty) one that transfers the sovereignty from one subject to another, which includes cession, annexation, conquest. All these are described in the following part. Cession is the term used to indicate the mode of acquisition based on the transfer of sovereignty of one State to another territory. This transfer may be the result of purchase, exchange, merge or any other voluntary act. The cession may involve part of the territory or its totality. Voluntary cession[27] has been experienced in history with 1875 merge of the Republic of Texas with the United States or 1866 French cession of Venice to Italy. On the other hand, the 1871 cession of Alsace-Lorraine from French to German sovereignty, as well as Korean and Japan merge in 1910, were the result of involuntary cessions resulting from war. The conquest mode consists of the defeat of the pre-existing and opponent State with the occupation of all or part of it. According to International Law, conquest itself is a basis for sovereignty right if followed by a formal annexation. The derived mode of acquisition is the annexation, which results into the merge of a territory into the pre-existing State as well as the merge of the sovereignty over the territory by the acquiring State. However, the mode of conquest is nowadays illegal as established by article 2(4) of the Charter of United

[26] W. ABDULRAHIM, *State Territory and Territorial Sovereignty*, available online.
[27] C. H. HACKWORTH, *Digest of International Law*, 1940, p. 421, available online.

Nations: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"[28].

The prohibition of the use of force as instrument through which acquire a territory is one of the two *jus cogens* norms which, together with the right of self-determination, limit the extension or transfer of sovereignty. The right of self-determination, meaning the right of people to choose who they are both as individuals and nationals should never be infringed during the process of extension of sovereignty. Neither an effective occupation nor the recognition of a possible illegal situation by other States may impair this right, which belongs to the population fighting for its determination. The only case which falls out of both modes of acquisition is the *ope legis*. This mode arises if two conditions are met: there must be a "legal rule providing for such and effect"[29] and the forecasted natural phenomenon must occur.

1.1.1 Italian and French borders controls

The Schengen Agreement was signed in April 1985 and entered into force ten years later, while in December 1997, establishing the "World's Largest Visa Free Zone"[30] composed of 26 Member States, including non-EU countries, creates an area with the same external border controls and abolishes internal ones. The idea behind this agreement was to incentivize a free and unrestricted movement of people. However, since the 1990s, the internal border controls became a fundamental task to deal with through a strategy in order to solve the security deficit deriving from the abolition of internal border controls.

The European Union has established several obligations and measures applied in order to intercept migrants without valid documents and block them from arriving at the external borders control of the Union. Such measures, also known as non-arrival measures – *"*non-entré*"* [31] –, define the obligation of carrier companies to transport back any passenger with no valid documents for travel, with the possibility of incurring into financial sanctions if not respected, and the need to coordinate EU foreign missions, carriage companies and border guard officials, instructing them on the Schengen regulations.

[28] Art. 2, para. 4, Charter of the United Nations of 24 October 1945.

[29] G. DISTEFANO, *Theories on Territorial Sovereignty: A Reappraisal*, in *Journal of Sharia and Law*, 2010, Vol. 41, p. 42, available online.

[30] SCHENGEN-VISAINFO.COM, *Schengen Area – The World's Largest Visa Free Zone*, in *Schengen Visa Insurance*, 2018, available online.

[31] P. ORCHARD, *A Right to Flee: Refugees, States, and the Construction of International Cooperation*, Cambridge, 2014, p.20.

According to the aim of the Schengen agreement, which wanted to sustain the freedom of movement within the European Union, all nationals from one of the Schengen Area's Member State can move freely needing just their passport or identity card. On the contrary, for all nationals from non-Schengen countries a visa is required. There are two different kind of visa: the Schengen Uniform visa (visa C), for people seeking to stay in EU for 90 days or less, and the National visa (visa D), for people seeking to stay in EU for longer than 90 days.

The Italian rules regarding the entrance in the state are enforces by the national Italian police[32]. According to such, every foreigner or stateless person from the external frontiers of the Schengen Area may enter into Italy if they show at the frontier and possess a passport and any travel document equivalent, as a valid visa. They should also possess any document to assess and justify the purpose and the travel conditions, having the adequate means to maintain themselves and their own family and to return home. Anyone perceived as a threat to the security of the Italian state or any other State it is partner with would not be admitted. Once at the frontier, foreigners and stateless people would undergo special frontier, custom, currency and sanitary controls. On the other hand, anyone entering the Italian territory for educational, business and tourist reasons should not ask for the residency permission but should only present a certificate of presence if the stay will last less than 3 months. Foreigners are exempt from exhibiting this certificate whether their travel document already has the official Schengen stamp.

Finally, the rules for asylum seekers and all the processes establishing the possibility to enter in the state territory are defined according to the Dublin III regulation[33]. Identically, France has its own rules regarding the documents that must be presented to the Border Police[34]. First of all, a valid passport issued less than 10 year before and valid for at least 3 months after the arrival is needed or a valid visa. Proof of accommodation covering the whole duration of the stay and Sufficient financial means. The return ticket or the financial means to acquire one and, finally, any document providing details on the profession or the capacity of the traveller as well as on the establishments or organisations located in France which are expecting you, if you are on a professional trip.

Some categories, such as anyone holding a valid French residence permit or a movement document for foreign minors or a French identity certificate, French citizens' spouses, anyone

[32] POLIZIA DI STATO, *L'ingresso in Italia*, 30 September 2013, available online.
[33] Regulation (EU) n. 604/2013 of the European Parliament and of the Council of 26 June 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for internal protection lodged in one of the Member States by a third-country national or a stateless person.
[34] PORTAIL FRANCE-VISAS, *Long-stay visa*, in *France-visas*, 2017, available online.

with a long-stay visa marked with "residence permit must be applied for upon arrival in France"[35] or people with special functions (diplomats, members of the parliament…) are exempted from presenting these documents. Foreigners and stateless people may apply for both kind of visa, which must be validated within 3 months after the arrival in the state. Vice versa, the possibility of legally staying within the territory ends, giving no chance to enter into the Schengen Area once again.

1.2 Internal borders according to the European Treaties and the Schengen Agreement

Freedom of movement of "goods, services, capital and persons"[36] are the 4 pillars of the European Union (EU) and the ability to move among countries without internal border controls is one of the greatest achievements enabling the creation of a single market for the economic and social cohesion and growth. The removal of internal border checks established a step forward the creation of a Union which has been evolving after globalisation, technologies improvement and travel cost reduction and has connected countries and people from different parts of the world. At this point, borders were no longer conceived as a line separating physically and culturally two or more countries, but as a line involving several bordering practices. The abolition of internal borders, meaning the elimination of internal border checks, made possible a connection and unification between people and cultures, already established by medias and technology[37].

Borders and their security are two crucial points within the European Union as one of the greatest achievements in the path through integration, making the Schengen Agreement a turning point in the EU history. Discussed soon after the end of the Second World War, the possibility of the creation of a common area with no internal barriers to the freedom of movement was delayed in order to give to the States involved in the conflict enough time to heal from the damages received. Actions took to a result only in 1985 when the Schengen Treaty was signed, and the internal frontiers were torn down. The Treaty became effective only 10 years later, in 1995, after the establishment of a common visa policy in the '90s.

However, in the difficult context after the 9/11 attacks to the World Trade Centre, the abolishment of internal border controls not only pointed out the benefits demonstrated by the

[35] *Ibidem.*

[36] R. SCHÜTZE, *European Union Law*, Glasgow, 2015, p. 471.

[37] C. JEFFRAY, *Fractured Europe: The Schengen Area and European Border Security*, in *Australian Strategic Policy Institute (ASPI) Special Reports*, 2017, available online.

huge numbers of journey per day in the Schengen Area (over a billion[38]), but showed the threats the States can be exposed to. For this reason, the creation of this area goes hand in hand with the creation of a set of "a body of rules (the Schengen *acquis*)"[39] enforcing the controls at the external borders through "a common visa policy, police and judicial cooperation, common rules on the return of irregular migrants and the establishment of common data-bases such as the Schengen Information System (SIS) together with the Visa Information System (VIS)"[40]. External border controls and the Member State's cooperation, together with the exchange of information, are pivotal for the elimination of threats which could jeopardise the free movement of citizens, leaving the restoration of internal frontier controls to the last resort solution.

The foundations for the creation of such area were laid before the Schengen Treaty through other European ones, such as: the Paris Treaty, the Treaty of Rome, the Single European Act and the Maastricht Treaty. First of all, the 1951 Paris Treaty, drafted on the idea of Robert Schuman, established the European Coal and Steel Community which aimed to create an economic relationship between France and West Germany in order to banish the possibility of a future war and solve old disputes among these two countries. The roots for the creation of a preferential area can be found in this Treaty, which Economic Community was "founded upon a common market, common objectives and common institutions"[41] involving 6 states: France, West Germany, Italy, Belgium, Luxembourg and the Netherlands. Moreover, the prohibition of "any discrimination in remuneration and working conditions between nationals and migrant workers […] in particular, they shall endeavour to settle among themselves any matters remaining to be dealt with in order to ensure that social security arrangements do not inhibit labour mobility"[42] is settled by article 69 (4).

Next, the Treaty of Rome signed in 1957 made a step forward, from a preferential trading area to a free trade area with no barriers established between the Member States, called European Economic Community (EEC)[43]. By increasing the predictability of the countries, the Treaty also increased the one of the Member States which enabled the development of a tighter cooperation through common policies, such as agriculture ones, and institutions, like the

[38] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, 16 September 2011, Schengen governance – strengthening the area without internal border control, COM (2011) 561 final, available online. Hereinafter: COM (2011) 561 final.
[39] *Ibidem.*
[40] *Ibidem.*
[41] Art. 1, Treaty of Paris of 18 April 1951.
[42] Art. 69, para. 4, *Ibidem.*
[43] P. COFFEY, *Main Economic Policy Areas of the EEC - Towards 1992: The Challenge to the Community's Economic*, Dordrecht, 1988, II edition, p.8.

European Atomic Energy Community (Hereinafter: EURATOM)[44] for peaceful use of nuclear energy after the second world war. Important changes were brought by this treaty which settled the main features of the free trade area needed for the creation of a common market, final goal of the Community.

Among these features listed in article 3 there are: "the establishment of a common customs tariff and of a common commercial policy towards third countries and the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital"[45]. Internal barriers are still present in this Community, though the Treaty weakened these by improving the collaboration between the Community's Member States for the movement and diffusion of each of the four above-mentioned freedoms, which are discussed respectively in articles 9, 59, 61 and 48. The freedom of movement of goods, as defined by article 9, is established through "the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries"[46], while article 48, together with article 7, employ measures for the free movement of workers eliminating any discrimination on the basis of nationality of the Member States regarding employment, remuneration and other working conditions.

Then, the Single European Act 's article 13, supplementing article 8(a), established the freedom of movement and its development among the Member States by saying "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty"[47]. Indeed, article 16 (4) modifies article 70 (1) of the EEC treaty stating "unanimity shall be required for measures which constitute a step back as regards the liberalization of capital movements"[48].

Finally, the Treaty of Maastricht of 1992 – also known as Treaty on European Union – brought many changes, amending the previous Treaties (Paris, Rome and Single European Act) to create the European Union (EU), as defined by article A: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen. The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organize, in a manner demonstrating consistency and solidarity,

[44] D. A. HOWLETT, *EURATOM and Nuclear Safeguards*, in New York, 1990, p.12.
[45] Art. 3, lit. c), Treaty of Rome of 25 March 1957.
[46] Art. 9, para. 1, *Ibidem.*
[47] Art. 13, Single European Act of 17 February 1986.
[48] Art. 16, para. 4, *Ibidem.*

relations between the Member States and between their peoples"[49]. This made the Schengen Treaty and its system applicable within the Union and between its Member States, "reaffirming their objective to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by including provisions on justice and home affairs in this Treaty"[50]. Among the objectives of the Union, it can be found the willingness to build "an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital"[51] (article 3), prohibiting any restriction on movement regarding these four.

"The suppression of internal borders of the European Union is recognition that all the citizens of the states concerned belong to the same space, that they share a common identity". This proclamation stencilled on the Schengen Museum wall in Luxembourg sums up the main goal of the Schengen Agreement. Established by the treaty signed in June 1985 in Luxembourg, the Schengen Treaty created a zone which internal borders were eliminated in order to create a single external one for the realisation of the common market, as defined by the Treaty of Rome. However, it must be emphasised the distinction between the European Union, Europe and the Schengen Area, as demonstrated by the figure below.

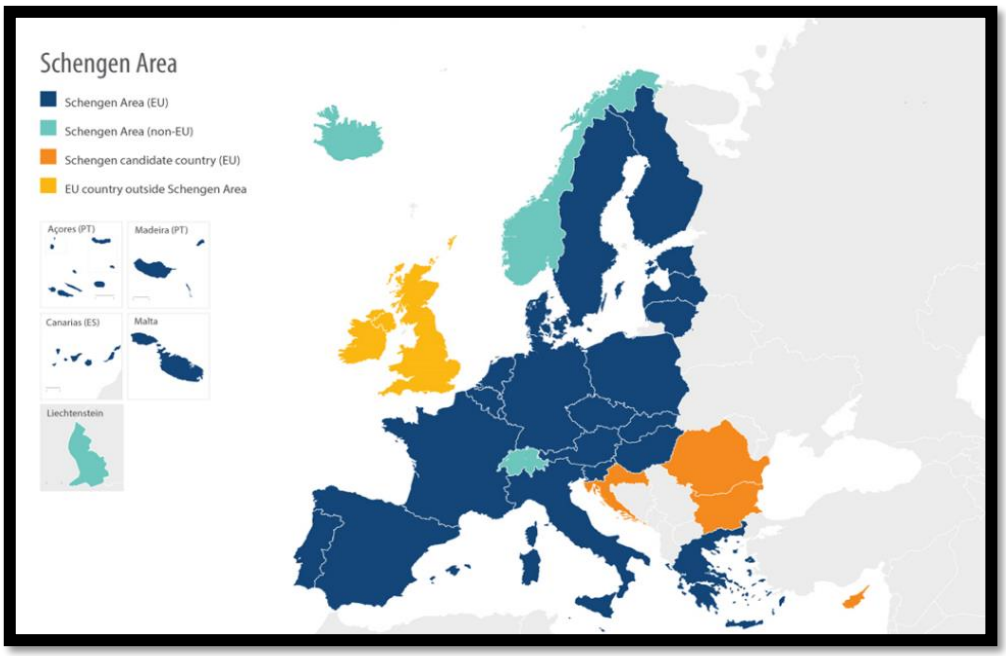

Fig. 1 – Map showing the Member States of the Schengen Area[52].

[49] Art. A, Treaty of Maastricht of 7 February 1992.
[50] *Ibidem.*
[51] Art. G, para. 3, lit. c, *Ibidem.*
[52] EUROPEAN PARLIAMENT, *Schengen: enlargement of Europe's border-free area*, 2018, available online.

The Schengen Treaty was firstly signed only by the five European Economic Community founding members (Belgium, France, Germany, Luxembourg and the Netherlands)[53]. Currently, this area has been in continuous expansion, including 26 countries, whose 22 are EU States (Belgium, Czech Republic, Denmark, Germany, Estonia, Greece, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Netherlands, Austria, Poland, Portugal, Slovenia, Slovakia, Finland and Sweden)[54] together with 4 non-EU countries (Iceland, Liechtenstein, Norway and Switzerland)[55]. The presence of Iceland, Liechtenstein, Norway and Switzerland demonstrates how being a member of the Schengen Area does not suppose the membership of the European Union, together with the other six EU Member States which are not part of the Area (Bulgaria, Croatia, Cyprus, Ireland, Romania and the United Kingdom)[56]

Therefore, the three European organisations may be distinguished upon their purpose: the European Union established for a political purpose, the Eurozone an economic one and the Schengen Area customs and borders one. The principles established by the Treaty were already set up within Title V of the Treaty of Lisbon, signed in 2007 but entered into force only one year later, which laid the foundations for an "area of freedom, security and justice"[57]. Chapter 1 of this Title not only establishes this area, but also ensures "the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals"[58] (article 61), including stateless people included in the category above-mentioned. Article 72 specifies that the exercise of the responsibilities described by this Title should be fulfilled together with the States' responsibilities to maintain "law and order and the safeguarding of internal security"[59].

Once the Schengen Area was implemented in 1995, the difference between national and European borders and the removal of internal barriers to the free movement brought to a drastic rethink of the difference "between an internal and external EU border"[60]. This Area is based on two principles both applied on border controls, as stated by article 77 (1) of the Treaty of Functioning of the European Union (hereinafter "TFEU") "The Union shall develop a policy with a view to: (a) ensuring the absence of any controls on persons, whatever their nationality,

[53] EUROPEAN COMMISSION, *The Schengen Area. Europe without borders*, 2015, available online.
[54] *Ibidem.*
[55] *Ibidem*.
[56] *Ibidem.*
[57] Art. 2, para. 2, Treaty of Functioning of the European Union of 13 December 2007.
[58] Art. 61, para. 2, *Ibidem.*
[59] Art. 61E, *Ibidem.*
[60] C. JEFFRAY, *Fractured Europe: The Schengen Area and European Border Security*, in *Australian Strategic Policy Institute (ASPI) Special Reports*, 2017, available online.

when crossing internal borders; b) carrying out checks on persons and efficient monitoring of the crossing of external borders; (c) the gradual introduction of an integrated management system for external borders"[61]. On the one hand, internal border within this Area are softened and abolished to ensure the freedom of movement enabling people to cross the internal borders at any point, regardless their nationality, without occurring into unnecessary controls. On the other hand, the external border is strengthen, implying mutual trust and collaboration among the Member State, together with the Schengen *acquis*, which includes also State's duties to implement "a common visa policy, police and judicial cooperation, common rules on the return of irregular migrants and the establishment of common data-bases such as the Schengen Information System (SIS)"[62].

According to article 78 of the TFEU, these measures must be applied in conformity with the Geneva Convention and the protocols related to refugees situation: "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy is based on article 18 of the EU Charter of Fundamental Rights, which right of asylum should be guaranteed in accordance with the Geneva Convention of 28 July 1951[63] and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties[64].

Moreover, paragraph 2 of article 77 of the TFEU affirms "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: (a) the common policy on visas and other short-stay residence permits; (b) the checks to which persons crossing external borders are subject; (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period; (d) any measure necessary for the gradual establishment of an integrated management system for external borders; (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders"[65]. A minimum check to verify the identity may be done by non-Schengen EU States once EU citizens are crossing the borders of countries such as Bulgaria, Croatia, Cyprus, Ireland, Romania and the United Kingdom[66].

[61] Art. 71, para. 1, Treaty of Functioning of the European Union of 13 December 2007.
[62] COM (2011) 561 final.
[63] Charter of Fundamental Rights of the European Union of 7 December 2000.
[64] Treaty of Functioning of the European Union of 13 December 2007.
[65] *Ibidem.*
[66] EUROPEAN COMMISSION, *The Schengen Area. Europe without borders*, 2015, available online.

The Schengen Information System, established to maintain the level of security within the area, is based on a deep collaboration between the police and all the other authorities involved, sharing sensitive data and alerts on missing people, people or objects linked to criminal actions and people without the permission to enter the area or stay in the area. However, everyone has the possibility to control his or her status acceding to the system, with the possibility to ask for a correction or deletion of personal data inserted. Nationals of non-EU States can send the request to any Schengen State consulate, while nationals of the states involved may send it directly to the national authority and indirectly to the national data protection one.

The migration crisis faced in 2015 called into question the Schengen idea of Europe lacking borders, heading many countries to reintroduce temporary border controls. This decision intensified the terrorist attacks against important European countries, such as Paris and Brussels, which answered the threat tightening border security in order to avoid other threats which could involve not only the nation in question, but also the other European countries. In particular, 7 countries were involved around November 2018 and February 2019[67] into the internal frontier closing, according to the first case. Poland closed them for 6 days this February for a ministerial initiative, while other 5, meaning Austria, Norway, Sweden, Denmark and Germany until May 2019 for different reasons such as security threats due to secondary movement from nearby countries. Terrorist threats and political meeting were the reason used by France to close internal frontiers from 1st of November 2018 to the 30th of April 2019[68].

However, the reintroduction of border is specified to be an exception for the Schengen Agreement to work fully and without interruptions though it is a state prerogative applied under the principle of proportionality. Then, it becomes a mean for responding to threats and securing both national and international environment only in the cases stated above, in order to reduce its usage to the minimum. According to this idea, the Commission has no possibility to veto the State's decision though it may give an opinion regarding the effective necessity for the state in question to rise such barriers, even if for a limited time period[69]. The restoration of internal frontiers corresponds to a barrier to the free movement of people inside of the Schengen Area and, as such, it should be applied as a last resort solution.

[67] EUROPEAN COMMISSION, *Back to Schengen: Commission takes next steps towards lifting of temporary internal border controls*, 2016, available online.

[68] *Ibidem.*

[69] *Ibidem.*

Article 27 of the Schengen Border Code discusses the "procedure for the temporary reintroduction of border control at internal borders"[70], according to which the Member State planning to reintroduce border controls should notify the Commission and the other States at least four weeks before the reintroduction, for them to assess this decision based on the reason, the scope, the duration and the measures other States have to take given by the State in question. The Commission or other Member States cannot veto the decision but may "issue an opinion"[71] regarding the measures decided and their proportionality, adapting and updating the Shengen Border Code – (hereinafter 'SBC') – to the evolving needs and threats in order to guarantee the internal security. The controls are not only important to support internal security, escaping to threat, but are essential to fight against illegal immigration and human trafficking. According to the regulation, human dignity should be preserved and ensured during the controls as these must be solved with a professional and respectful conduct. To do so, the border guards have access to the VIS and the data inside, which enable the identification of migrants through a fingerprints-based system.

This system aims at accelerating the process of identification and selection, with the possibility of setting different border crossing points, not to discourage any economic, social or cultural exchange with other states, as the migration phenomenon should not be considered as a threat to the public order or the security of the society. A closed mentality towards diversity and multiculturalism may lead to the creation of what Bush defined as a "pocket of isolation", where people's aspirations and desires are limited and retarded by their closeness to the rest of the world. Indeed, there are different reasons that encourage people to leave their countries, such as economy, society, climate change, family reunification, job, education, and so on.

1.2.1 The requirements for becoming a Schengen Member State

The possibility to be part of the Schengen Area and the criteria used to select among countries those who may successfully implement the Schengen rules and duties derive from the willingness to avoid any failure within the system. Hence, there are some criteria a State must meet in order to become a Schengen Member State. First, the State willing to be part of this area must be able to safeguard the external border on behalf of the other Member State, doing the necessary controls over the citizens coming into the country and, therefore, the area. Next, it must collaborate with other State's agencies and institutions for security reasons and

[70] Regulation (EU) 399/2016 of the European Parliament and of the Council of the 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).
[71] *Ibidem.*

implementation. Finally, applying the Schengen *acquis* and all the instrument included, the State must ensure border controls of land, sea and air, short-visa instruments and protection of personal data through the Schengen Information System.

Beyond the abolition of internal barriers and the strengthening of external border controls for a border-free but safe Europe where to travel, others are the aim that are involved in the implementation of such Agreement. This Area creates a harmonised short-visa issuing system among the Member States, improving collaboration between judicial and police bodies in order to share information quickly for a faster extradition or relocation of criminals or people recognised as threat to the security[72]. The rules regarding asylum, visa, immigration and other aspects on people's freedom of movement were not set up until the Treaty of Amsterdam of 1997, giving the Member States 5 years after the enter into force of the Treaty to ensure the free movement of persons. The incorporation of the Schengen regulations within the framework of the Union avoids overlapping between EU and existing Schengen rules.

Among the instruments that a State must implement within the framework of the Schengen Agreement, there is the Dublin III regulation. Dublin III regulation, approved in 2003, only entered into force in January 2014, with the aim to establish a common system by which controlling people entrance in the Schengen Area and organise all the asylum requests. According to the regulation, every third country national may seek for Member States to accept their asylum request, which may be done only to the first State of entrance. The proof of entrance must be done through identification by local authorities or presenting the travel ticket used to arrive there. There is no possibility for an asylum seeker to ask it to a State different from the one of entrance, nevertheless a State different from the one of entrance may spontaneously decide to accept them. Moreover, "the Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States"[73] according to article 79 of the TFEU.

The *non-refoulement* and the family reunification principles are the pillars of the Dublin regulation. The former, is discussed in article 33 "Prohibition of expulsion or return ("refoulement")"[74] of the 1951 convention and protocol relating to the status of refugees as follows: "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political

[72] SCHENGEN VISA INFO, *The Schengen area - The World's Largest Visa Free Zone*, available online.
[73] Art. 79, para. 3, Treaty of Functioning of the European Union of 13 December 2007.
[74] Art. 33, Convention Relating to the Status of Refugees of 28 July 1951.

opinion"[75]. All refugees, including stateless people, Internally Displaced People (IDP) and Unaccompanied minors have the right to seek for their freedom in another country with no possibility of being extradited or sent back to their home countries where their life may be endangered. This principle is safeguarded by article 78 of the TFEU as well, which belongs to chapter 2 of Title V regarding "policies on border checks, asylum and immigration"[76] establishing "the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement"[77]. The latter determined the right for the rest of the family to enter into the State where one of its members settled.

The implementation of a common European system, as defined by the steps made by the treaties before Schengen aforementioned, was reached after a long process resulting into a two-phases programme established by 1990 Tampere Programme. It consisted into a short-term adoption of common standards which would have implied a long-term procedure and regulation for guaranteeing asylum throughout the Union. Both phases lead in 2013 the establishment of instruments such as: the Reception Conditions Directive (hereinafter RCD), the Asylum Procedures Directives (hereinafter APD), the Dublin III Regulation and the Eurodac Regulation[78].

The last regulation assesses States' responsibility for the management of asylum applications using the Eurodac system, which collects data and fingerprints of each asylum seeker in order to share information with the other States and organise the request successfully, for the right implementation of the Common European Asylum System (CEAS). This idea is expressed by article 29 of the Regulation, which states "Consistency should be ensured between this Regulation and Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of "Eurodac" for the comparison of fingerprints for the effective application of Regulation (EU) No 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 comparisons with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes"[79]. This system is employed to ensure

[75] Art. 33, para. 1, *Ibidem.*

[76] Chapter 2, Treaty of Functioning of the European Union of 13 December 2007.

[77] Art. 78, *Ibidem.*

[78] EUROPEAN PARLIAMENT, *Migration and Asylum: a challenge for Europe*, 2018, available online.

[79] Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

the right established by article 14 of the 1948 Universal Declaration of Human Rights according to which "Everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations"[80].

1.2.2 The European countries reintroducing the Internal border controls

Internal security has always been one of the most important issues of the Schengen Member States, whose responsibility is to ensure it regardless the absence of internal border controls, substituted with a single external barrier since 1995. However, the current and increasing threat of terrorism that has been striking Europe since 2015 has resulted into the possibility of internal borders reintroduction. According to the Schengen rules, the Member States are able to reintroduce the internal checks for a maximum of six months, in specific situation and using specific and proportionate actions, as described by article 25 and 28 of the Schengen Borders Code aforementioned.

According to these rules, the state willing to reintroduce internal checks due to security threats or special events that may involve a higher level of safety must set up a proposal to be submitted to the European Commission. After the opinion issued by this entity, which confirms or denies the foreseeable threat and the reintroduction of the checks as the last resort, the state is able to set a regulation to inform the neighbour States and the foreigners regarding the decision. Using this procedure, 7 different countries have been reintroducing their internal checks between November and February of current year, that be analysed below.

The Polish minister of internal affairs and administration on 7 February 2019 has declared the temporary reintroduction of border checks on persons crossing the state border forming the internal border. Based on Article 17(a) of the Act of 12 October 1990 on the Protection of the State Border, it established the temporary restitution of border control of persons crossing the state borders in the period from February 10, 2019 to February 16, 2019[81]. This measure will be adapted to the degree of public order or state security threat in connection with the Ministerial Meeting on peace and security in the Middle East taking place on the territory of the Republic of Poland. The control of persons involves the state border with Czech Republic,

[80] Art. 14, para. 1, Universal Declaration of Human Rights of 10 December 1948.

[81] MINISTER OF INTERNAL AFFAIRS AND ADMINISTRATION, *On the temporary reintroduction of border checks on persons crossing the state border forming the internal border*, 2019, available online.

Germany, Lithuania, Slovakia, the seaports forming the internal border within the meaning of the SBC and the airports constituting an internal border within the meaning of the SBC.

On the same day, 7 February 2019, also the Swedish Government Office has released the statement for the reintroduction of border control from 12 February to 11 May 2019 "with other Schengen Member States such as Germany, Austria, Norway and Denmark"[82]. The controls will be carried out by the national police because of the presence of current terrorist threat to the internal security. This procedure will last until the threats do not vanish and security will be restored.

A six-month period of controls was instead established by Norway at the Danish, German and Swedish border from 12 November 2018 to 11 May 2019, as reported by the European Commission. The second movements endangering the State's internal security triggered the section 4-6 of the Regulations of 2009 on the entry of foreign nationals, giving the Ministry of Justice the possibility to decide regarding the reintroduction of internal border controls, "in accordance with the provisions of Article 23 to 31 of the Schengen Borders Code"[83] and with the Commission's opinion. According to this regulation, "The Ministry of Justice may give the National Police Directorate authority to make decisions regarding the temporary reintroduction of border control on internal borders"[84] while establishing the duty for anyone crossing the border of providing the authorities with their identity and information needed to fulfil the controls' procedures.Austrian controls at the borders of some EU states, as Hungary and Slovenia, were reintroduced on 12 October 2018 and will continue until the 11 of May 2019. Their purpose is to protect the environment and public health endangered by significant secondary movements, as described by the European Commission notification on Member States reintroducing the internal controls cited before.

The border controls reintroduction in Denmark depended on the high number of migrants and refugees crossing the border since 2015 and the secondary movements related, which involved a significant number of unaccompanied minors seeking for asylum and people without a valid travel document[85]. These were the reasons expressed in the letter of the Minister for immigration and integration, Inger Støjberg, who described the situation that has brought the Danish government to decide for the internal border control reintroduction. After the approval

[82] GOVERNMENT OFFICES OF SWEDEN, *Reinstated border control at Sweden's internal border*, 2019, available online.

[83] Regulations of the Ministry of Justice and the Police of 15 October 2009 on the entry of foreign nationals into the kingdom of Norway and their stay in the realm (Immigration Regulations).

[84] *Ibidem.*

[85] Letter of the Danish Minister for Immigration, Integration and Housing to the European Commissioner Avramopoulos of 14 December 2015, on reintroduction of border controls.

from the Commission, the border controls were activated the 12 October 2018 until the 11 of February 2019 with the neighbour states, with an initial focus on the German border.

Apart from Denmark, also the German-Austrian border has been facing illegal transits of people, which have led the Interior Minister to extend the border controls to May 2019. The Federal Minister de Maizière observed: "Germany and other EU member states have witnessed dramatic terrorist attacks. The European security situation remains tense. Shortcomings in the protection of the external borders and significant irregular migration within the Schengen area persist". The European Commission, the Council of the European Union, the President of the European Parliament and the interior ministers of the EU and Schengen countries approved the reintroduction.

1.3 The bilateral regulations between France and Italy

Promoters of the Schengen area for the creation of a borderless Europe, both Italian and French Republic signed the agreement in 1985 for a gradual elimination of checks and establishment of a single common external border, together with the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands. The European norms and articles related to the cooperation between Italy and France enables the French agents to operate on the Italian territory, still they define specific procedures and limits for this cooperation to last, in defence of both State's security. The norms dealing with the coordination of the police forces are: "Convenzione tra l'Italia e la Francia relativa agli uffici a controlli nazionali abbinati ed ai controlli in corso di viaggio*"* of 1963, the Chambery Agreement of 1997, the Prüm Treaty of 2005 ratified under the Italian *Legge* n. 85/2009 and the "Accordo tra Italia e Francia in materia di cooperazione bilaterale per l'esecuzione di operazioni congiunte di polizia" of 2012 ratified under Italian *Legge* n. 215/15. The ratification is one of the final steps that enables the formalisation of an International Treaty. It occurs with a Presidential act, who signs the treaty, according to article 80 of the Italian Constitution giving the President this role for all the treaties of political nature, expecting judicial regulation or amending the territory, the finances or the laws.

First, the "Convenzione tra l'Italia e la Francia relativa agli uffici a controlli nazionali abbinati ed ai controlli in corso di viaggio" signed in Rome in 1963 and ratified under Italian Legge n.824/1965 published in the Italian Official Gazette (GURI), entered into force only two years later to establish the relationship between Italy and France, to provide these with a set of

procedures that will lead to common national controls and border controls. According to article 2 of this Convention, both States may institute border controls for the purpose of simplifying and speed up the procedures[86]. This article gives the right of implementing controls in the other countries, after the selection of the paths in questions made by the authorities of both States. Whenever irregularities appear during controls[87], the neighbouring State cannot arrest or take people to their territory unless they violated the administrative or regulatory norms of the border controls, as specified by article 5. Still, article 6 obliges both States to ensure the same protection and assistance measures as the one for their authorities, for the agents of the counterpart[88]. State's and agent's responsibilities are described in the next articles, according to which each State is responsible for the damages provoked by their agents operating in the territory of the other State, refunding it for the damages. The agents in questions will be compared to the agents of the territory in which the first where acting and will be judged as such in order to impose equal penalties to avoid any favouritism.

Article 10 and 11 will be necessary to explain the case study in the next chapter. The first[89], establishes that any dispute has to be solved through negotiations and consultations between the two parts. The collaboration trait of this Treaty, visible in the precedent articles regarding the establishment of work dispositions, civil and penal responsibilities, are explicitly affirmed by this article, which goal is to avoid a breaking point of the relationship between the two States proposing the diplomatic dialogue as the main resort. Then, article 11 establishes the main role of communication and cooperation between the two States, establishing that any joint operation has to be discussed and organised by the authorities of both States in order to define the carrying out conditions, to settle the limits of the authorities' powers and of the weapons and equipment necessary[90].

All the others bilateral treaties between Italy and France will be adopted in the post-Schengen context, for the necessary of these State to continue to take joint decisions without the mediation of third parts, in the spirit of collaboration shared by these two. However, the Schengen Convention signed in 1990 establishing the application of the Treaty signed five years before, defines the possibility for the agents of one state to act or chase anyone caught *in flagrante delicto*[91] without a previous authorisation of the other State. Moreover, it also defines the need of the agents to declare the entrance within the other State once it happens, regardless the

[86] Art. 2, L. 824/1965 of 30 June 1965, Convenzione tra l'Italia e la Francia relativa agli uffici a controlli nazionali abbinati ed ai controlli in corso di viaggio. Hereinafter: L. 824/1965
[87] Art. 5, L. 824/1965
[88] Art. 6, L. 824/1965
[89] Art. 10, L. 824/1965
[90] Art. 11, L. 824/1965
[91] Art. 41, Convention implementing the Schengen Agreement of 14 June 1985.

situation, denying the possibility for the other State's agents to keep chasing for the criminal entering any private space, as defined in article 41.

On the basis of the 1963 convention and on the Schengen Treaty of 1985, hoping for a complete implementation of the measures established by these, the two countries agreed to sign the "Accordo fra il governo della repubblica italiana e il governo della repubblica francese sulla cooperazione transfrontaliera in materia di polizia e dogana". The 1997 Agreement is composed of four titles: general dispositions, cooperation centres of the police, direct cooperation of the frontier zones and final disposition. The Agreement's article 6 defines the collaboration between the two States as based on the share of services, such as the cooperation centres, information and assistance useful to avoid and fight the criminality involved in the illegal migration trafficking in respect to the national dispositions[92]. Together with article 12, it defines the goals of this agreement regarding the cooperation of the police, of the offices, of the competences employed to ensure and protect national security and avoid threats to it[93].

The agents employed in the cooperation centre will work as an *équipe*[94] to catch and exchange important information between each other and with the agents of the other State's cooperation centre, as established by article 9. All the civic and penal responsibilities and punishments related to any infringement of the Agreement or measures established by the State will be decided by the State on which territory the fact has happened, giving the agents of the other State the same treatment of their own agents. The border zones where agent's controls may take place are defined by article 10. The Italian frontier zones are all the territories of the provinces of Aosta, Cuneo, Imperia and Torino (where the Bardonecchia incident happened), while the French ones are the territories from the provinces of Alpes-Maritimes, Alpes-de-Haute-Provence, Hautes-Alpes, Savoie and Haute-Savoie[95].

The "Schengen II", gone down in history as Prüm Treaty, strengthens the borders' cooperation and completed the process of integration started with the Schengen Treaty, aiming at redefining the European borderless area and the consequences on the exercise of territorial sovereignty. Crucial are the terms for the cooperation established in 2005 with this Treaty: the measures against terrorism, the ban of weapons and theirs supplies and illegal immigration, the register of the car's license plate and the collection of data through DNA by the DNA's national banks[96].

[92] Art. 6, Accordo fra il governo della repubblica italiana e il governo della repubblica francese sulla cooperazione transfrontaliera in materia di polizia e dogana of 3 November 1997. Hereinafter: Chambery Agreement.

[93] Art. 12, Chambery Agreement.

[94] Art. 9, Chambery Agreement.

[95] Art. 10, Chambery Agreement.

[96] Art. 2, Council Decision 2008/615/JHA of 23 June 2008, on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. Hereinafter: Decision 2008/615/JHA.

The acquisition of the genetic code from these institutions aims at providing an objective data useful for the identification of data for any individual the police is dealing with. In case of any correspondence, the national law of the State of the person in question will provide any information useful for the investigations. In case of absence of DNA data, the State received the request will commit to collect the data from the person involved or may start an inquiry, after the State demanding such defines the aim or produced a warrant. Article 24 of this Treaty specifies that the agents involved in these operations are bound to the sent State authority's instructions[97]. The possibility for the sending State's agents to act without the previous permission of the sent State are related to a status of emergency where the agents cannot wait for the other State to act and must employ their force to prevent the rise of a danger. Anyway, article 25 also defines that whenever this possibility happens, the agents of the sent State must be warned immediately[98].

The latest Bilateral Treaty between the two States was published in 2016 in the Italian Official Gazette (GURI) but it was signed in Lyon in 2012 as the "Accordo tra Italia e Francia in materia di cooperazione bilaterale per l'esecuzione di operazioni congiunte di polizia" (Cooperation Agreement for the joined police operations). The modalities of cooperation are described in article 3, which defines that the agents must work together, following the instructions and decisions taken by the national authority of the State where they were sent, assisting during the control processes, especially when taken on compatriot[99]. They are subject to the authority of the agent of the State they were sent to and must follow their commands during the joined operations. Similarly, article 4 defines the need for the agents to follow the instructions regarding the use of weapons within the State they were sent to, believing into a use only related to the self or other defence problems[100]. The duty for the State's agent in giving the other State's agents the same protection they receive can be found in article 6 of the same document. The next articles, as well as the 1963 Convention, deal with the dispositions regarding: civic and penal responsibilities, how to solve disputes and application of the agreement.

1.3.1 Italian and French history of immigration policy

The historical process of the European migration policy described in the last paragraphs was defined by many important steps made through the years after the WWII. Until that time, the

[97] Art. 24, Decision 2008/615/JHA.
[98] Art. 25, Decision 2008/615/JHA.
[99] Art. 3, D.Lgs. 215/2015 of 1 December 2015, Accordo tra Italia e Francia in materia di cooperazione bilaterale per l'esecuzione di operazioni congiunte di polizia. Hereinafter: D.Lgs. 215/2015.
[100] Art. 4, D.Lgs. 215/2015.

State's migration policies were believed to be only at the complete discretion of each national authority. Then, after the atrocious crimes and the terrible situation that the war left behind, the States moved forward a cooperation that involved not only economic matters but also social ones, such as migration. As we have seen, the first steps for the establishment of a common migration policy within the European Union were taken with the 1957 Treaty of Rome that established the objective of a common market, eliminating the barriers for ensuring the free movement of goods, capital, services and people. Then, the sign of the Schengen Treaty and its application within the Member States enabled the creation of a free border area, established on the common migration policies created and the cooperation between the States involved.

As a matter of fact, both Italy and France have promoted, accepted and implemented the Schengen Agreement and all the measures established by it. The migration crisis of the last years has involved both countries considered "transit countries"[101] by all the migrants arriving from the East and Mediterranean Sea, who hope to reach England or other Northern countries. However, these two countries have been experienced two different migrant flows during history, especially in the post-war context, where Italy was an emigration country, differently from France that was one of the main craved European destinations. In the immediate period after the world conflict, France was the only European country encouraging permanent migration, while main other countries were trying to discourage the migration flow caused by the war.

Valéry Giscard d'Estaing's policies reflected the situation after the main crisis happened in the '70s[102], which led French government to introduce some closed-door policies, even trying not to renew the residence permit of migrants[103], encouraging their exit from the territory. The US 1965 Naturalisation Act was considered a revolutionary bill that opened the gates to migrants, with a great focus on the family reunification aspect, welcoming huge numbers of migrants and families within its territory. Then, the policy of the United States during the 70s was merely in opposition with Western Europe one, and so with French one especially, which was experiencing high inflation and high unemployment that encouraged the xenophobic sentiment within the population. If, one the one hand, USA lobbied for an open-door migration policy trying to increase the number of people entering the State, on the other hand, the French interest groups discouraged the entrance of workers to sustain the nationals seeking for a job.

[101] V. GUIRAUDON, *Immigration Policy in France*, in *Brookings*, 2001, available online.
[102] These years, also defined as the third wave of globalisation, were showing the effects of the past crisis with the collapse of the US Bretton-Woods system (1972), the high inflation, the current account deficit and the European increase of oil prices to developing countries evolved into the first oil shock (1973).
[103] *Ibidem.*

According to statistics, the number of foreigners in France in 1999 is 9% lower than the number registered in 1990[104]. However, this data should not be translated into a decrease of migrants, but it can be justified by the number of people encountering the process of naturalisation, which enables to consider them as nationals instead of foreigners, decreasing the number of the latter. Independently from the numbers, it is possible to recognise a tendency in this country of using the migrant's topic as the main issue during electoral campaigns. Starting from the '80s, with François Mitterrand policies proposal, the reforms that affected this area "passed in 1980, 1984, 1987, 1989, 1993, 1997, and most recently in 1998"[105].

The Italian migration law history has been characterised only by the phenomenon of emigration until the recent crisis in 2015. During decades, the economic instability of this State has encouraged people to cross the borders in search for stability, job and wellness elsewhere, both inside and outside Europe. It is possible to identify 3 waves of migration that have characterised the Italian migration history[106]: emigration, internal migration and immigration.

First, the emigration waves started during the years of the Italian unification (1861), registering "nearly 7 million migrants"[107] moving to other countries within Europe. The main flow of Italians to non-European destinations, especially United States, happened in the period between 1900 and 1928, even though the years after the WWI were marked out again by migration flows to European countries. Germany and Belgium received the highest number of migrants, the majority of which were workers that during the post-war period (1946 to 1965) moved there to find a job due to the absence of labour in these countries. The term "Gastarbeiter"[108] was coined to indicate all the "guest workers" coming from Italy, Spain, Turkey, Portugal and other countries that moved in Germany during the '50s looking for jobs requiring no specialisation, such as in the car or building industry.

Then, the internal migration wave started with the process of urbanisation exploding during the '90s and supported by the Mussolini regime's policies[109], encouraged people to move from

[104] *Ibidem.*
[105] *Ibidem.*
[106] A. SCOTTO, *From Emigration to Asylum Destination, Italy Navigates Shifting Migration Tides*, in *The online Journal of the Migration Policy Institute*, 2017, available online.
[107] *Ibidem.*
[108] N. JACOBY, *America's De Facto Guest Workers: Lessons from Germany's Gastarbeiter for U.S. Immigration Reform*, in *Fordham International Law Journal*, Vol. 27, Issue 4, 2003, available online.
[109] Formally, the Mussolini era is considered to be the period started on 29th October 1922, after the March on Rome organised that ended with the Italian King Vittorio Emanuele III appointing Mussolini to create a new government and ended the 25th July 1943. The policy making process of this period was based on an economic alternative to strengthen the Italian power among the other European States. The cooperation between the social classes, opposite to Marxism, was emphasised by the ideology that placed the State before the single citizen, enabling the State to intervene in the economic relationships, avoiding the "*laissez-faire*" liberal principle. However, the fascist willingness to sustain Italy as capable of independent from other States, evolved into the

rural to central areas and people from the south of Italy to move to the northern regions, causing overpopulation in big cities, such as Turin, Rome and Milan[110]. The evident geographical differences between the southern and the northern regions and the development of different industrial areas where emphasised by some policies during the period of the unification and the Giolitti[111] era.

Finally, the immigration wave defines the post-war period since 1946, when many Italians returned back significantly during the '70s, while many migrants arrived during the next decade. The 2015 period of crisis is characterised by the huge flow of migrants coming from Albania, Morocco and other Northern Africa countries to escape from terrorist and the several conflicts threats. Italian geographical position has posed this State under the spotlight, becoming one of the most common first entrance countries responsible for the asylum request examination, as specified by the Dublin III regulation.

The *Legge* Foschi n. 943/1986[112] was one of first migration law establishing the norms regarding the family reunification, the touristic stay and the equality between nationals and foreigner workers. The *Legge* Martelli , n. 416/1989[113] put the basis for the nowadays laws. This law derives from the necessity to regulate the number of people arriving from Albania to the Apulia coast. It focuses on economic migration, trying to regulate the arrival of workers to favour the Italian job market and obstacle irregular entrance. Influenced by a negative perception of the phenomenon of migration, which resulted in restrictive norms regarding the citizenship and the procedures for expulsion. This law was finally substituted with law n. 40/1998[114], also known as *Legge* Turco-Napolitano, considered to be the first Italian law on the

sustain of Italians within their territory, implying persecutions and threats to all the other minorities that moved away during these years.

[110] A. SCOTTO, *From Emigration to Asylum Destination, Italy Navigates Shifting Migration Tides*, in *The online Journal of the Migration Policy Institute*, 2017, available online.

[111] The government of Giolitti was characterised by the banks capacity to involve private investments in financing industries. For this reason, it is possible to notice a growth of these during the years between 1901 and 1914. The technologic sectors rose in the northern regions, where the mechanic, the chemical and the iron and steel industry developed the most, while the southern regions specialised in the agriculture and food sector. Considering that the majority of the workers employed lived in the northern regions, which needed more labour to face the growth, and the phenomenon of illiteracy that impeded the creation of a leading class, a huge number of people migrated to the North America, where their presence is still visible nowadays though their naturalisation.

[112] L. 943/1986 of 30 December 1986, Norme in materia di collocamento e di trattamento dei lavoratori extracomunitari immigrati e contro le immigrazioni clandestine.

[113] D. Lgs. 416/1989 of 30 December 1989, Norme urgenti in materia di asilo politico, di ingresso e soggiorno dei cittadini extracomunitari e di regolarizzazione dei cittadini extracomunitari ed apolidi già presenti nel territorio dello Stato. Disposizioni in materia di asilo.

[114] L. 40/1998 of 12 March 1998, Disciplina dell'immigrazione e norme sulla condizione dello straniero.

general aspects of migration, providing for the coordination with the foreign policy with a quota system to favour the countries collaborating to repatriate those expelled from Italy[115].

1.3.2 Italian and French laws in 1998

Defined as the first the first law established not in an emergency context, the *Legge* "Turco-Napolitano", n. 286/1998, has introduced many changes in the Italian immigration laws. The so-called "Testo Unico sull' Immigrazione" [116] has introduced the family reunification principle, as one of the many rights absent in the previous laws regarding this issue. It is composed of 49 articles and 6 Titles divided as follows:

- Title I – General principles (Art. 1-3)
- Title II – Dispositions on entrance, stay and removal from the State's territory (Art. 4-20bis)
- Title III – Dispositions on job (Art. 21-27)
- Title IV – Rights of family reunification and of minors' safeguard (Art. 28-33)
- Title V – Dispositions on sanitary, education, accommodation, public life participation and social integration (Art. 34-46)
- Title VI – Final norms (Art. 47-49)

The first Title includes article 1 regarding the application of the text and article 2, listing the rights and the duties of the foreigners. According to article 1[117], the text has to be applied to non-European citizens and stateless people, excluding all the people with Italian and European nationality. The fundamental rights defined by the internal national law and by the general international rights are guaranteed for all the migrants falling in the above-mentioned categories, as established by article 2[118]. The equality of rights between the Italian and the legal migrant citizens, equal treatments to nationals, translated documents, diplomatic safeguard require some duties, such as participating in their local public life and respecting the obligation present on all the Italian territories. The Title ends with article 3[119] dealing with the two-levels

[115] M. FOGLIA, *Immigrazione, evoluzione normativa e giurisprudenziale*, in *Fatto e Diritto magazine*, 2018, available online.
[116] D. Lgs. 286/1998 of 18 August 1998, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero. Hereinafter: D.Lgs. 286/1998.
[117] Art. 1, D.Lgs. 286/1998.
[118] Art. 2, D.Lgs. 286/1998.
[119] Art. 3, D.Lgs. 286/1998.

migration policy based on a three-monthly program of intervention, together with an annual settle of the maximum number of passports released by the State.

The regulations regarding the norms of entry and stay in the State starts with article 4. It defines all the entry points valid for all the migrants possessing a passport or another similar document useful for the identification of the person or a VISA document[120]. The articles from 4 to 9 recognise two types of VISA, with many subtypes different for reason and duration of the stay. Are exempt from the entry those who don't show to have any means necessary to survive or return to their country of origin – unless the stay involved work reasons – and those recognised as a threat for Italy or any other States the latter has stipulated agreements with and to expelled migrants.

Border controls, reject and expulsion are defined within articles 10-17. Article 12[121] denounces any promotion, direction, organisation, finance or transport of migrants through illegal activities and channels. All these activities will be considered as a crime and treated as such when defining the fees to assign. The humanitarian help and all the rescue activities organised by the State are considered legal. It is applied to the entrance and the illegal stay of more than five people within the State whose lives have undergone danger treatments. Those involved in the organisation will also be punished for the use of fake documents or weapons and for any money collected through these activities. The next article until 17 deal with the provisions of expulsion of migrants, including the administrative which has immediate effects. Title III (articles 21 – 27) lists all the norms regarding migrants and work. The determination of the entrance flow described in article 21, includes migration workers having fixed-term and permanent contracts - described in article 22 – or seasonal works – article 24 –. Insurance policies for invalidity, old age, injuries, diseases and maternity are guaranteed to migrant workers, as specified in article 25. Entrance in the State's territory in order to conduct an autonomous job are regulated by the next article, together with the provisions for particular jobs.

The area which received many changes through this law is the Title IV, dealing with the family reunification and rights of the minors from article 28 to 33. According to article 28[122], the right of keeping and re-obtaining the family's reunification belongs to all the legal migrants who possess a VISA or a stay permission for a period longer than one year, given out for reasons of asylum, education, religion and family. This right, as specified by the next article - refers to any spouse who is not legally separated or is over eighteen years old, minors, adults at the expenses

[120] Art. 4, D.Lgs. 286/1998.
[121] Art. 12, D.Lgs. 286/1998.
[122] Art. 28, D.Lgs. 286/1998.

of the parents or vice versa, parents at the expenses of their children, when serious health problems occur. Included in the categories of people who may invoke this right there are all the people who have been recognised with the status of refugees. The dispositions on minors are described by articles 31 and 32 establishing respectively the rights of minors, including the change of status once they are fourteen years old, and the rights of the adults. According to the former, all minors are subscribed to the stay permission of one or both their parents until they are fourteen, when a stay permission for family reasons is released and will be valid until they come of age. Then, according to the latter, adults will receive a stay permission for study, work or health reasons.

All the dispositions on healthcare, education, stay and social assistance are described respectively within the articles 34 – 36, 37 – 39, 40 – 46. The healthcare services are compulsory and equal to the one offered to the nationals if not, the possibility for migrants to receive a VISA for health reasons, giving them the opportunity to be assisted within the State. As this service, also education is compulsory for all minors on the territory of the State, as the right to study is defended by State and provided by such with all the services involved. Universities must ensure equal treatment between the students, regardless their nationality, promoting the access to foreigners through orientation activities. Shelter centres are guaranteed for all migrants having a VISA for reasons different from tourism, who have no possibility of finding a stay. Any act of discrimination – defined as behaviours that directly or indirectly will imply any distinction, exclusion, restriction or any preference based on race, colour, origin or religion – is denounced by the law, giving the authorities the power to settle the discriminatory action down. The last Title deal with the abrogation of the past law's articles after the entered into force of this text.

The French law related to the entrance of foreigners in France and the right of asylum was established by the Senate of this State in the same year of the Italian *Legge* "Turco-Napolitano", in 1998. Differently from the Italian law, the 'LOI no 98-349 du 11 mai 1998 relative à l'entrée et au séjour des étrangers en France et au droit d'asile'[123] one is only composed of 3 Titles divided between:

- Title I - Abrogation of past law's articles (Art. 1-26)
- Title II - Dispositions on the right of asylum (Art. 27-36)
- Title III - various dispositions (Art. 37-45)

[123] Loi 98-349 of 11 may 1998, relative à l'entrée et au séjour des étrangers en France et au droit d'asile. Hereinafter: Loi no 98-349.

Title I amends and abrogates many articles of the "Ordonnance n° 45-2658 du 2 novembre 1945 relative aux conditions d'entrée et de séjour des étrangers en France"[124] dealing with the dispositions and conditions of the foreigners necessary to enter in the French territory. Such ordinance is updated by the new law established in 1998. More in details, articles 5, 9, 12, 12bis, 15, 16, 18, 19, 21, 22, 22 bis, 25, 26 bis, 27, 28, 28 bis, 29, 31, 35 bis, 40 are amended by the latter ordinance[125]. Articles 5-3, 10, 21, the last two paragraphs of Article 33, the last paragraph of article 36 and article 39 are instead abrogated[126].

Title II deals with the new dispositions on the right of asylum. This Title amends many articles from the 'Loi n° 52-893 du 25 juillet 1952 L'office français de protection des réfugiés et apatrides et la commission des recours des réfugiés'[127], whose title was abrogated and changed in 'Loi n° 52-893 du 25 juillet 1952 relative au droit d'asile'[128]. Article 29[129] of the law n. 98-349 substitutes the last two paragraph of article 2 of the former law of the 1952 with a new definition of the status of refugee. It is considered as such anyone who falls into the definition established the Geneva Convention of 28 July 1951 or "over whom the Office of the United Nations High Commissioner for Refugees exercises its mandate under the terms of the articles 6 and 7 of its statute as adopted by the United Nations General Assembly on 14 December 1950"[130]. According to article 31[131], any doubt regarding the recognition of this status should be submitted to the Minister of the Interior. The latter, after consulting the Minister of Foreign Affairs, may apply the definition above-mentioned to anyone whose life is considered in danger by him[132]. Title III finally opens with article 37[133] receiving a limit to the court's possibility to pronounce on the prohibition of French territory in the case:

- A foreign parent of a French child living in France, exercising even partial parental authority over the child or providing for his needs
- A foreign convicted person married before the events occurred for at least one year with a French national who retained the nationality;
- A foreign convict whose habitual residence in France occurred since the age of ten
- A foreign convict whose habitual residence in France lasted more than fifteen years

[124] Ordonnance 2658/45 of 2 novembre 1945, relative aux conditions d'entrée et de séjour des étrangers en France.
[125] Loi 98-349.
[126] *Ibidem*.
[127] Loi 52-893 of 25 july 1952, relative au droit d'asile
[128] *Ibidem*.
[129] Art. 29, Loi 98-349.
[130] Art. 28, Loi 98-349.
[131] Art. 31, Loi 98-349.
[132] Art. 36, Loi 98-349.
[133] Art. 37, Loi 98-349.

- A foreign convict receiving by a French organization of a work accident or occupational disease pension paid because of a permanent disability rate is equal to or greater than 20%
- A foreign sentenced person habitually residing in France needing medical care he cannot benefit from in the country of origin and which could result in a situation of extreme seriousness.

The Title continues with articles 38 and 39 on the provisions regarding incarcerated persons and foreign nationals with a “retired” residence card. Apart from the old-age insurance ones, all the other insurance benefits granted to foreigners need the proof of residence, as specified by article 41. It is then specified that the law is applicable only to foreigners possessing any document justifying the lawfulness of their stay in France.

The articles of the law of 1945 were finally abrogated by the so-called “Loi n° 2005-32 du 18 janvier 2005 de programmation pour la cohésion sociale”, created to organize the activities and dispositions for the social cohesion.

CHAPTER 2 – The Incident

2.1 Description of the Bardonecchia's incident

One year has passed since the Bardonecchia incident that involved the border police of France and Italy in the territory of this last one. At midnight between the 29th and the 30th of March 2018 two agents of the French borders have forced a Nigerian regular migrant to undergo the urine testing at the public toilets of the station of Bardonecchia. Suspected to be involved in drugs illegal trafficking, the two agents stopped the man on the train departed from Paris to Milan and brought him to the station of Bardonecchia, a small town of 3150 inhabitants at the border between Italy and France. As stated in the bilateral treaties analysed in the last chapter, it is possible to read that this city's border, together with other from different regions, was employed for the border controls made by Italian and French agents.

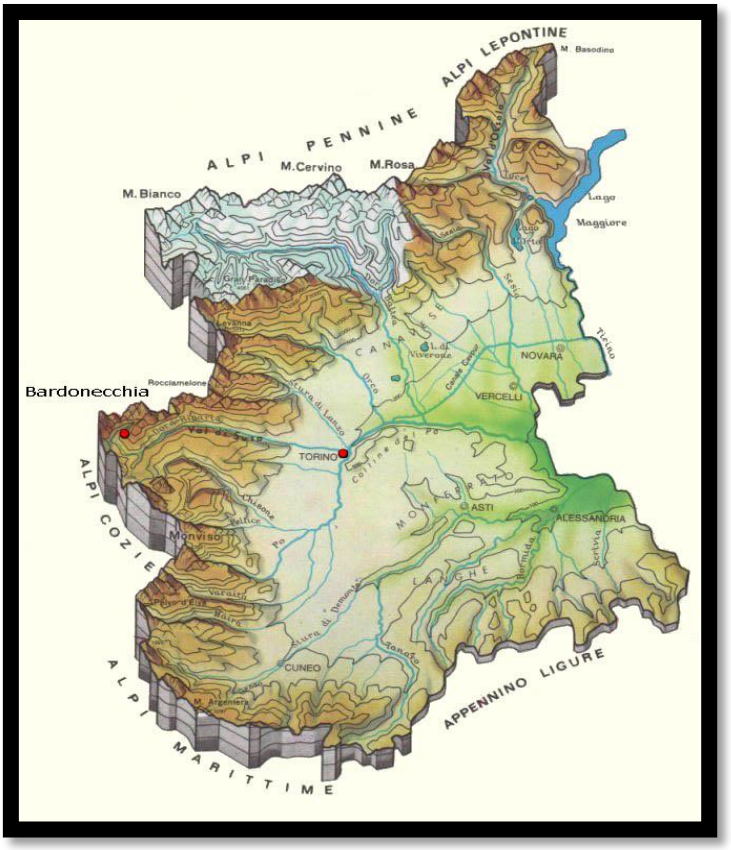

Fig. 2 – Location of Bardonecchia in Piedmont[134]

[134] M. MAFFUCCI, *Dove siamo – Piemonte*, in *Associazioni Nazionale Vigli del Fuoco in Congedo "Volontario e Protezione Civile*, available online.

The Italian Government and the Minister of Foreign Affairs and International Cooperation (Hereinafter: *Farnesina*) have asked the French authority for an explanation during the day of the 30th of March. However, the absence of any response increased the tensions between the governments of the two countries, leading the Italian one to ask for a meeting to the French ambassador in Italy, Christian Masset. Such incident put into discussion the functioning of the bilateral border cooperation between the two countries and so, their relationship regarding this subject[135].

The meeting hosted the Director General for the European Union at *Farnesina*, Giuseppe Buccino Grimaldi, who expressed the outrageous event and the Italian request for the French agents to encounter their punishment. Though the possibility for the French agents to submit migrants to controls, the man stopped in the train was a regular migrant and, even if the agents suspected his involvement in an illegal trafficking, they should have spoken to the Italian agents to warn of their entering into their territory for such aim or left the case to them. Moreover, on 13th of March, the station was no more under the use of the French agents for pursuing the controls over migrants, but it was given to the NGO "Rainbow for Africa". This organisation born in 2007 developed activities both at the national and international level for the implementation of pace and solidarity , intervening in war zones to sustain the conflict's victims, injured or suffering people facing dangerous problems and threats to their lives, such as hunger, diseases, malnutrition and absence of medicines or medical treatments.

One of the volunteers of this Organisation, declared she was there when the French agents entered the station asking for no permission, armed, dragging a man for a test. The man was in shock when asked for patience and respect from the agents that ordered him to stay silent. The Director General Grimaldi showed the exchange of information between the Italian and French border authorities, including the Italian railways company "*Ferrovie dello Stato*", where Italy declared to have employed the place of the station of Bardonecchia at the service of the NGO cited above. Furthermore, the authorities of both countries agreed to meet on the 16th of April to discuss about this choice and the possible consequences[136]. In the next days the French authorities continued to defend their agents, arguing that they only solved their roles and duties, among which there is the possibility to enter into the other State in order to submit migrants to tests.

It must be pointed put that the incident happened in Bardonecchia was just one of the many illegal actions made by French authorities within the Italian territory. The Italian journalist

[135] MINISTERO DEGLI AFFARI ESTERI E DELLA COOPERAZIONE INTERNAZIONALE, *Comunicato sui fatti di Bardonecchia*, 2018, available online.
[136] *Ibidem.*

Maurizio Pagliassotti, interviewed during the Italian tv program *L'aria che tira*, defined this case as a modus operandi used also in other occasion and place. Some months before the Bardonecchia incident, the journalist witnessed an illegal behaviour conducted by a few French agents beyond the Italian border, near the city of Claviere have released two Nord-African migrants. The Italian Minister of the Interior, Matteo Salvini[137], have moved different critiques to the French authorities' actions that have put into danger the lives of many migrants. However, the Claviere case solved after the French authorities declared their mistake, even if the Italian Minister refused them.

2.2 Other globally relevant cases of border trespassing

The not at all *sui generis* case occurred in Bardonecchia has not to be considered as one of a kind. Thus, it is possible to identify antecedent cases that has involved not only Italy and France, but also other European and non-European states, such as: Albania and Kosovo, Serbia and Kosovo, US and Mexico. First of all, at the beginning of the 19th century, "Kosovo and Albania, as well as […] Macedonia"[138] fought for independence from the Ottoman Empire who defeat only occurred with the rise of the nationalist ideas. These ideas fed the feelings necessary for the States to take their power and territories and create several independent states. However, the relationships among them became tormented around the end 90's because of several illegal trespassing from the Serbian authorities crossing the Albanian border. The internal fights between the minority groups on the territory ended up into a national conflict.

The border started to be burning up on the "14th of April 1999"[139] when, not only the Kosovar army reached and trespassed the border, but several explosions were registered during the morning. It is then possible to recognise in those actions the beginning of the conflicts between the two States. The initial design of a state where two different ethnicities and religions living together resulted in a utopia, when in 2018 ten years have been already passed without a real peace. The assassination of the Serbian-Kosovar leader Oliver Ivanovic, involved in many peace building operations, on January can be translated into the unwillingness of the people to

[137] V. LONGO, *Migranti, Salvini rifiuta le scuse della Francia: «Condotta vomitevole»*, in *Secolo d'Italia*, 2018, available online.

[138] S. GASHI, *History of Kosovo – in the history textbooks of Kosovo, Albania, Serbia, Montenegro and Macedonia*, Ulpiana, 2016, p. 6.

[139] P. DEL GIUDICE, *Anniversario in tono minore. I primi 10 anni di Kosovo ancora senza la vera pace*, in *Avvenire.it*, 2018, available online.

find a solution similar to the cohabitation. Then, another similar case involved two Kosovar agents who trespassed the Serbian border.

The two were have been intercepted by the Serbian authorities in an area accessible only by the Serbian army and the NATO members. They have been arrested for trespassing not only the national border, but also a limited-accessible area, wearing their uniforms and weapons outside their territory. At first, the event of the 3rd of April 2012[140] appeared to be a *casus belli* that would have provoked a conflict between Kosovo and Serbia. The situation became problematic when the President of the Republic of Kosovo referred to the episode as a kidnapping from the Serbian authorities and intimated their return as the only possibility to avoid any conflict. However, the situation settled once the Serbian President approved the release of the two agents who were taken back to their country. The two remained under accuse but waited in Kosovo until the final decision of the court. It has to be noticed that these conflicts are usually solved as the one above-mentioned. The two states either tend to collaborate for a solution, admitting the mistake made, or wait for the case to fall into disuse.

Finally, the US-Mexican parenthesis includes the relationship between these two countries and their migration policies. Hence, it must be opened more than one century and half ago and must include different types of border-setting instruments (material, technological and human walls). On the one hand, the American dream has been craved by people of different nationalities, then has attracted migrants from all over the world, nearly differentiated among decades. On the other, the state considered as home by many Latin American migrated and settled there years ago, wracked by poverty[141], supplying labour to the US economy. Influenced by xenophobic feelings the border between these two countries has been at the centre of several discussions during the last decades and subject of trespassing from both sides. Since the 11/09 attacks, borders patrols have been including stricter ways to control the migrants' entrance, especially when involving people with no documents. It has to be noticed that Mexican people as been involved into this issue as much as American agents.

For example, the case of 2007 when the border fences were installed "10 metres into Mexico"[142], violating the territorial sovereignty of the State. The ministers of interior from US, Canada and Mexico met to take a decision regarding such episode, given that the population of the State where such fence was installed felt it as a threat. Recent problems regard the police authority outside the US territory. The US agent who shot until death a 15-years-old boy who

[140] S. GIANTIN, *Belgrado rilascia i due poliziotti kosovari*, in *Portfolio*, 2012, available online.
[141] S. W. BENDER, *Run for the Border: Vice and Virtue in U.S.-Mexico Border Crossings*, *New York*, 2012, p.1.
[142] BBC, *Mexican anger over US 'trespass'*, in *BBC News*, 2007, available online.

justified asserting the guy was throwing rocks at him, is an example of agents' abuse of power and personal xenophobic feelings influencing their jobs. Unfortunately, the Washington Times registered nearly 10 death over the border and 43 cases since 2010[143]. The abuse of power and the separation of power between the States have been discussed for many years, without finding a proper solution. Many have been the cases condemning agents as well as many have been the unsolved cases of trespassing over this border.

2.3 The Bardonecchia's incident in the light of the Treaties and of the general international law applicable.

The several violations of the International and Bilateral treaties made by the French agents working during that night are the reason behind the seriousness of the incident of Bardonecchia. Starting from the principles of International law and moving forward the laws of the Bilateral Treaties, the following chapter aims to analyse the infringement that has weighted on the case. The territorial sovereignty – as defined in paragraph 1.1 of Chapter 1 – is one of the main features belonging to any State, corresponding to the capacity of exercising an authority within the territorial borders. The violation of this power results in the infringement of the State's jurisdiction. The principle of sovereign equality in common between the two States involved points at tearing down any disparity in the exercise of the UN Member State's powers. The amount of power of the Member States is then completely equal and at the basis of the States' mutual recognition. On the one hand, this principle ensures the recognition of the government *de jure*. On the other, the partnership between the two through the International treaties and bilateral agreements signed demonstrate an acknowledge at the *de facto* level of both sovereignties.

Moreover, the relationship between the two States has been founded on the *uti possidetis* principle from the start. It guarantees each part's commitment to solve any disputes looking for any solution employing dialogue in order to strengthen the relationship and to avoid the use of violence. This principle implies a relationship of equality and respect between the parts involved, based on the witness of the past conflicts. These were the main points on which the Schengen Agreement was based.

Placed at the same level, the time was the only State's requirement necessary for the implementation of an area with no internal borders ensuring the freedom of movements.

[143] G. E. MOORE, *US border agents shouldn't have the courts' permission to shoot people in Mexico*, in *The Guardian*, 2015, available online.

Wracked with WWII, the abolition of the boundaries required years and instruments to establish the unrestricted movements of the 4 pillars at the basis of the common market. The elimination of such relies on a complete trust between the Member States since these lines are necessary to limit and allow the acquisition of the sovereignty from each State. Cooperation and communication result to be the trust-building features necessary for the implementation of the Schengen Area. Unfortunately, these have been threatened by the *Gendarmerie*'s behaviour during the Bardonecchia incident. However, the point is that this peculiar situation has become a frequent kind of violation in the last years. Thus, from a specific case it is possible to derive a more general *modus operandi* that can be traced back in the other several cases. The lack of control that permitted such actions to take place complicated the cooperation between the contracting parts.

The State's predictability acquires an important role for the establishment of the international "co-ordination"[144] – as defined in the Treaty of Rome – based on the possibility to forecast the actions of the other members. This possibility relies on the "common objectives and common institutions"[145] that the States were willing to create through the international cooperation. The unpredictability of the actions of the French agents undermines the trust built between the two States and the future relationships. These episodes threaten the State's security leading a xenophobic fear to re-emerge, together with the willingness to resettle the national borders. Solving these disputes and punishing such actions will then imply to avoid the rise of any nationalistic sentiment which would have made impossible the creation of a free movement area. Interests-maximisation and national superiority were the ideals that characterised the world conflicts and lead to the atrocious consequences that must never repeat once more. Hence, it is important to calm down any action threatening international peace, national security and people's lives.

The French agents' actions must be considered as illegal trespassing case where the abuse of power and mistreatment of the migrant involved happened. Such should be condemned as any other illegal activity is denounced and punished according to article 12[146] of the Testo Unico sull'Immigrazione. The violence and the urine examination that the migrant was subjected to were unnecessary, giving that such examination would only prove any *in corpore* presence of drugs. Provided with all the legal documents necessary to enter in the Italian territory – as defined by the Polizia di Stato[147] –, the migrant was found with any narcotic substance.

[144] Art. 70, p. 1, Treaty of Rome of 25 March 1957.
[145] Art. 1, Treaty of Paris of 18 April 1951.
[146] Art. 12, D.Lgs. 286/1998.
[147] POLIZIA DI STATO, *L'ingresso in Italia*, 30 September 2013, available online.

According to the Schengen Convention, the possibility for the other State's agents to arrest anyone is triggered only in the case of a *in flagrante delicto*. The migrant stopped on the train from Paris to Milan possessed any drugs though the agent's suspects. Moreover, the examination used should have be done in a medical centre, rather than a Station's bathroom. The Station of Bardonecchia – as explained in the 2.1 of this Chapter – was no longer accessible to the *Gendarmerie* as employed for the NGO "Raibow for Africa"'s activities. It results in the infringement of article 41 paragraph 5[148] which ban the entrance of the agents in any private place.

The several international and bilateral treaties and the joined police actions provide for the possibility of French agents to operate within the Italian territory limited by the conditions defined, which appeared to have been completely violated during this case. The regulation in force during this episode includes the "Convenzione tra l'Italia e la Francia relativa agli uffici a controlli nazionali abbinati ed ai controlli in corso di viaggio" of 1963, Chambery Agreement of 1997, the Prüm Treaty of 2005 and the "Accordo tra Italia e Francia in materia di cooperazione bilaterale per l'esecuzione di operazioni congiunte di polizia" of 2012. These treaties control the execution of the police joined actions, planning any coordination measure between the two State's agents.

In accordance with the article 3[149] of the Agreement for the bilateral cooperation of 2012, the French agents have the authority to operate within the Italian territory following the instructions and the decisions made by the national agents operating. Hence, it is necessary their actions to take place under the control and in the presence of the Italian authorities. During the Bardonecchia incident, none of the Italian authority was neither informed nor involved during the operations, implying the infringement of the Agreement. The French agents considered unnecessary the presence of any agents, leading to an abuse of power to take place.

The Chambery Agreement defines another key element regulating the cooperation between the two States: the subordination of the French agents working on the Italian territory. Article 13[150] of this Agreement explains the role of the *Gendarmerie* on the Italian territory as consisting in the participation and the support of the territorial authorities during the public manifestations. None of these competences can be fulfilled exclusively by the French agents. This article defines the cooperation between Italy and France, recognising the Italian sovereignty within the national borders. Hence, the French agent neither were acting on behalf of the Italian

[148] Art. 41, Convention implementing the Schengen Agreement of 14 June 1985.
[149] Art. 3, D.Lgs. 215/2015.
[150] Art. 13, Chambery Agreement.

authorities, nor asked for any permission regarding their entrance in the territory, the examination and the arrest of the migrant who appeared to have committed no crimes.

The disparity of competences favours each authority operation on their State's territory, imposing the subordination of the other State's agents. According to article 24[151] of the Prüm Treaty, all the agents involved during the interventions made by the Italian authorities must respect the instructions given by the hosting State. Emergencies happen to be the exception for the French agent to act and enter the territory without a previous permission, as defined by article 25[152]. All the episodes involving the use of force as the only resort available to stop any action threatening the national security. Another exception empowering the French authorities to cross the border without an advance notice is the chase of a person caught *in flagrante delicto*. If not at the beginning of the chase, the authorities must inform the national agents once they are crossing the border. Nonetheless, the French agents working responsible for the Bardonecchia incident seemed to haven't informed the Italian authorities.

Finally, it must be mentioned the article 349[153] of the Italian order defining that any hair, saliva or other kind of sample requires the previous license from the judicial authority if the person involved is unwilling to undergo these examinations. It derives that the agents have infringed the abovementioned Italian procedures having no permission to conduct any examination, neither from the judicial authority, nor from the man. Such operation has brought serious violation of the fundamental rights and the respect for other human beings, more than of the international treaties and norms regarding the authorities' cooperation.

The lack of the exchange of communication and the mutual respect of the Agreements are necessary for the cooperation relationship to last through years. Especially since the last years' migration crisis started, which has intensified the issue of national security already threatened by the absence of internal borders, such values appear to be fundamental. As defined above-mentioned, the construction of the Schengen Area was established on the common aim the Member State were willing to fulfil. The proper achievement of such objectives was possible only through the collaboration of every State involved in the respect of each other authority. Then, French agents' actions of disrespect and closeness towards Italy as their partner undermines the national and International security, together with the achievement of the common goals established. Finally, it must be reported how the events happened after the case and involving the French government reaction support the previous beliefs. After days of

[151] Art. 24, Decision 2008/616/JHA.

[152] Art. 25, *ibidem*.

[153] L. 85/2009 of 30 june 2009, gli accertamenti medici coattivi – questioni concernenti la banca dati ed il laboratorio nazionale del DNA.

silence, the French government replied to the Italian demand for an explanation, standing up for their agents and declaring that no violation has ever occurred. The way the French government reacted goes against the articles 2 and 6 of the 1963 Convention[154]. Thus, this reaction favoured in any way the diplomatic dialogue imposed also by the international principle of *uti possidetis*. Fortunately, no armed conflict or action took place between the two States, still the dialogue was not used as the only resort as expressed by this principle. The possibility to find a solution was eclipsed once France decided to fail to take the responsibility for the agent's action, as defined by this regulation.

[154] Art. 2, L. 824/1965.

Conclusions

The relationship between France and Italy involves the further recognition of each other's identity as partners for exchanges. The unruled actions conducted by the French agents demonstrate an underestimation of the partner's powers. It is reasonable to affirm that the abuse of power deriving from the agents' actions was shaped over a belief of superiority that has induced such actions to take place. The actions that took place show a complete underestimation of the State equality of sovereignty, at the basis of the UN membership, together with the disrespect for the boundaries and territorial authorities.

Three are the possible consequences deriving from the Bardonecchia incident. First of all, there is the remote chance of the end of the cooperation at the borders between the two States involved. Even if the existence of this chance, the delete of all the Treaties and so the creation of new regulations will imply the need of a long-time commitment. The nowadays dispositions are the result of decades of discussions and trials, which elimination would provoke a step backward the historical relationship between France and Italy. In the light of such relationship, it is possible to affirm that an armed conflict between the two has absolutely no chance to ever take place.

Then, an amend of the cooperation relationship involving tighter controls over the hosted agents, together with an increase in the number of the Italian agents at the border. This would diminish the possibilities for any improper action or entrance to happen. It would also avoid the option of banning the exchange of agents between the two State. The presence of the authorities of both States in both territories was sketch out in order to ensure the objectivity and equality of treatment of people controlled at the border.

Finally, punishing the agents could spare the interruption of the relationship and increase the possibility for a trust re-build process to start. However, as it has been discussed, the likelihood of this event to end up in the oblivion is extremely high. Many were the antecedent cases that has involved these two countries and also other European and non-European countries. However, the importance to explain the seriousness of this case relies in the hope that a solution would be found, in order to decrease the number of future cases and future victims.

In conclusion, the history, the fashion enthusiasm, the diversity and contrast of the new and old, the ancient traditions still vibrantly present these two cities share are hard to be found elsewhere. The values and the ideas for the establishment of a stronger Europe have characterised a 60-

years-old twinning. Despite the unpredictability of the future, the bound between the two is destined to last in both States' interests. Without Bilater treaties it would have been impossible to organise both State's willingness to solve against the common problem of immigration, always on the respect of the fundamental human rights. Both have experienced the phenomenon of people's movement, though the Italian territorial position implies a further involvement of it in the discussion. Even if the majority of the people entering the country head towards Northern European countries, the Mediterranean Sea house the majority of the journeys. Days, if not weeks, smashed together on a boat, hoping for a better place to establish and search for freedom and safety. Days dreaming of an Area where to move freely in a borderless area full of opportunities. Then, the possibility to amend parts of the relationship should be taken into consideration for the strengthen of such during the future years.

The analysis made in the chapter before aims to spread the awareness of how such actions threats the security of human beings and entire nations, together with the values of the union both States are involved in. Unfortunately, the union of time and external distractors makes it extremely likely for the case to fall in the oblivion. The relationship between the two countries appears to be the most useful tool regarding the possibility to regulate the several issues Italy and France are together involved in and surely will during the next 21th century.

List of abbreviations

The following list of abbreviations contains the acronyms used in this essay.

ABBREVIATIONS	DEFINITIONS
NATO	North Atlantic Treaty Organization
SIS	Schengen Information System
VIS	Visa Information System
EEC	European Economic Community
EURATOM	European Atomic Energy Community
TFEU	Treaty of Functioning of the European Union
SBC	Schengen Border Code
IDP	Internally Displaced people
CEAS	Common European Asylum System
RCD	Reception Conditions Directive
APD	Asylum Procedures Directives
EURODAC	European Dactyloscopie
GURI	Gazzetta Ufficiale Della Repubblica Italiana
NGO	Non-governmental Organization
FARNESINA	Italian Government and the Minister of Foreign Affairs and International Cooperation
COM.	Communication
L.	*Legge*
D.LGS.	*Decreto Legislativo*
N.	Number
ART.	Article

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Abstract:

Fondatori della comunità europea, del G7, G8 e della NATO, l'Italia e la Francia hanno avuto storie differenti ma valori così simili che i rapporti tra questi due paesi da economici, sono divenuti sociali e culturali. Gli accordi bilaterali sanciti nel corso dei decenni a partire dal 1963 disciplinano la cooperazione frontaliera tra i due stati, regolandone le operazioni congiunte di polizia. Strumento fondamentale per sostenere lo sviluppo dell'area di Schengen – nonché la libertà di movimento di beni, servizi, persone e capitali – senza dover sacrificare la sicurezza nazionale, i controlli di frontiera sono stati reintrodotti dai due stati successivamente all'Accordo del 1985. I valori instaurati attraverso questi trattati, quali fiducia, rispetto e cooperazione, sono gli stessi ad essere stati violati durante la vicenda di Bardonecchia nella notte tra il 29 e il 30 marzo scorso. Gli agenti francesi che operavano sul territorio italiano un anno fa hanno fatto irruzione presso la stazione di Bardonecchia per sottoporre al test delle urine l'immigrato regolare fermato e arrestato sul treno Parigi-Milano con l'accusa di sospetto traffico di stupefacenti.

Divenuto da subito un caso diplomatico, oltre che politico, le insoddisfacenti risposte ottenute dal governo francese hanno mosso il presente studio ad analizzare i fatti avvenuti alla luce dei trattati in vigore e del rapporto attuale tra le due nazioni. Al fine di effettuare un'analisi completa che considerasse gli aspetti sopraelencati, l'elaborato ripercorre le fasi storiche che hanno permesso la creazione dei trattati, rinforzando i rapporti tra i due paesi. Partendo dai principi fondamentali che costituiscono uno stato secondo il diritto internazionale, l'accordo di Schengen e i trattati bilaterali vengono descritti nello specifico, in modo da agevolare l'analisi finale volta ad evidenziare le violazioni commesse dagli agenti d'Oltralpe. La prima parte si focalizza dunque sul rapporto instaurato tra Italia e Francia durante i decenni. La seconda fase esamina le vicende del caso preso in considerazione, elencando gli articoli e i principi infranti. La fase conclusiva propone le possibili alternative nelle mani dello stato italiano.

Il primo capitolo si apre con il principio della sovranità territoriale che esprime l'effettivo potere svolto nei limiti definiti dai confini. Questi ultimi, abbattuti dall'Accordo di Schengen, rimangono strumenti fondamentali per limitare i poteri degli stati confinanti e prevenire eventuali conflitti internazionali. Dopo aver dunque definito il processo storico terminato con l'entrata in vigore dell'Accordo a dieci anni di distanza dalla firma avvenuta nel 1985, lo studio prosegue con l'elenco dei requisiti necessari affinché uno stato possa far parte dell'area di Schengen. Elaborato da Schuman sul progetto di un accordo che risolvesse le antiche dispute

tra Francia e Germania, l'Accordo di Parigi firmato nel 1951 è considerato la pietra miliare nella storia dell'Unione Europea, definita tale solo nel 1992 dopo aver instaurato non solo un mercato comune, ma una vera e propria unione di stati. Questa si è insediata nelle vite di ogni cittadino, permettendo loro di avvalersi di una seconda cittadinanza, ossia quella europea. Stabilita poi l'evoluzione a cui sono andati incontro sia Italia che Francia, il paragrafo finale elenca i trattati bilaterali che hanno stretto un gemellaggio lungo 60 anni, nonostante le differenze nella storia delle politiche migratorie delle due nazioni.

Il secondo e ultimo capitolo si conclude con un'ampia indagine sulla vicenda di Bardonecchia, secondo quanto riportato dalle autorità italiane. Proseguendo con l'elenco delle violazioni avvenute, l'indagine permette di effettuare l'analisi prefissata, considerando l'abuso di potere e la mancanza di reciproco rispetto evidenziato dai fatti. La vicenda viene principalmente considerata come un caso di sconfinamento illegale, a cui si sommano i comportamenti incongrui con i limiti stabiliti dai trattati bilaterali. Si evince come non solo vi è stata una violazione della sovranità territoriale italiana, ma i gendarmi hanno infranto tutti i regolamenti riguardanti il loro obbligo d'informare le autorità italiane di un eventuale sconfinamento, oltre a quelli sul limite dei loro poteri in assenza delle autorità statali. Ne risulta un complesso di superiorità che non giustifica, ma permette di comprendere anche l'irruzione avvenuta nella stazione ferroviaria di Bardonecchia, locale non più accessibile alle attività di controllo frontaliere.

Le conclusioni spronano ad una riflessione riguardo le possibili conseguenze derivanti dal grave comportamento degli agenti e dall'insufficienza di spiegazioni da parte del governo francese. Si considerano tre alternative che potrebbero, in tre modi diversi, influenzare i rapporti tra Italia e Francia. Analizzando dalla più alla meno probabile delle misure che il governo italiano potrebbe prendere, lo studio non svolge un'analisi finalizzata alla soluzione del problema, piuttosto mira a considerare la seria possibilità di aver compromesso i rapporti tra i due stati, ritenuti fondamentali per un'Unione Europea fondata sulla libertà, sicurezza e giustizia.