

Department of *Political Science*

Bachelor Degree in *Politics, Philosophy and Economics*

Chair of *International Law*

The principle of *non-refoulement*: a
comparative analysis of the legal systems of
the European Union, the United States of
America and Australia through most relevant
case law

Prof. Roberto Virzo

SUPERVISOR

Raffaella De Meo
Matr. 085592

CANDIDATE

Dott. Giorgio Maria Briozzo

CO-SUPERVISOR

TABLE OF CONTENTS

1. The history of the principle of <i>non-refoulement</i> and its application and nature	1
1.1 The Geneva Convention of 1951 and the 1967 Optional Protocol.....	3
1.2 The Declaration on Territorial Asylum of 1967	7
1.3 The International Covenant on Civil and Political Rights of 1966.....	8
1.4 The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1987.....	9
1.5 The principle in the legal systems across the world.....	11
1.5.1 The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969	11
1.5.2 The American Convention on Human Rights of 1969	13
1.5.3 The Cartagena Declaration on Refugees of 1984.....	14
1.5.4 The Asian-African Principles On Status And Treatment Of Refugees of 1966	16
1.6 New frontiers: eco-refugees? <i>Teitiota v New Zealand</i>	18
1.7 Considerations	21
2. The principle of <i>non-refoulement</i> in Europe	22
2.1 The Council of Europe	22
2.1.1 The European Convention of Human Rights of 1950	22
2.1.2 <i>Soering v United Kingdom</i>	23
2.1.3 <i>Hirsi Jamaa and others v Italy</i>	24
2.2 The European Union	28
2.2.1 The Charter of Fundamental Rights of the European Union of 2000.....	29
2.2.2 The European Union’s primary and secondary law	29
2.2.2.1 The Schengen Borders Code.....	30
2.2.2.2 The Qualification Directive	31
2.2.2.3 The Asylum Procedure Directive.....	32
2.2.2.4 The European Border and Coast Guard Agency and its operations.....	32
2.2.3 Operation EUNAVFOR MED Sophia.....	35
2.2.4 Safe Third Countries and the case of Turkey.....	36
2.2.5 The politics of externalization of the borders.....	38
2.5 Considerations	39
3. The principle of <i>non-refoulement</i> in the United States of America	40

3.1 The United States' legal system concerning refugees.....	40
3.2 <i>Sale v Haitian Centers Council, Inc.</i>	42
3.3 Safe Third Countries	47
3.3.1 Canada: a contested reality.....	47
3.3.2 Mexico: a possible alternative?	49
3.4 Considerations	51
4. The principle of <i>non-refoulement</i> in Australia.....	51
4.1 The Australian legal system concerning refugees	52
4.2 The <i>Tampa</i> incident and its consequences	54
4.3 Safe third countries	58
4.3.1 Papua New Guinea	59
4.3.2 Malaysia	60
4.3.3 Indonesia	61
4.4 Considerations	62
Conclusion	63
List of abbreviations.....	66
Bibliography	67
Legal cases	71
Treaties and Official Documents.....	73
Acknowledgements	78
Riassunto dell'elaborato in lingua italiana	79

1. The history of the principle of *non-refoulement* and its application and nature

This introductory chapter will examine the development of the principle of *non-refoulement* through the most relevant legal instruments adopted by the international community of States and by regional organizations to this day, with particular attention to the nature of the principle in the current academic debate and the mechanisms of enforcement provided for by the said instruments. Starting from the first attempt of codification in the 1933 Convention on the Status of Refugees, this chapter will analyse the 1951 Geneva Convention along with the 1967 Optional Protocol, the 1967 Declaration on Territorial Asylum, the 1966 Covenant on Civil and Political Rights and the 1987 Convention against Torture. On a geographic level, this chapter will provide an overview of the codification of the principle in the 1969 OAU Convention on Refugee Problems in Africa, the 1969 American Convention on Human Rights, 1984 Cartagena Declaration on Refugees and the 1966 Asian-African Principles On Status And Treatment Of Refugees. Lastly, a brief presentation will be provided of the recent case *Teitiota v New Zealand*, which may open in the future the possibility for migrants escaping from environmental threats to claim the application of the principle of *non-refoulement*.

Non-refoulement is a principle of international law that prohibits the return (in French “*refoulement*”) of a refugee to a country where the said refugee faces threats of discrimination, torture and where his or her life is put at risk. This principle is often considered as the central provision of refugee law¹. It must be noted that the prohibition only applies to refugees, hence all those persons that are “forced” to migrate, as opposed to those who migrate “voluntarily”, namely for economic reasons.

According to the recent developments of international law, the principle applies to those persons that are persecuted by their national State or its officials as well as to those persons that are endangered by non-State actors present on the national territory². Throughout time, uncertainties have emerged on the true meaning of the verb “return”, and therefore on the scope of the application of the principle. This matter will be addressed in the third chapter, where an overview of the case *Sale v Haitian Centers Council, Inc.* will be provided.

The necessity of unilaterally regulate the conduct of States to prohibit the rejection of refugees at their borders can be traced backed to the end of the World Wars in the 20th Century. The barbaric conflicts that mostly affected the European continent, especially First World War, produced an unprecedented volume of refugees flows, escaping from the totalitarian regimes of Germany, Italy and Russia. Already in the context of the League of Nation, the first institutional attempt of States to cooperate for peace, the

¹J. KLABBERS, *International law*, Oxford, 2017, II ed.

²ICRC, *Note on Migration and the Principle of Non-Refoulement*, in *International Review of the Red Cross*, no. 904, 1st April 2017, p. 345–357.

international community took a first step towards the codification of the principle of *non-refoulement*. On 28th October 1933, the governments of Belgium, Bulgaria, Egypt, France and Norway signed the Convention relating to the Status of the Refugee. The Convention was later ratified only by Belgium, Bulgaria, France and Norway and acceded by Czechoslovakia, Denmark, Ireland, Italy and the United Kingdom.

In Article 3 the Convention states:

“Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order.” The intention of the drafters of this article was clearly to express on States the prohibition of expelling or avoiding the entry of refugees. However, the provision also contains an exception to the rule for security reasons. The article also states in the following paragraphs: “It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin. It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorisations and visas permitting them to proceed to another country”.

Some preliminary clarifications on the principle are needed, as uncertainty on the nature of the principle itself has always unsettled the minds of legal scholars, especially on whether the prohibition of *refoulement* may be considered a customary principle of international law and, at the same time, part of *jus cogens*.

On the one hand, for what concerns the question of customary principle, scholars have observed in the application of the principle of *non-refoulement* in the States of the international community both the requirements provided for in Article 38 of the Statute of the International Court of Justice, which states that general customs of international law are “evidence of a general practice accepted by law”. Hence, according to international law scholars, the principle of *non-refoulement* may qualify as customary law inasmuch States provide for it in their material acts and in their legislative acts, generally accepting it as law (*opinio juris sive necessitate*).

On the other hand, the question of whether the principle of *non-refoulement* may be considered part of *jus cogens* remains largely debated. Before inquiring further in this topic, a specific definition of *jus cogens* must be provided. *Jus cogens*, a concept present in the writings of Grotius and Vattel and the

dissenting opinions of the Permanent Court of International Justice³, is an alternative way of referring to a peremptory norm which, as expressed in Article 53 of the 1969 Vienna Convention on the Law of the Treaties, is “a norm accepted and recognized by the international community of States as a whole [*opinio juris*] as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”⁴.

According to Lauterpacht and Bethlehem⁵, among the nineteen States Members of the United Nations that are not States Parties of the treaties analysed in the present chapter (the 1951 Geneva Convention and its Optional Protocol, the Convention Against Torture, the OAU Refugee Convention and the American Convention of Human Rights) nor of the European Convention of Human Rights, there is “no suggestion (...) of opposition to the principle”. However, while the latter statement largely demonstrates that the principle is “accepted and recognized by the international community of States as a whole”, much uncertainty remains around the question of derogation. Following paragraphs of this chapter will analyse the question on a case-by-case analysis.

Reinforcing the view of Lauterpacht and Bethlehem is the comment of Harold Koh, who already in the 1990s, while commenting the case *Sale v Haitian Centers Council Inc.*, declared that “numerous international publicists now conclude that the principle of *non-refoulement* has now achieved the status of *jus cogens*”⁶.

Jean Allain, as many other scholars, suggested that the lack of compliance of States with the principle of *non-refoulement* that occurred in certain occasions does not indicate that the principle is not widely accepted, but rather, as the sentence of the International Court of Justice on the pivotal *Nicaragua case* hinted, the lack of compliance “confirms rather than to weaken the rule”, as long as there is a “general consistency of conduct” on behalf of the State⁷.

It is worth noticing that some scholars assert that the principle of *non-refoulement*, rather than being part of *jus cogens*, may be considered part of *jus dispositivum*, meaning a law from which States may deviate by claiming circumstances which preclude their wrongfulness⁸.

1.1 The Geneva Convention of 1951 and the 1967 Optional Protocol

More than ever, after the events that occurred in Europe during the Second World War it was evident the

³J. ALLAIN, *The Jus Cogens Nature of Non-Refoulement*, in *International Journal of Refugee Law*, Vol. 23, no. 4, 2001, pp. 533-559.

⁴Vienna Convention of 23rd May 1969, on the Law of the Treaties. Hereinafter: VCLT.

⁵E. LAUTERPACHT, D. BETHLEHEM, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, Cambridge, 2001.

⁶H. H. KOH, *Reflections On Refoulement And Haitian-Centers Council*, in *Harvard International Law Journal*, vol. 35, no. 1, 1994, pp.1-47.

⁷J. ALLAIN, *supra* note 3, p. 541.

⁸J. ALLAIN, *supra* note 3, p. 534.

need for a systematic legal framework dealing with the conditions of refugees. A very first step was taken on 10th December 1948, when the United Nations General Assembly approved the Universal Declaration of Human Rights (“UDHR”), whose Article 14 states:

“Everyone has the right to seek and to enjoy in other countries asylum from persecution”⁹.

On 8th August 1949, the United Nations Economic and Social Council appointed in Resolution 248/10 the *Ad Hoc* Committee on Statelessness and Related Problems, whose mandate was to “consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and (...) a draft text of such a convention”¹⁰. The Secretary General later implied that new provisions should have been based on principles already existing in the context of the League of Nations, namely the aforementioned 1933 Convention Relating to the Status of Refugees¹¹.

On 28th July 1951, the General Assembly approved the draft of the Convention Relating to the Status of Refugees, adopted in 1951 and fully in force as of April 22, 1954. The 1951 Geneva Convention nowadays counts 147 parties and, among the most relevant States out of the scope of the Convention are Libya, Syria, Pakistan, India and Indonesia.

The first objective of the Geneva Convention was to provide a clear definition of the figure of the refugee. Under Article 1(A)(2), a refugee is a person who has:

“wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”¹².

After giving such an exhaustive definition, the 1951 Geneva Convention provides for the prohibition of *refoulement* in Article 33, under the title “Prohibition of Expulsion or Return (“*Refoulement*”)”, stating that:

“No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The benefit of the present provision may not, however, be claimed by a refugee whom there are

⁹Resolution 217 A(III) of the UN General Assembly of 10th December 1948, on the Universal Declaration of Human Rights.

¹⁰E. LAUTERPACHT, D. BETHLEHEM, *supra* note 5, p. 12.

¹¹E. LAUTERPACHT, D. BETHLEHEM, *supra* note 5, p. 12.

¹²Convention of the United Nations General Assembly of 28th July 1951, Relating to the Status of Refugees. Hereinafter: 1951 Geneva Convention.

reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”¹³.

The wording of Article 33 appears to be directly inspired by the preceding 1933 *Convention on the Status of Refugees*, completing it with precise grounds of protection, namely threats to his or her life or freedom because of his or her “race, religion, nationality, membership of a particular social group or political opinion”.

The Convention excludes the possibility of claiming this right when there are “reasonable grounds” to suppose that the refugee would undermine the public order of the receiving State. Moreover, the provision specifies that the said refugee should have been “convicted by a final judgement of a particularly serious crime”. The critical point of this is that if a citizen of a country is discriminated in said country for his or her political opinion or his or her belonging to a particular political group, such person may be convicted in its own country and labelled as a danger for national security. In theory, such a person should not be able to claim its right to seeking asylum in another country and maybe unjustly returned based on its convictions. The only shield against this possibility is if officials of receiving State find no “reasonable grounds” to consider the refugee a danger for the nation. But the impreciseness of information coming from the country of origin or collected at the frontier may overshadow the judgement of public officials.

Initially, the Convention’s scope was limited *ratione tempore* and *ratione loci*, as it was meant to govern only events occurring before 1951 on the European continent. However, the end of the Second World War did not curb the movement of refugees across international borders. In April 1965 a Colloquium on the Legal Aspects of Refugee Problems was convened in Italy, agreeing that a Draft Protocol to the Geneva Convention needed to be approved¹⁴. In 1967 the international community approved the Optional Protocol, which eliminated the regional and temporal limitations to the Convention. Today States Parties to both the Convention and the Optional Protocol are obliged to ensure the compliance with the provisions of the Convention “irrespective of the dateline 1 January 1951”¹⁵ and in all their national territories. Among the 135 State parties to the 1951 Convention, all except for Madagascar signed the Optional Protocol.

The validity of the 1951 Geneva Convention was reaffirmed on the occasion of the 50th anniversary of its ratification in the Declaration adopted at the “Ministerial Meeting of States Parties to the Convention and/or its Protocol”, which was held in Geneva on December 2001. In January 2003 the United Nations General Assembly, after having welcomed the Declaration adopted in 2001 in paragraph 3 of the Resolution 57/187, added in paragraph 4 of the said Resolution that:

¹³Article 33, para. 1, 1951 Geneva Convention.

¹⁴E. LAUTERPACHT, D. BETHLEHEM, *supra* note 5, pp. 15.

¹⁵Protocol Relating to the Status of Refugees of the United Nations General Assembly of 31st January 1967.

“(…) the 1951 Convention and the 1967 Protocol thereto remain the foundation of the international refugee regime, (…) underlines, in particular, the importance of full respect for the principle of *non-refoulement*(…)”

For what concerns the nature of the principle, the Geneva Convention sets clear standards for derogation of Article 33 in the text of Article 1(F) which states that:

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations”¹⁶.

Under such provisions, it is clear that the principle of *non-refoulement* in the Geneva Convention tends to fall out of the definition of *jus cogens*, insomuch as the Convention itself provides for an exception to the full application of the principle.

Moreover, according to the 2001 Opinion of Lauterpacht and Bethlehem, “although not in identical terms, there is an evident overlap between the exceptions in Article 33(2) and the exclusion clause which forms part of the definition of refugees in Article 1F of the 1951 Geneva Convention”¹⁷, even if “Article 33(2) indicates a higher threshold”¹⁸. This latter observation implies that, while Article 1F refers to crimes committed in the past by the concerned person, Article 33(2) rather refers to any type of threat to public security potentially posed by the refugee in the future, hence something rather improbable to foresee, unless the concerned person has committed crimes in the past in its country of origin or transit that could worry the State of arrival.

In any case, this observed overlapping of exclusion clauses reinforces the view that the prohibition of *refoulement* under the Geneva Convention is subject to consistent reservations, thus far from being considered part of *jus cogens*.

¹⁶Article 1 litt. F, 1951 Geneva Convention.

¹⁷E. LAUTERPACHT, D. BETHLEHEM, *supra* note 5, p. 47.

¹⁸E. LAUTERPACHT, D. BETHLEHEM, *supra* note 5, p. 47.

1.2 The Declaration on Territorial Asylum of 1967

Even after the full entry into force of the 1951 Geneva Convention, many uncertainties and inconsistencies remained on the application of the principle of *non-refoulement*. Unable to find an agreement that could legally bind States, the United Nations General Assembly adopted in December 1967 the Resolution 2132 (XXIII), better known under the name of “Declaration on Territorial Asylum” (hereinafter “DTA”). The Resolution, stemming from Article 14 and Article 13(2) of the Universal Declaration of Human Rights, is one of the few instruments analysed in the present chapter that was adopted unanimously, mainly because it did not give rise to direct obligations on sovereign States.

After giving a definition of refugees in Article 1 by referring directly to the Universal Declaration of Human Rights, the Declaration on Territorial Asylum states in Article 3:

- “1. No person referred to in Article 1, Paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.
2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.
3. Should a State decide in any case that exception to the principle stated in Paragraph 1 of this article would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State”¹⁹.

Although the wording of the second paragraph clearly excludes that the principle was intended to be considered part of *jus cogens*, this Article presents three interesting characteristics.

First of all, it embraces both the situation of rejection at the border and expulsion towards a State in which the refugee may be subject to persecution. About this latter part of the paragraph, it is worth noticing that the Declaration, differently from other instruments presented in this dissertation, does not provide any clarification on the word “persecution”, nor it provides clear grounds for the neat recognition of situations of persecution that a refugee may face.

Secondly, a first mention of “a case of a mass influx of persons” is made, probably as a measure to safeguard State sovereignty, thus facilitating the adoption of the resolution by all Member States. Such wording gives a very specific and controversial ground of exclusion, which is not present in any of the legal instruments analysed in the present chapter. Although United Nations General Assembly’s Resolutions are

¹⁹Resolution 2312 A(XXII) of the UN General Assembly of 14th December 1967, on the Declaration on Territorial Asylum.

non-binding due to the incompetence of the Assembly to create legal obligations²⁰, this ground of exclusion may justify the conduct of some States that fear a perceived “invasion”. Moreover, such a wording may have a political implication for a number of Governments that, in recent years, have deliberately acted against the protection of refugees.

Thirdly, Article 3(3) envisages the possibility of discretionarily granting a safe passage of refugees towards a third State through “provisional asylum” or other means. As it shall be explained in more detail in the second chapter of the present work, more specifically in the part dedicated to “Safe Third Country” policies, the transfer of a refugee to another State may not always unquestionably guarantee protection from the violation of fundamental rights. However, this paragraph may complement and give a possible solution to the critical point raised by the “case of mass influx” presented above.

1.3 The International Covenant on Civil and Political Rights of 1966

The International Covenant on Civil and Political Rights (“ICCPR”) is one of the instruments of international law that more extensively protects human rights. The Covenant, entered into force on 23rd March 1976, has been ratified by 167 States, while seven other States have only signed it without a formal ratification. Among these States are China, Cuba, Nauru and Palau.

In Article 7, the Covenant provides that:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”²¹.

Differently from other legal instruments analysed in this work, the Covenant does not explicitly provides for the prohibition of *refoulement* in a specific article. However, scholars agree that the Covenant protects the rights of refugees against the possibility of being rejected by expressing a deep connection of the principle of *non-refoulement* with the prohibition of torture, a norm of international law widely regarded as peremptory.

The greatest relevance of the Covenant in the context of this analysis of the principle of *non-refoulement* lays in the case-law of the Human Rights Committee. The Human Rights Committee was instituted as an instrument to monitor the implementation of the Covenant on Civil and Political Rights and is composed by independent experts that require State parties to compile periodical reports on the state of application of the Covenant. The capability to mediate in inter-State complaints is given to the Committee by

²⁰J. KLABBERS, *supra* note 1, p. 94.

²¹International Covenant of the United Nations General Assembly of 16th December 1966 on Civil and Political Rights. Hereinafter: ICCPR.

Article 41 of the Convention, while it has also the possibility to consider individual complaints limited to State parties, according to the principles laid in the First Optional Protocol of the Convention. Among the most relevant decisions taken by the Human Rights Committee in regard to environmental migrants is *Teitiota v New Zealand*, which will be analysed in more detail in the latter part of the first chapter due to its interesting implications.

The question on the nature of the principle in the Covenant is quite evident by the wording of Article 4, which states under paragraph 2 that:

“No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision”,²².

Hence, it is easy to assert that, according to the drafters of the Covenant, the prohibition of *refoulement* is part of *jus cogens*. Additionally, of a great relevance is the General Comment No. 20 (1992) of the Human Rights Committee, which states in Paragraph 3 that:

“The text of Article 7 allows no limitation. The Committee also reaffirms that even in situations of public emergency such as those referred to in Article 4 of the Covenant, no derogation from the provision of Article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reasons, including those based on an order from a superior officer or public authority”,²³.

1.4 The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1987

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, hereinafter “Convention against Torture” or “CAT”, was adopted by the General Assembly Resolution 39/46 on 10th December 1984 and entered into force on 26th June 1987. At present, it has been ratified by 169 States.

In Article 3 the Convention declares that:

“No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

²²Article 4, para. 2 ICCPR.

²³General Comment no. 20 of the UN Human Rights Committee of 10th March 1992 on the Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment).

2. To determine whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”²⁴.

This Article provides for much more general grounds for the determination of the status of the persons concerned with the application of the principle of *non-refoulement*. If this provision and the aforementioned Article 7 of ICCPR, which directly gives the name to the Convention against Torture, are jointly taken into consideration, much space is left for interpretation of the “competent authorities”. Although Article 3(2) expressly refers to “consistent pattern of gross, flagrant violations of human rights”, the Convention against Torture remains vague and unspecific if confronted with the 1951 Geneva Convention.

The main limit of the present Convention is that the wording of Article 3 may suggest that gross violations of human rights are only those perpetrated by the State. The reality of facts suggests that gross violations of human rights often derive by the intervention on the territory of the State of non-State actors. This issue is better addressed, for example, in the 1969 OAU Convention, which will be analysed in detail in the following paragraphs.

The compliance with the principles established in the Convention against Torture is guaranteed by the Committee Against Torture. The Committee is formed by ten independent experts who analyse State parties’ periodical reports on the implementation of the Convention on their national territories. The latest case on *non-refoulement* analysed by the Committee Against Torture is the case *Flor Agustina Calfunao Paillalef v Switzerland*. In this case, notwithstanding the evident status of vulnerability of the applicant as a member of an indigenous minority in Chile, Switzerland failed to provide protection to the applicant, therefore the Committee against Torture invited Switzerland, under the provisions of Article 3 of the Convention Against Torture, to reconsider its past decisions on the case²⁵.

For what concerns the nature of the principle of *non-refoulement*, the Convention against Torture makes no reference to whether States may or may not derogate from their obligation to protect refugees. Hence the question remains open.

²⁴Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the United Nations General Assembly of 10th December 1984.

Hereinafter: Convention Against Torture.

²⁵UN Committee Against Torture judgement of 2nd January 2020, CAT/C/68/D/882/2018, *Flor Agustina Calfunao Paillalef v Switzerland*.

1.5 The principle in the legal systems across the world

1.5.1 The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969

After the Second World War, conflicts and systematic violation of fundamental rights started to produce refugees in regions of the world different than Europe only. Following the processes of decolonization, the difficult period of transition for new-born independent States and the episodes of apartheid, the African continent started to face an increase of migratory flows of difficult handling. Hence in September 1969 the Heads of State and the Heads of Government of the Member States of the African Organization for Unity (“OAU”, which later in 2001 became the African Union) signed in Addis Ababa, Ethiopia, one of the most revolutionary instruments of protection for refugees, which still today remains relevant and interesting.

Based on the UDHR, the DTA and on the 1951 Geneva Convention and its Protocol, the Convention Governing the Specific Aspects of Refugee Problems in Africa, or OAU Refugee Convention, is legally binding for 45 of the 54 current members of the African Union and entered into force on 20th June 1974. Interestingly, the OAU Refugee Convention was ratified by Libya, which has however never become part of the 1951 Geneva Convention.

Within the OAU Refugee Convention, there exist regulations regarding the principle of *non-refoulement* under Article II, paragraph 3, which states that

“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2”²⁶.

The novelty of this Convention lies in the fact that, for the first time, the prohibition of returning refugees to situations of danger is nearly absolute. Differently from the already analysed instruments, the OAU Refugee Convention does not provide, in the Article concerning *non-refoulement*, for situations in which a refugee may be excluded from claiming the protection of a State. The only provision that excludes refugee from enjoying their rights is in Article III, which states:

“Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the

²⁶Convention of the Organization of African Unity of 10th September 1969 Governing the Specific Aspects of Refugee Problems in Africa.
Hereinafter: OAU Refugee Convention.

maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU”²⁷.

This latter exclusion clause is not a direct exception to Article II, hence it is possible to assert that, at least under the 1969 OAU Refugee Convention, the principle of *non-refoulement* is regarded as part of *jus cogens*. However, some scholars that have adopted a critical approach towards this latter assertion have noticed that some degree of exception, hence derogation, exist in the wording of Article I(5). The entire paragraph is indeed identical to the exclusion clauses of the 1951 Geneva Convention, hence:

“The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the Organization of African Unity;
- (d) he has been guilty of acts contrary to the purposes and principles of the United Nations”²⁸.

Another difference with other legal instruments that have been analysed so far in the present work is that the OAU Refugee Convention does not institute a separate body to enforce the obligations established. By relying to the principles of cooperation among the Member States of the OAU and with the Office of the United Nations High Commissioner for Refugees (“UNHCR”), as provided for in Articles VII and VIII, ultimately recognises that the settlement of possible disputes on interpretation and application should be addressed to the Commission for Mediation, Conciliation and Arbitration of the Organization of African Unity.

Apart from the absolute prohibition of *refoulement*, the other innovative aspects of the 1969 OAU Refugee Convention are the stress posed on the humanitarian character of the management of refugee flows, the importance of sharing the burdens and the responsibility of acts among Member States and an extensive codification of the voluntary repatriation under Article V. Furthermore, the convention enlarges the previous definitions of refugee in Article I(2), which *inter alia* protects

²⁷Article III, OAU Refugee Convention.

²⁸Article I, para. 5, OAU Refugee Convention.

“[E]very person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”²⁹.

On a liberal interpretation, this clause may also protect victims of climate change-related catastrophes, either provoked by human acts or not. Such an enlargement of the scope of protection may be crucial in the following years, as the African continent may be affected by serious difficulties related to climate change. Further details on possible forms of protection of the so-called environmental refugees will be provided in the last paragraph of this first chapter.

1.5.2 The American Convention on Human Rights of 1969

In the same year of the signature of the OAU Refugee Convention, the Organization of American States signed in San José, Costa Rica, the American Convention on Human Rights. This legal instrument also referred to as “Pact of San José, Costa Rica”, was signed by 23 States, entered into force in July 1978 and was later denounced by Trinidad and Tobago in 1998 and Venezuela in 2012. For the purposes of this dissertation, more specifically for its third chapter, it is worth noticing that neither the United States nor Canada ever signed the Convention. The bodies responsible to ensure compliance of Member States with the principles of the Conventions are the Inter-American Court of Human Rights (“IACrHR”) and the Inter-American Commission of Human Rights.

Under Article 22, the Convention provides for measures of “Freedom of Movement and Residence”, more specifically for the right of a person to move within, leave and not being expelled from his or her country and the right to seek asylum “in the event he [or she] is being pursued political offences or related common crimes”. Article 22(8) eventually states:

“In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions”³⁰.

It is worth noticing that word alien may not necessarily entail that the person is recognized as a refugee. In any case, the wording of this article offers several innovative points.

Firstly, the provision envisages protection from threats in both the country of origin or any other country, as long as there is the possibility that the fundamental rights of the “alien” are violated.

²⁹Article I, para. 2, OAU Refugee Convention.

³⁰Convention on Human Rights of the Organization of American States of 22nd November 1969. Hereinafter: Pact of San José.

Secondly, the wording of the paragraph provides for specific grounds of persecution. Being Article 22 listed under Chapter II of the American Convention of Human Rights, which regards Civil and Political Rights, the Article poses a particular emphasis on discrimination based on political allegiances, also as a response to political unrest in some Latin American countries.

This wording, similarly from other instruments analysed in this dissertation, fails to recognize that some refugees may be persecuted for their sexual orientation. While the question of sexual orientation has been addressed by the Canadian Immigration and Refugee Board in 2007³¹ and subsequently in the directives of the European Union, in 2018 the Inter-American Court of Human Rights, in its Advisory Opinion requested by the Republic of Ecuador, filled this potential vacuum in the scope of the American Convention of Human Rights by asserting that:

“(…) the reference to "international conventions" implies that this Court's interpretation of Article 22(7) should focus not only on the Latin American conventions on asylum but also on the most universally relevant instrument for the protection of persons fleeing persecution, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. This is of utmost importance, as it allows the Court, based on an evolving interpretation, to interpret the grounds for persecution of Article 22(7) in light of current conditions regarding the need for international protection, with a gender, diversity and age focus”³².

Although this statement is limited to Paragraph 7 of Article 22, concerning asylum law, nothing precludes the application of the approach suggested by the Opinion on matters concerning *refoulement* and its prohibition.

1.5.3 The Cartagena Declaration on Refugees of 1984

As South America continued to be plagued by conflicts and military dictatorships, as it happened in Nicaragua, El Salvador, Guatemala, Colombia, Chile, Argentina, Uruguay and Brazil, States started to perceive the need for new legislation concerning refugees. In November 1984, as a result of the “Colloquium on International Protection for Refugees and Displaced Persons in Central America, Mexico and Panama” and of the pressure of the High Commissioner for Refugees Poul Hartling³³, the government of ten States of

³¹Federal Court of Canada, judgement of 29th November 2007, FC 1262, *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v Her Majesty the Queen*.

³²Advisory Opinion of the Inter-American Court of Human Rights delivered on 30th May 2018 Oc-25/18, requested by the Republic of Ecuador.

³³Statement by Mr. Poul Hartling, United Nations High Commissioner for Refugees, to the Third Committee of the United Nations General Assembly, of 11th November 1985.

Latin America, assisted by legal experts³⁴, adopted an instrument that, although not legally binding, is of an extraordinary relevance for what concerns the principle of *non-refoulement*.

In Section III, Paragraph 5, the Declaration reiterates the conclusion of the aforementioned Colloquium by underlining:

“(...) the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*”³⁵.

Some remarks need to be made on the extraordinary wording of this paragraph. In the minds of the drafters of the Declaration, the principle of *non-refoulement* is not a mere concept in refugee law, but a “cornerstone of the international protection of refugees”. This sole wording grant unprecedented importance to the principle, which is indeed defined as “imperative”. This Declaration, although not as binding as the American Convention, erases any doubt on the nature of the principle, at least in the minds of the drafters. Unfortunately, events occurring from the rejection by the United States of Haitian citizens in 1993, up until today, jeopardize the application of the principle of *non-refoulement* in the American continent as part of the *jus cogens*. As Joan Fitzpatrick suggested, “[i]ntergovernmental bodies like the Inter-American Commission on Human Rights and the OAS [Organization of American States] General Assembly acknowledged the conclusions of the Cartagena colloquium with approval, but the expanded definition of a refugee was never formally codified within the region”³⁶. In other words, the legal instruments analysed in this dissertation may suggest that the view on *jus cogens* expressed in the Cartagena Declaration have encountered a general level of acceptance among the Latin American States, without anyway being formally incorporated in regional binding legal instruments, but only in national laws of fourteen Latin American States.

Another innovative aspect of the Cartagena Declaration stands in Part III(3), which states that:

“(...) it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the

³⁴S. RYIANTO, *The Refoulement Principle and Its Relevance in the International Law System*, in *Indonesian Journal of International Law*, vol. 7, no. 4, 2010, pp. 732-756.

³⁵Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, “Cartagena Declaration on Refugees” of 22nd November 1984, done at Cartagena de Indias, Colombia.
Hereinafter: Cartagena Declaration.

³⁶J. FITZPATRICK, *Temporary Protection of Refugees: Elements of a Formalized Regime*, in *The American Journal of International Law*, vol. 94, no. 2, 2000, pp. 279-306.

1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order³⁷.

Apart from suggesting an extensive reform of the definition of a refugee under international law, the Cartagena Declaration is the first legal instrument in refugee law that mentions “massive violation of human rights”. Moreover, the wording “other circumstances which have seriously disturbed public order” may, similarly to the 1969 OAU Refugee Convention, provide the legal grounds for the protection of the so-called environmental refugees.

Although non-binding, the Cartagena Declaration has resonated in the legislations of sixteen Latin American States, including Mexico and Ecuador. Concrete action has been taken in Brazil through the adoption of a decree that started a process of *prima facie* recognition of 21.000 Venezuelan refugees in December 2019³⁸.

1.5.4 The Asian-African Principles On Status And Treatment Of Refugees of 1966

Of great relevance for the purposes of this work is a relatively unknown legal instrument, the Asian-African Principles on Status and Treatment of Refugees, better known with the name of Bangkok Principles. The Principles were initially drafted in Bangkok, Thailand, in the context of the Asian-African Legal Consultative Organization (“AALCO”), an international organization comprising forty-seven States from Asian and African continents. The Draft was only approved on 24th June 2001, during the AALCO’s 40th session held in New Delhi, India. Adopted at the end of the long process of codification of the principle of *non-refoulement* described in this first chapter, the Bangkok Principles may be seen as comprising most of the legal development achieved in refugee protection.

In Article I the Bangkok Principles define the refugee as:

“A person who, owing to persecution or a well-founded fear of persecution for reasons of race, colour, religion, nationality, ethnic origin, gender, political opinion or membership of a particular social group:

- (a) leaves the State of which he is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident; or,

³⁷Part III, para. 3, Cartagena Declaration.

³⁸Decision of the Brazil’s National Committee for Refugees (“CONARE”) of 5th December 2019.

(b) being outside of such a State or Country, is unable or unwilling to return to it or to avail himself of its protection”³⁹.

As it may be noticed, for the first time legal instruments mention gender as one of the grounds of discrimination, being thus far the most complete one. Article I continues in the following paragraphs to enlist grounds for the recognition of the status of refugee, namely “external aggression, occupation, foreign domination or events seriously disturbing public order”, as well as grounds for exclusion, meaning “a crime against peace, a war crime, or a crime against humanity (...) or a serious non-political crime outside his country of refuge prior to his admission to that country as a refugee or has committed acts contrary to the purposes and principles of the United Nations”⁴⁰.

The principle of *non-refoulement* is at the centre of Article III of the Bangkok Principles, which states that:

“No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion.

The provision as outlined above may not however be claimed by a person when there are reasonable grounds to believe the person’s presence is a danger to the national security or public order of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

In cases where a State decides to apply any of the above-mentioned measures to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country”⁴¹

Propositions of amendments have been made by the governments of Thailand and Oman aimed at adding the provision that rejection is prohibited only when people are granted asylum.

Being the Bangkok Principles a rather recent legal instrument of minor importance, scholars have not discussed on the nature of the principle thus far. As the text of the Principles is rather similar to the 1951 Geneva Convention, similar assumptions may be made.

³⁹Bangkok Principles On Status And Treatment Of Refugees of the Asian-African Legal Consultative Organization of 24th June 2001.

Hereinafter: Bangkok Principles.

⁴⁰Article I, Bangkok Principles.

⁴¹Article III, Bangkok Principles.

1.6 New frontiers: eco-refugees? *Teitiota v New Zealand*

Notwithstanding the recent developments in international law, and more specifically in environmental law, scholars, States and experts have always been reluctant to include environmental refugees in the scope of humanitarian protection.

The term “environmental refugees” dates back to 1985, when Essam El-Hinnawi, a researcher for the United Nations Environment Program, issued a paper on those persons escaping from dangers stemming from climate change⁴². Since then, the same class of “aspiring” refugees has been given several other names, for example, climate change refugees, eco-refugees, ecological refugees, forced environmental migrant or disaster refugee. According to the International Organization of Migration (“IOM”), an environmental migrant can be generally defined as “a person (...) who, predominantly for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad”⁴³. Such changes may be divided into two broad categories:

- a) Sudden-onset disasters, namely earthquakes, tsunamis, floods or hurricanes;
- b) Slow-onset disasters, namely desertification, the rise of the level of the sea, droughts, changes in the seasonal weather patterns.

In any of the cases presented above, environmental migration may assume different dimensions, as it may be forced or voluntary, internal or international, on a long or a short term, individual or mass migration. Additionally, disasters may be natural or caused by direct human intervention.

The concept of environmental refugees has thus far no legal basis. Moreover, agencies concerned with refugee protection tend to avoid the usage of such a concept. This position is remarkably reiterated by UNHCR, which claims that persons that migrate for environmental reasons are out of its scope of protection, as environmental disasters are not enlisted in the grounds for refugee protection enshrined in the 1951 Geneva Convention. According to UNHCR, “there may be situations where the refugee criteria of the 1951 Convention or broader refugee criteria of regional refugee law frameworks [for instance, the 1969 OAU Convention and the 1984 Cartagena Declaration, which refers to “events seriously disturbing public order”] may apply, for example if drought-related famine is linked to situations of armed conflict and violence – an area known as *nexus dynamics*”⁴⁴. It must be noted that, while an armed conflict may result in a slow but possible return to pre-existing conditions of peace, some environmental disasters may result in possibly irreversible situations.

⁴²E. EL-HINNAWI, *Environmental Refugees*, Nairobi, 1985.

⁴³IOM, *Glossary on Migration*, in *International Migration Law*, vol. 34, 2019.

⁴⁴UNHCR, *Legal considerations on refugee protection for people fleeing conflict and famine affected countries*, 5th April 2017, available at www.refworld.org.

Today the question about the so-called environmental refugees seems to remain open, especially after the case *Teitiota v New Zealand*. The case concerned Ioane Teitiota, a citizen of the Republic of Kiribati, which had sought asylum in New Zealand after the island where he originated from, Tarawa, had been affected by severe shortages of freshwater due to saltwater contamination, the rise of the sea-level and overcrowding of the island, which consequently caused “housing crisis and land disputes that have caused numerous fatalities”⁴⁵. All these issues, according to the applicant, were directly caused by climate change, hence he claimed himself and his family to be eligible for refugee protection in New Zealand. In 2013, the Immigration and Protection Tribunal, appealing to the fact that the dangers posed by climate change did not represent a form of persecution on the grounds of the 1951 Refugee Convention, rejected the asylum application of Teitiota, who was repatriated to Kiribati with his family. The tribunal further ruled about the right of life enshrined in Article 6 of the ICCPR, holding that there was no evidence of the fact that Kiribati had not taken measures to ensure this fundamental right, as it had supplied about 80% of the population residing in Tarawa with fresh water. Furthermore, the risk faced by Teitiota and its family did not meet the threshold set by Article 6. The same decision was reiterated by the Supreme Court, to which Teitiota appealed before eventually applying for the opinion of the Human Rights Committee on the admissibility of the decision taken by the Immigration and Protection Tribunal.

The Committee, reporting the reasoning of New Zealand’s authorities, considered that:

“In the present case, there is no evidence that the author faced an imminent risk of being arbitrarily deprived of his life when he was removed to Kiribati. (...) the domestic authorities emphasized that their conclusions should not be read to mean that environmental degradation resulting from climate change could never create a pathway into protected person jurisdiction. The authorities considered, however, that the author and his family had not established such a pathway”⁴⁶.

The Committee issued an interesting observation by stating that:

“Both sudden-onset events (such as intense storms and flooding) and slow-onset processes (such as sea level rise, salinization, and land degradation) can propel cross-border movement of individuals seeking protection from climate change-related harm. The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under Articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending states.

⁴⁵UN Human Rights Committee, judgement of 7th January 2020, CCPR/C/127/D/2728/2016, *Ioane Teitiota v New Zealand*. Hereinafter: *Teitiota Case*.

⁴⁶*Teitiota Case*, para. 4.5.

Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized”⁴⁷.

This part of the ruling gives rise to several interesting points. First of all, it clarifies that no distinction between slow-onset and sudden-onset disaster should be made when considering the protection of individuals facing severe harms. Secondly, although it eventually ruled against Teitiota, the Committee called for national and international measures to effectively tackle climate change, hence to prevent violation of the right to life. Thirdly, it emphasized that, even if a State respect individuals’ right to life, it must ensure that it is a right to a dignified life and not a mere state of survival, to prevent situations similar to the one presented above. The Committee further observed that:

“[The judges of the Committee], in addition to regional human rights tribunals, have established that environmental degradation can compromise effective enjoyment of the right to life, and that severe environmental degradation can adversely affect an individual’s well-being and lead to a violation of the right to life”⁴⁸.

The implications of the observations of the Human Rights Committee go beyond the final ruling on the case of Teitiota and his family. Although the Committee ruled against the applicant, it nevertheless set the standard for possible recognition of the status of environmental refugees. The simple use in the ruling of the expression “climate change refugees” directly goes against what the most authoritative UN agency for what concerns refugees, the UNHCR, has asserted. The ruling of the Committee enlarges the scope of Article 6 of the Convention, which is related to the right of life, in a twofold implication: on the one hand, it recognizes the right to a dignified life, on the other hand, it recognizes that the negative effects of climate change may lead to inhuman or degrading treatment, hence it may give a strong legal basis to affirm that the so-called environmental refugees should not be rejected.

Whether or not the prohibition of *refoulement* will concern persons escaping natural disasters, either caused by human intervention or not, depends on a future consistent application of the observations laid in the ruling of the Human Rights Committee. The rulings of the Committee are non-binding, but this latter judgement may become the legal basis for the enlargement of the scope of the protection traditionally enshrined in the 1951 Geneva Convention, opening the possibility for an important development of refugee law.

⁴⁷*Teitiota* Case, para. 9.11.

⁴⁸*Teitiota* Case, para. 9.5.

1.7 Considerations

Having traced the textual development of the principle of *non-refoulement*, it is clear that it is an obligation present in International Refugee Law (for instance in the OAU Refugee Convention and in the AALCO's Bangkok Principles), in International Humanitarian Law (the 1951 Geneva Convention) and International Human Rights Law (in the CAT and in the ICCPR)⁴⁹. Notwithstanding the apparent universal *consensus* on the prohibition of *refoulement*, many refugees continue to be rejected by some States as they are forced to return to places where their most fundamental rights are systematically violated. This issue poses the question of whether the principles have yet achieved the status of *jus cogens*, as numerous scholars and various courts' judgements suggest, or rather it is an obligation from which States may generally and easily deviate.

The following three chapters of the present dissertation will enquire the application of the principle of *non-refoulement* in Europe, the United States of America and Australia trying to give an answer to this research question. Moreover, a particular analysis will be provided in the chapters of the agreements that these entities have reached with neighbouring countries under the spreading habit of declaring them "safe third countries", although these States are far from being safe for refugees.

⁴⁹ICRC, *supra* note 2, p.346.

2. The principle of *non-refoulement* in Europe

This chapter aims at providing an overview of the principle of *non-refoulement* in the broader European region and subsequently in the European Union. Similarly to the preceding chapter, the explanation of the legal instruments adopted by the Council of Europe and the European Union will be supported by the analysis of the most relevant cases concerning the principle and its application. At the end of the chapter, the concepts of “safe third country” and “externalization of the borders” will be introduced and further developed in the two following chapters.

2.1 The Council of Europe

The first section of the second chapter will consider the prohibition of *refoulement* present in the European Convention of the Human Rights, the last regional instrument analysed in this work. After briefly inquiring the nature of the principle of *non-refoulement* in the Charter and in the interpretation of the European Court of Human Rights, the section will focus on two pivotal sentences delivered by the Court itself in the cases *Soering* and *Hirsi*.

2.1.1 The European Convention of Human Rights of 1950

The European Convention of Human Rights, hereinafter “ECHR”, is commonly regarded as the best extant regime for the protection of human rights. Signed in Rome in 1950, the Convention entered into force on 3rd September 1953 as a recognition on a regional level of the principles set in the Universal Declaration of Human Rights⁵⁰. The ECHR counts as parties all 47 States members of the Council of Europe, hence it has a much larger territorial scope if compared to the European Union, as the reach of the Court extends even to Turkey and Russia.

Similarly to the ICCPR, the ECHR does not provide directly for the prohibition of *refoulement*. However, the principle is traditionally inferred from the text of Article 3 of the Convention, stating that:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”⁵¹.

The Convention does not provide for any other guarantee for refugees, probably because in 1950 the migration patterns in Europe were completely different from experienced in present days. However, since the entry into force of the ECHR, the interpretation of Article 3 in favour of the principle of *non-refoulement* was neat. In 1965, the Parliamentary Assembly of the Council of Europe clarified that the prohibition of

⁵⁰J. RISTIK, *The right of asylum and the principle of non-refoulement under the European Convention of Human Rights*, in *European Scientific Journal*, vol.13, no.28, 2017, pp. 108-120.

⁵¹Convention of the Council of Europe of 4th November 1950, for the Protection of the Human Rights and Fundamental Freedoms.

returning refugees to “a country where their life or freedom would be threatened” was binding on all the States signatories to the Convention⁵².

For what concerns the nature of the obligation set in Article 3, the European Court of Human Rights (“ECtHR”), the judicial body which supervises the correct application of the Convention, repeatedly observed that the prohibition of torture under the Convention is absolute and it cannot be derogated even in case of national emergency⁵³.

More than any other regional court, the ECtHR has been regarded as the main defender of human rights. Although the application of the norm has not always been consistent throughout time, in its most relevant sentences the Court has established a high level of protection for refugees that risk or have been exposed to *refoulement*.

2.1.2 *Soering v United Kingdom*

The case brought before the ECtHR on 7th July 1989 concerned Jens Soering, a German national, accused of a double homicide he had committed in Virginia, in the United States, before fleeing to the United Kingdom with his girlfriend and accomplice, where they were later arrested. As the United States required extradition of Soering from the United Kingdom, the applicant filed a claim to the ECtHR, in which he declared that if returned to the United States he would be sentenced death penalty, hence he would be victim of a violation of Articles 2 and 3 of the ECHR, regarding respectively the right to life and the prohibition of torture and inhuman treatment. While on the one hand Article 2 did not prohibit death penalty *per se* at that time⁵⁴, on the other hand Soering claimed that in the United States he would be victim of the so-called “death row phenomenon”. This meant that Soering would be forced to wait an unknown amount of time before his own execution, and this treatment was so severe to be considered by the applicant as inhuman, hence prohibited by the ECHR. At the same time, concern was expressed also by the British Embassy in Washington, which filed in 1986 a request to the United States government stating that: “Because the death penalty has been abolished in Great Britain, the Embassy has been instructed to seek an assurance, in accordance with the terms of (...) the Extradition Treaty [of 1972], that, in the event of Mr Soering being surrendered and being convicted of the crimes for which he has been indicted (...), the death penalty, if imposed, will not be carried out”⁵⁵.

⁵²Recommendation no. 434 of 1st October 1965 of the Parliamentary Assembly of the Council of Europe, concerning the granting of the right of asylum to European refugees.

⁵³See: ECtHR, judgment of 18th January 1978, case 5310/71, *Ireland v United Kingdom*; ECtHR judgement of 15th November 1996, case 22414/93, *Chahal v United Kingdom*; ECtHR judgement of 28th February 2008, case 37201/06, *Saadi v Italy*.

⁵⁴Article 2 of the ECHR states that the right to life has to be protected by law “(...) safe in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”. However, the abolition of death penalty in the context of the Council of Europe is provided for in Protocol no. 13, ratified by the United Kingdom in 2003, and in Protocol no. 6, ratified by the United Kingdom in 1999.

⁵⁵ECtHR, judgement of 7th July 1989, case 14038/88, *Soering v United Kingdom*. Hereinafter: *Soering Case*.

The Court unanimously stated that:

“(…) having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, (…) the applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.(…) accordingly, the Secretary of State’s decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3”⁵⁶.

To deliver this sentence the Court relied, *inter alia*, on the provisions set out in the Convention against Torture of 1987⁵⁷ and on the conclusions made in the case *Ireland v United Kingdom*, stating that the severity of the treatment “(…) depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim”⁵⁸. Considering the length of the detention, the conditions of living in the death row in Virginia and the impact on the mental illness of the young applicant, the Court concluded that the United Kingdom risked to violate the rights of Soering if he was extradited.

While the events occurring in the life of Jens Soering are far from being relevant for the purposes of this work, the sentence of the ECtHR had a strong impact on subsequent jurisprudence concerning the application of Article 3 of the ECHR and the protection of refugees in Europe. Firstly, the case of Soering posed on the Court the question of whether a State may be convicted for the actions carried out in a third State, which in turn is not party to the ECHR. According to this sentence, the United Kingdom would be liable for breaching Article 3 although the “inhuman treatment” risked to occur in the United States. Secondly, the ECtHR implied that the Extradition Treaty that bound both States concerned was overridden by the Convention, even if the United States is not a signatory to the ECHR.

Soering was eventually extradited to the US with the guarantee that he would not be sentenced to death. While it is still unclear whether he truly committed the crime, he was finally released in December 2019, after 33 years of prison in the United States, and returned to Germany.

2.1.3 *Hirsi Jamaa and others v Italy*

On 6th May 2009, three ships belonging to the Italian Guardia di Finanza and Guardia Costiera intercepted three other vessels carrying more than two hundred migrants, previously departed from Libyan

⁵⁶*Soering* Case, para. 111.

⁵⁷*Soering* Case, para. 86.

⁵⁸*Soering* Case, para. 100.

shores. The operation of interception took place thirty-five nautical miles off the Italian island of Lampedusa and in the Search and Rescue (“SAR”) area of Malta⁵⁹. After intercepting the vessels, the Italian authorities transferred the migrants on their military ships and, after a ten-hours journey, returned them to Libya, where Hirsi Jamaa and twenty-three other Eritrean or Somali nationals appealed to the ECtHR with the aid of the UNHCR officials in Tripoli. Although some of the applicants’ traces were lost due to the Arab Spring revolution in Libya in 2011, the Court delivered on 23rd February 2012 a sentence of the utmost importance for the purposes of this work.

The applicants claimed that not only the operation carried out by the Italian authorities was illegal under Article 3 of the ECHR, but also that there existed a violation of Article 13 of the ECHR, which provides for the right to an effective remedy, and of Article 4 of the Protocol no. 4 attached to the Convention, which states that:

“Collective expulsion of aliens is prohibited”⁶⁰.

Contrarily, Italy claimed that, much similarly to what the United States Federal Court had stated in 1993⁶¹, the prohibition of *refoulement* does not apply in the high seas, for the latter may not be considered as Italian territory. Indeed, the 1974 United Nations Convention on the Law of the Sea (“UNCLOS”) clearly set the limit of territorial sea up to 12 nautical miles from the coast⁶².

The Court ruled against Italy on the basis of a series of findings that are still of the utmost relevance after almost ten years. Judges started their reasoning from taking into consideration the different obligations of Italy.

Firstly, the Italian Navigation Code of 30th March 1942, as amended in 2002, provides (Art. 4) that Italian vessels on the high seas are to be considered as part of Italian territory.

Secondly, the Court took into consideration the bilateral agreement between Italy and Libya. The relationship between the two States went from a difficult post-colonial phase through a gradual rapprochement between the Italian government and Colonel Gaddafi, leader of the country, in the first years of 2000. After an agreement was signed in 2007 and renewed in 2009 with a protocol, Italy and Libya concluded on 30th August 2008 a Treaty on Friendship, Partnership and Cooperation in Benghazi, according to which Italy had to pay 5 billion of dollars to Libya in a time span of 25 years as a compensation for the military occupation during the colonial period, while Libya had to take measures to combat illegal migration in Libyan and international waters with the aid of Italian maritime forces⁶³. The Court never considered

⁵⁹The SAR zones have been fixed in the International Convention on Maritime Search and Rescue of Hamburg of 27th April 1979.

⁶⁰Art. 4, Protocol No.4 to the European Convention of the Human Rights.

⁶¹This case is analysed in depth in the third chapter of the present work.

⁶²United Nations Convention of 10th December 1982, on the Law of the Sea.

⁶³*Trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e la Grande Giamahiria Araba Libica Popolare Socialista* of 30th August 2008.

whether or not the agreements were legitimate *per se*, but it underlined how these agreement do not lift Italy's responsibility of ensuring that the principle of *non-refoulement* is observed, even if, as it is the case for the 2008 Treaty, there is a specific reference to the fact that operations ought to be carried out in respect of human rights⁶⁴. While these agreements were suspended after the events that occurred in Libya in 2011, the two States signed further agreements in November 2013 and a *memorandum* of understanding ("MoU") in February 2017, which was tacitly renewed in February 2020. Negotiations announced by Italy for the modifications of the MoU in early 2020 seems to have not produced any effects so far.

The Court also considered a number of legal instruments to which Italy is a member State, among which are the 1982 United Nations Convention on the Law of the Sea, the 1979 International Convention on Maritime Search and Rescue ("SAR Convention"), the 2000 Palermo Protocol against the Smuggling of Migrants by Land, Sea and Air and, notably, also the 2000 Charter of Fundamental Rights of the European Union and other European Union, instruments that will be further analysed in following sections of the present chapter. Moreover, to support the assertion made by the applicants that Libya was far from being a safe country, the Court relied on the reports of UNHCR, of Human Rights Watch and of the Council of Europe's Committee for the Prevention of Torture, which visited Italy between the 27th and the 31st July 2009. These reports analysed altogether provided to the Court a precise description of the living conditions of irregular migrants in Libya, who were subject to long period of detention, often even to torture, or were subject to difficult living conditions in a xenophobic and racist environment. Moreover, due to the fact that Libya is not a signatory to the 1951 Geneva Convention on Refugees and that no substantial guarantees of protection were provided to refugees, migrants faced the threat of a secondary *refoulement*, meaning that they risked being returned to their countries of origin, which in this case meant the risk of torture and ill-treatment in Somalia and Eritrea⁶⁵. According to the Court it was a specific responsibility of Italian authorities to get informed about the conditions of migrants in Libya before carrying out the operation of *refoulement*, even in the case where the migrants were unable to express their fears and describe their precise conditions in that moment, mostly due to linguistic barriers⁶⁶.

In its assessment, the Court reiterated the principle already provided in a precedent case, the case *Banković and Others v Belgium and 16 Other Contracting States*, that the jurisdiction of a State under the ECHR is essentially territorial, hence only violations committed in the territory of a member State are imputable⁶⁷. However, the Court recognised that:

"The responsibility of a Contracting Party may also arise when as a consequence of military

⁶⁴ECtHR, judgement of 23rd February 2012, case 27765/09, *Hirsi Jamaa and Others v Italy*. Hereinafter: *Hirsi Case*.

⁶⁵*Hirsi Case*, paras.149 to 157.

⁶⁶*Hirsi Case*, para.133.

⁶⁷*Hirsi Case*, para. 71.

action - whether lawful or unlawful – it exercises effective control of an area outside its national territory (...), which is however ruled out when, as in *Banković*⁶⁸, only an instantaneous extra-territorial act is at issue, since the wording of Article 1 does not accommodate such an approach to “jurisdiction”(...)”⁶⁹.

The Court considered that Italian authorities exercised not only a *de jure* control of the applicants, as the ships used to return them to Libya flying the Italian flag, but also a *de facto* control, as the crew of the operation was entirely composed of Italian nationals, similarly to another case of the ECtHR, *Medvedyev v France*⁷⁰. Hence the Court found out that “the events giving rise to the alleged violations fall within Italy’s “jurisdiction” within the meaning of Article 1 of the Convention”⁷¹. Moreover the Court stressed the point already expressed in the aforementioned *Medvedyev* case that the high seas is not an environment free of any guarantee of human rights⁷².

For what concerns the prohibition of collective expulsion enshrined in Article 4 of Protocol no. 4 to the ECHR, the Court found evidence in the *travaux préparatoires* and in its own case-law that the provision is subject to a teleological interpretation that, as the Convention is considered as a “living instrument”, covers all the changing migratory patterns to comprise the act of *refoulement* in the word “expulsion”. Moreover, the Court reminded that the violation of this provision specifically occurs if refugees do not have the opportunity of being individually assessed. In the present case the Court found out that:

“[i]t has not been disputed that the applicants were not subjected to any identification procedure by the Italian authorities, which restricted themselves to embarking all the intercepted migrants onto military ships and disembarking them on Libyan soil. Moreover, the Court notes that the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers”⁷³.

It is worth noticing that a comprehensive definition of an adequate procedure of identification has been provided by Goodwin-Gill, who stated that authorities should “identify all those intercepted, and keep records regarding nationality, age, personal circumstances and reasons for passage”⁷⁴.

In sum, the Court ruled that Italy had violated the principle of *non-refoulement* not only because the

⁶⁸The Court recognised in *Bankovic* four exceptional cases of jurisdiction, which are: (i) extradition or expulsion; (ii) control by military action; (iii) activities of ‘diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State’; (iv) effects produced outside by an action inside the territories. See: ECtHR, judgement of 12th December 2001, case 52207/99, *Bankovic v Belgium*.

⁶⁹*Hirsi* Case, para. 73.

⁷⁰*Hirsi* Case, paras. 76 to 81.

⁷¹*Hirsi* Case, para. 81.

⁷²ECtHR, judgement of 29th March 2010, case 3394/03, *Medvedyev and Others v France*.

⁷³*Hirsi* Case, para. 185.

⁷⁴G. S. GOODWIN-GILL, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, in *International Journal of Refugee Law*, vol. 23, 2011, pp. 433-457.

applicants had been returned to a situation of possible secondary *refoulement* and torture, but also because the crew, composed of Italian nationals, were obliged to “find out about the treatment to which the applicants would be exposed after their return”⁷⁵. This poses the obligation on national authorities to individually identify, inform and eventually provide protection to refugees intercepted, instead of automatically reject them. In following chapters of the present work it will be analysed how the United States and Australia have set out mechanisms of identification outside their national territories and how this may represent a violation of the prohibition of *refoulement*.

Notwithstanding the sentence of the ECtHR, even after the events occurring in Northern Africa and Middle East region in 2011, Italy and Libya kept concluding agreements to jointly patrol territorial and international seas with the aim of containing illegal migration. Libya never concluded an agreement with the European Union, as in the case of Turkey. However, the exacerbation of the armed conflict in Libya and the conditions in the camps of detention for migrants suggest that Libya is far from being considered as a safe country for refugees.

In addition to the opinion of the Court, a long concurring opinion of the judge Pinto de Albuquerque was delivered in *Hirsi*, where the judge affirmed that:

“(…) the prohibition of *refoulement* is a principle of customary international law, binding on all States, even those not parties to the UN Refugee Convention or any other treaty for the protection of refugees. In addition, it is a rule of *jus cogens*, on account of the fact that no derogation is permitted and of its peremptory nature, since no reservations to it are admitted”⁷⁶.

2.2 The European Union

This section of the chapter will analyse the provisions of *non-refoulement* in the context of the European Union through the Charter of Fundamental Rights of the European Union, the most relevant EU secondary legislation and the border control operations carried out by the EU, among which are the operations of the agency Frontex and the military operations carried out by the European Union in the Mediterranean sea in order to combat illegal immigration.

As the European Union was born as a fundamentally economic union, it lacked of a substantial human rights regime. Whereas after a long discussion lasting entire decades the possibility of accession of the European Union to the ECHR has been finally regulated by the Lisbon amendment treaties of 2007, the Union has provided for its own human rights regime in 2000. However, much uncertainty arose around the

⁷⁵*Hirsi* Case, para. 133.

⁷⁶*Hirsi* Case, concurring opinion of Judge Pinto De Albuquerque.

procedural conditions under which border control operations have been carried out and whether they are always in compliance with the principle of *non-refoulement* or not.

Lastly, this section of the chapter will focus on the strategies undertaken by the European Union to reduce the inflow of migrants. More specifically, the last part of the section will focus on the agreement concluded in 2016 between the EU and Turkey and how this agreement may be considered as a practice of externalization of the external border of the European Union.

2.2.1 The Charter of Fundamental Rights of the European Union of 2000

For many years the European Union lacked of a legal instrument protecting human rights. In the famous case *Internationale Handelsgesellschaft*, the Court of Justice of the European Union (“CJEU”) declared that fundamental rights in the EU were “inspired by the constitutional traditions common to the Member States”⁷⁷. While the initiative for an independent Charter came from the European Council, it took twenty years to finally proclaim the 2000 Charter of Fundamental Rights in Nice, which became binding on the EU Member States only with the Lisbon amendment treaties of 2007. According to Article 6 of the Treaty of the European Union, as amended in Lisbon, the Charter of Fundamental Rights has the same legal value as the Treaties⁷⁸.

After declaring the compliance with the 1951 Geneva Convention and the 1967 Protocol in Article 18, the Charter of Fundamental Rights provides for the principle of *non-refoulement* in the second paragraph of Article 19, stating that:

“No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”⁷⁹.

So far, this wording appears as one of the most comprehensive prohibition of *refoulement*. However, as it will be further inquired in following sections, the complex legal structure of the European Union in the matters of asylum regulation and borders control has often posed some doubts on whether the prohibition of *refoulement* is fully respected by the twenty-seven Member States and, formerly, by the United Kingdom.

2.2.2 The European Union’s primary and secondary law

The Treaty of Amsterdam of 1997 brought two fundamental changes to the European Union that inevitably affected refugee law. Firstly, all what concerns asylum and immigration was transferred under

⁷⁷CJEU, judgement of 17th December 1970, case 11-70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

⁷⁸Art. 6 para. 1, TEU.

⁷⁹Art. 19, Charter of Fundamental Rights of the European Union.

the competences of the European Union and no longer of the national governments, meaning that the approach towards asylum and immigration shifted from an intergovernmental one to a supranational one. Article 78 of the Treaty on the Functioning of the European Union (“TFEU”, formerly, Articles 63 and 64 of the Treaty of the European Economic Community), reads:

“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 must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”⁸⁰.

Such a project for the creation of a common European asylum system brought to a series of other provision, among which the politics of cooperation with third States for the management of migratory flows, the conditions under which nationals of third States are to be granted asylum or temporary protection, the instruments determining which country has to consider the applications for asylum or temporary protection, and the creation of the European Asylum Support Office (“EASO”) in 2010.

Secondly, the Treaty of Amsterdam incorporated the Schengen *acquis* into the European Union, hence it incorporated also the Schengen visa policies and the Schengen Information System. The Schengen agreements, signed on 14th June 1985, are the legal basis for the complete abolition of internal borders control among the members of the European Union, Iceland, Norway and Switzerland.

The European Council met in Tampere, Finland, in October 1999 to elaborate *inter alia* political guidelines for the establishment of a Common European Asylum System (“CEAS”) “based on the full and inclusive application of the Geneva Convention of 28 July 1951 relating to the Status of Refugees (‘the Geneva Convention’), as supplemented by the New York Protocol of 31 January 1967 (‘the Protocol’), thus affirming the principle of *non-refoulement* and ensuring that nobody is sent back to persecution”⁸¹.

2.2.2.1 The Schengen Borders Code

Regulation 2016/399 of the European Parliament and of the Council of 9th March 2016 “on a Union Code on the rules governing the movement of persons across borders”, commonly known as the “Schengen Borders Code” is a legal instrument of the European Union that amends the preceding Regulation 2013/1051, which in turn amended Regulation 2006/562.

⁸⁰Art. 78 para.1, TFEU.

⁸¹Directive 2011/95/UE of the European Parliament and of the Council of 13th December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.
Hereinafter: Directive 2011/95.

The principle of *non-refoulement* is frequently expressed in the wording of the Regulation, ever since the preliminary considerations. Article 3 of the Schengen Borders Code states that the provisions in the Regulation apply “without prejudice (...) to the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*”⁸².

Article 4 of the Schengen Borders Code requires that States act in compliance with the 1951 Geneva Convention, the 1967 Protocol and the Charter of Fundamental Rights of the European Union. Remarkably, Article 4 further requires that “decisions under this Regulation shall be taken on an individual basis”⁸³. The European Union Agency for Fundamental Rights (“FRA”) specified this latter provision by stating that “the individual assessment should be carried out on land, as the necessary pre-conditions to identify protection needs and vulnerabilities can usually not be met on board a vessel”⁸⁴. It is evident that the requirement for individual assessing stems directly from the sentence *Hirsi*.

2.2.2.2 The Qualification Directive

The Directive 2011/95 of the European Parliament and of the Council “on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted”, commonly known as the “Qualification Directive”, was signed on 13 December 2011 and amended the preceding Directive 2004/88 of the European Commission.

The core objective of the Qualification Directive is to regulate in the European Union the rules under which a national of a third country qualifies as a refugee or as a person that does not qualify as a refugee but, since he or she may be subject to a “serious harm”, can obtain anyway a form of protection defined as “subsidiary protection”⁸⁵.

After having individuated an exhaustive list of the reasons why a refugee might fear persecution in Article 10, the Qualification Directive expressly provides for the principle of *non-refoulement* in Article 21, which states that:

- “1. Member States shall respect the principle of *non-refoulement* in accordance with their international obligations.
2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may *refoule* a refugee, whether formally recognised or not, when:

⁸²Art. 3 litt. b, Regulation 2016/399.

⁸³Art. 4, Regulation 2016/399.

⁸⁴EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA), *Guidance on How to Reduce the Risk of Refoulement in External Border Management when Working in or together with Third Countries*, in *International Journal of Refugee Law*, vol. 29, no. 4, 2017, pp. 711–715.

⁸⁵Art. 15, Directive 2011/95.

- (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or
- (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State”⁸⁶.

As it might be noticed, the provision itself specifies in paragraph 2 on which grounds the prohibition of *refoulement* does not apply. This underlines the difference between the European Union and the Council of Europe in considering whether the principle of *non-refoulement* may be considered *jus cogens*.

2.2.2.3 The Asylum Procedure Directive

The Directive 2013/32/CE of the European Parliament and of the Council “on common procedures for granting and withdrawing international protection”, commonly known as the “Asylum Procedure Directive”, was signed on 26th June 2013 and amended the previous Directive 2005/85/CE of the Council of the European Union. This Directive specifically complement and refers to the aforementioned Qualification Directive, focusing only on the granting of international protection of refugees. The relevance of this Directive for the purposes of this work is that of being the provision that regulates the concepts of the first country of asylum, of the safe country of origin and of the safe third country, this latter to be addressed more specifically in a separate paragraph of the present chapter.

The Directive provides for the prohibition of *non-refoulement* in five articles, but for the purposes of this work it is sufficient to underline that under Article 9, concerning the right to remain in the Member State pending the examination of the application, which third paragraph states that:

“A Member State may extradite an applicant to a third country(...) only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect refoulement in violation of the international and Union obligations of that Member State”⁸⁷.

2.2.2.4 The European Border and Coast Guard Agency and its operations

The European Border and Coast Guard Agency, commonly known as Frontex, has a long history made of EU Regulations and increasing scope. Born with Regulation (EC) 2007/2004 under the name of European Agency for the Management of Operational Cooperation at the External Borders, Frontex has its own headquarters in Warsaw, Poland, and has the task of coordinating the national border and coast guards of the Member States. It is worth noticing that the provisions in the Treaties of the European Union and the fears for new terrorist attacks after 9/11 set the grounds for the birth of what is often regarded as the core of

⁸⁶Art. 21, Directive 2011/95.

⁸⁷Art. 9 para. 4, Directive 2013/32.

an European “police force” that patrols the external borders of the Union.

At the beginning, Frontex was a rather small agency of the European Union, counting forty-five members in its staff and a budget of 6 million of Euros⁸⁸. As it counts to employ ten thousand persons by 2027⁸⁹, the Agency operates in 2020 with a budget of 420.6 million of Euros (a 34.6% increase compared to 2019)⁹⁰.

The Regulation of 2004, which never provided for the prohibition of *refoulement* due to its contained scope, was repealed by Regulation 656/2014⁹¹. This latter instrument specifically provided for the principle of *non-refoulement* in Article 4, stating that

“No person shall, in contravention of the principle of *non-refoulement*, be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where, *inter alia*, there is a serious risk that he or she would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of *non-refoulement*”⁹².

Article 4 is an extensive provision that seems to require a multi-tier protection of the principle of *non-refoulement*. Indeed, paragraph 2 seems to integrate the judgement of the ECtHR in *Hirsi* by requiring that “(w)hen considering the possibility of disembarkation in a third country, (...) the host Member State, in coordination with participating Member States and the Agency, shall take into account the general situation in that third country (...) based on information derived from a broad range of sources, which may include other Member States, Union bodies, offices and agencies, and relevant international organisations and it may take into account the existence of agreements and projects on migration and asylum carried out in accordance with Union law (...)”⁹³. Moreover, paragraph 3 requires that the staff of the operations of the Agency “identify the intercepted or rescued persons, assess their personal circumstances, inform them of their destination in a way that those persons understand or may reasonably be presumed to understand and give them an opportunity to express any reasons for believing that disembarkation in the proposed place

⁸⁸Decision of the management board of Frontex on the budget of the agency for 2005, Warsaw, 30th June 2005.

⁸⁹Regulation 2019/1896 of the European Parliament and of the Council of 13th November 2019 on the European Border and Coast Guard and repealing Regulations No.1052/2013 and 2016/1624.

⁹⁰Budget of the European Union for the year 2020.

⁹¹Regulation 656/2014 of the European Parliament and of the Council of 15th May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

⁹²Art. 4 para. 1, Regulation 656/2014.

⁹³Art. 4 para. 2, Regulation 656/2014.

would be in violation of the principle of non-refoulement”⁹⁴. In paragraph 5 it is required that the exchange of data with third countries does not contravene the prohibition of *refoulement*, while paragraph 8 provides for the training of the staff of the agency “with regard to relevant provisions of fundamental rights, refugee law and the international legal regime of search and rescue”⁹⁵.

Regulation 656/2014 was in turn repealed in the midst of the refugee crisis of the past decade by Regulation 2016/1624⁹⁶, which shows a further evolution of the agency by establishing the European Border and Coast Guard with the aim of ensuring a “high level of internal security within the Union in full respect for fundamental rights”⁹⁷. While on the one hand the Regulation compels the new Agency to respect the principle of *non-refoulement*, on the other hand in Article 4 it defines the so-called policy of Integrated Border Management (“IBM”), provided for in Article 77 of the TFEU⁹⁸, which has to be carried out in four tiers of actions: i) measures directly carried out in third countries; ii) cooperation with neighbouring third countries; iii) control and surveillance of the EU external borders; and iv) repatriation⁹⁹. Under this Regulation, the Agency is entitled to localize and intercept vessels in territorial seas, in high seas and in the contiguous zone¹⁰⁰. Moreover, this Regulation provides for the creation of a consultative forum for fundamental rights matters and it provides for the appointment of a fundamental rights officer, who shall evaluate the compliance of Frontex operations with fundamental rights and shall manage the complaints of the complaint mechanism for the breaches of fundamental rights¹⁰¹. Regulation 2016/1624 was eventually repealed by Regulation 2019/1896¹⁰², which significantly enlarges and reinforces the scope of Frontex.

For what concerns the operations carried out by Frontex, the most notable ones are the operations Triton and Themis.

Operation Triton was created on November 2014 to replace the Italian operation *Mare Nostrum*. This latter operation was initiated in 2013 after a shipwreck in the surrounding of the island of Lampedusa, where more than three hundred migrants lost their lives. *Mare Nostrum* operated for about one year under the Italian Navy and Air Force with a small contribution from Slovenia. *Mare Nostrum* had a rather large scope of action, as it could reach also the Libyan territorial seas. However, due to political speculations that the operation could serve as a pull-factor for migrants crossing the Mediterranean sea, the operation terminated

⁹⁴Art. 4 para. 3, Regulation 656/2014.

⁹⁵Art. 4 para. 8, Regulation 656/2014.

⁹⁶Regulation 2016/1624 of the European Parliament and of the Council of 14th September 2016 on the European Border and Coast Guard and amending Regulation 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No. 863/2007 of the European Parliament and of the Council, Council Regulation 2007/2004 and Council Decision 2005/267/EC.

⁹⁷Art. 1 para. 1, Regulation 2016/1624.

⁹⁸Art. 77 para. 1 litt. c, TFEU.

⁹⁹Recital no. 3, Regulation 2016/1624.

¹⁰⁰According to Article 33 of the UNCLOS the contiguous zone extends no further than 24 miles from the baseline to (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea”.

¹⁰¹Articles 16, 17, 28, 33 para. 4, 70, 71 and 72, Regulation 2016/1624.

¹⁰²*Supra* note 89.

and was replaced by *Triton*. Operation Frontex Plus, commonly known with the name of *Triton*, operated for about four years with the aim of contrasting illegal migration, trafficking in persons and smuggling. Operation *Triton* operated with the voluntary contribution of fifteen European States, among which three were not members to the European Union. On 1 February 2018 *Triton* was replaced by another operation named *Themis*, once again coordinated by Italy.

Operations carried out by Frontex were often at the centre of controversies for what concerns the principle of *non-refoulement*, especially before the recasts of 2016 and 2019¹⁰³. In response to that, much attention was posed on the figures of the fundamental rights officer and the consultative forum, specifically addressing to criticisms. Moreover, the increasing number of migrants crossing and dying in the Canal of Sicily during the period of action of *Triton*, has not to be seen as the evidence that the operation was a pull-factor encouraging smugglers to cross the Mediterranean, as it would not sufficiently capture the complexity of the migratory flows in the Mediterranean sea.

2.2.3 Operation EUNAVFOR MED Sophia

Although it is not part of Frontex, the operation European Union Naval Force Mediterranean (EUNAVFOR MED) is of an equal if not superior relevance for the purposes of this work. The operation, commonly known with the name “Operation Sophia”, was the first naval military operation of the European Union. The operation started in May 2015 and formally concluded on 20th March 2020, as it was replaced by operation EUNAVFOR MED *Irini*. This latter operation, differently from *Sophia*, will only enforce the arms embargo on Libya established by the United Nations Security Council Resolutions 1970 (2011), 2292 (2016) and 2473 (2019)¹⁰⁴.

Operation *Sophia* consisted in four phases: i) training, deployment and gathering of information around the smuggling and trafficking of migrants; ii) interception of vessels transporting migrants; iii) disposal of captured vessels iv) the completion of the operation and the withdrawal of forces. The second phase of the operation was authorized by the UN Security Council with Resolution 2240 (2015). The operation, led by the Italian Navy, comprised six naval units and, in addition to the operations of Frontex, provided for the training of the Libyan Navy. In January 2019, before its permanent suspension in 2020, the operation was already reduced to an aerial surveillance mission, rather than a naval one.

While on the one hand the intention of the creators of the operation was indeed of saving the lives of migrants, *Sophia* has been subject to criticism, similarly to Frontex. In September 2016 Reuters reported that Boris Johnson, at that time serving as Foreign Minister in the United Kingdom, declared that operation

¹⁰³See: S. KLEPP, *A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea*, in *European Journal of Migration Law*, no. 1, 2010, pp. 1-22.

¹⁰⁴Decision (CFSP) 2020/472 of the Council of the European Union of 31st March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI).

Sophia served to push back the boats of smugglers and added “I think I am right in saying we have turned back about 200,000 migrants” and then corrected himself by saying “Sorry, saved, saved. Thank you. We have saved 200,000 migrants and turned back 240 boats”¹⁰⁵. Although this episode may be seen as an unintentional use of the expression “turn back”, the wording of Johnson was rather symptomatic of the attitude of EU Member States in the last few years.

2.2.4 Safe Third Countries and the case of Turkey

At the end of 1992, the Ministers responsible of Immigration in the Member States of the former European Communities engaged a month-long discussion that eventually resulted in the so-called London Resolution on the adoption of an harmonized approach towards the designation of the “host third countries”. The drafters of this Resolution intended in turn to clarify the text of Article 3 paragraph 5 of the First Dublin Convention of 1990, stating that:

“Any Member State shall retain the right, pursuant to its national laws, to send an applicant for asylum to a third State, in compliance with the provisions of the Geneva Convention, as amended by the New York Protocol”¹⁰⁶.

Fearing that some refugees were leaving the countries of first asylum or transit to move into the territories of the Member States, the Ministers of Immigration decided in 1992 to set out the criteria to determine which country can be considered safe for refugees to be returned without harm, hence without violating the principle of *non-refoulement*. According to the London Resolution:

“Fulfilment of all the following fundamental requirements determines a host third country and should be assessed by the Member State in each individual case:

- (a) In those third countries, the life or freedom of the asylum applicant must not be threatened, within the meaning of Article 33 of the Geneva Convention.
- (b) The asylum applicant must not be exposed to torture or inhuman or degrading treatment in the third country.
- (c) It must either be the case that the asylum applicant has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to

¹⁰⁵C. BALMER, *Britain says EU mission should turn back migrant boats*, 15th September 2016, available at: www.reuters.com.

¹⁰⁶Convention of the European Union of 15th June 1990 determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities.
Hereinafter: Dublin Convention.

seek their protection, before approaching the Member State in which he is applying for asylum, or that there is clear evidence of his admissibility to a third country.

(d) The asylum applicant must be afforded effective protection in the host third country against refoulement, within the meaning of the Geneva Convention.

(...) Member States will take into account, on the basis in particular of the information available from the UNHCR, known practice in the third countries, especially with regard to the principle of *non-refoulement* before considering sending asylum applicants to them”¹⁰⁷.

Similarly to the ECtHR’s judgement in *Hirsi*, States are obliged to gather information about the country that is found to be responsible for the refugee and which shall take him or her back. While this is not the case for Libya, as this latter is not a signatory to the 1951 Geneva Convention, the European Union saw in Turkey a useful ally to contain the migratory flows coming from Syria after the Syrian civil war in 2011.

After a long process of negotiation process, on 18th March 2016 the European Union and the government of Turkey concluded in Brussels, Belgium, an agreement that favoured both sides. The intention of the EU was to reduce the inflow of Syrian, but also Iraqi and Afghan refugees through the so-called Balkan route while at the same time granting to refugees that remained in Turkey the conditions necessary to be safe. For this reason, the European Union required from Turkey the guarantee that measures for the safety and the inclusion of refugees would be taken. On the other side, Turkey obtained the promise from the EU of 3 billion of Euros, in addition to 3 more billions of Euros promised in November 2015, to be invested for the security of the Union’s external frontiers. The agreement also provided for the initiation of a process of visa abolition between the Union and Turkey, to be carried out by June 2016. However, Turkey did not satisfy the minimum security requirements, hence this latter part of the agreement did not produce any effect.

After the entry into force of the agreement two days later, all irregular migrants on Greek islands would have been taken back to Turkey “in full accordance with EU and international law, thus excluding any kind of collective expulsion (...) the relevant international standards and in respect of the principle of *non-refoulement*. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order”¹⁰⁸. Moreover, the agreement instituted a one-for-one mechanism according to which for every migrant transferred to Turkey one migrant would have been resettled to Europe. In addition to all measures described above, the agreement also provided that “[o]nce irregular crossings between Turkey and the EU are ending or at least have been substantially and sustainably reduced, a Voluntary

¹⁰⁷Resolution of the European Council of 30th November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries.

Hereinafter: London Resolution.

¹⁰⁸Press Release of the Council of the European Union no. 144/16 of 18th March 2016 concerning the EU-Turkey statement.

Humanitarian Admission Scheme will be activated. EU Member States will contribute on a voluntary basis to this scheme”¹⁰⁹.

The agreement has been initially successful in diminishing the number of refugees crossing the external borders of the Union, except for the case of Libya and the central Mediterranean route. However, the failed military *coup* that took place in Istanbul on 15th July 2016 resulted in social unrest, a prolonged state of emergency and the suspension in Turkey of the ECHR¹¹⁰. Moreover, the aims of the agreement were only partially achieved, as by 2018 the EU failed to pay the sum convened and to recognize the full visa liberalization. The effects of such a precarious agreement were finally evident in the first months of 2020, when the Turkish president Recep Tayyip Erdogan announced the opening of the border separating Turkey from Greece. While, according to Greece, this resulted in an inflow of 30.000 refugees, the Turkish Ministry of Interior announced that 130.000 refugees had entered the European border. In any case, such a sudden large-scale arrival severely pressured the reception system on Greek islands.

In early March 2020, the leaders of the European Council, the European Parliament and the European Commission jointly travelled to the Greek border. During this event, the President of the European Commission Ursula von der Leyen declared: “This border is not only a Greek border, it is also a European border (...) I thank Greece for being our European *aspida* in these times”, which means “shield” in Greek. The President of the Commission promised 700 million of Euros to Greece but did not make any reference or comment to the decision of the Greek Prime Minister of suspending for one month all asylum applications. This type of response of the European Union to the crisis was seen by many as a strong position against the entering of refugees in Europe.

2.2.5 The politics of externalization of the borders

Much of the attention of scholars has been focused on the practice of externalization of the border. By externalization is meant the shifting of all of the prerogatives of a State for what concerns the management of migration to another country by concluding agreements that lift from the first country the obligation of receiving large amounts of refugees and processing their requests for asylum. Such a behaviour, as in the case of *Hirsi*, may sometime give the opportunity to States to circumnavigate their international obligations, especially the prohibition of *refoulement*.

Such a practice has been carried out by the European Union on multiple levels. Firstly, the Regulations creating Frontex provide for a reinforcement of cooperation with third States. Secondly, tier one

¹⁰⁹*Ibid.*

¹¹⁰In 2016 Turkey temporarily suspended ECHR on the basis of Article 15, stating that “[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”.

and two of the IBM project, concerning respectively the measures taken directly in third States and the measures of cooperation with third States are considered as externalization in the form of visa requirements, pacts, financing agreements, formation of local authorities and deployment of military equipment (as in the case of Libya). Thirdly, the agreement with Turkey is a clear attempt of drawing the European border more East to contain the inflow of refugees from the Middle East.

In 2018 the Italian Government further proposed the creation of a hotspot in Southern Libya to early process asylum applications and push back economic migrants. While similar structures already exist in Niger and are managed by IOM, it is evident that such an attempt may impact the right of refugees to seek protection as Libya, especially in such a period of military and political unrest, hardly qualifies as a real safe country.

2.5 Considerations

Europe, and more particularly the European Union, has been frequently regarded in the past as the stronghold of human rights and the guarantee of protection for many refugees. However the continuing bilateral relationships between Italy and Libya even after the case of Hirsi, the response to the Greek refugee crisis of early 2020 and, more than everything, the rise of populist parties in the governments of many European Union Member States closed Europe behind its own borders, whether physical or metaphorical. In April 2016, while presenting the reforms to the Common European Asylum System, Migration and Home Affairs Commissioner Dimitris Avramopoulos stated: “Human mobility will be an inherent feature of the 21st century. To address this challenge, Europe needs to set up a robust and effective Common European Asylum System, (...) that is fair for Member States, EU citizens, migrants and countries of origin and transit”¹¹¹. However, such an ambitious project remains far from perfectly protecting the rights of refugees.

¹¹¹Press release of the European Commission of 6th April 2016, Commission presents options for reforming the Common European Asylum System and developing safe and legal pathways to Europe.

3. The principle of *non-refoulement* in the United States of America

This third chapter will inquire whether the United States of America fully respect the principle of *non-refoulement* and whether, under U.S. laws and State practice, the principle may be considered as *jus cogens*. To answer to these question, the first part of the chapter will provide an overview of the case *Sale v Haitian Centers Council*, brought before the Supreme Court in 1993, to better understand how it differs from the *Hirsi* case. In the second part, the chapter will review the Safe Third Country Agreement signed by the United States and Canada in 2002 and the proposal made by Donald Trump in 2019 of a similar Agreement with Mexico.

Among the legal instruments analysed in the first chapter of the present work, the United States of America signed only the 1967 Protocol to the 1951 Geneva Convention. However, the U.S. voted in favour of the 1948 Universal Declaration of Human Rights and it is a signatory of the 1966 International Covenant on Civil and Political Rights and the 1987 Convention Against Torture. On a regional level the United States is a Member of the Inter-American Commission on Human Rights but, for what concerns the 1969 American Convention on Human Rights, the U.S. signed it in 1977 without proceeding with ratification.

3.1 The United States' legal system concerning refugees

During and after the World Wars the United States experienced a consistent inflow of refugees coming mainly from Europe. The Immigration and Nationality Act of 1952¹¹² (also known as McCarran-Walter Act) provides for a fixed quota of refugees to be admitted every fiscal year in the country. The Immigration and Nationality Act of 1952 was amended by the Hart-Celler Act of 1965¹¹³ and by the Refugee Act of 1980¹¹⁴.

The text of the INA in Section 101 defines refugees as:

“(...) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social

¹¹²An Act of 27th June 1952 of the Congress to revise the laws relating to immigration, naturalization, and nationality. Hereinafter: 1952 INA Act.

¹¹³An Act of 3rd October 1965 of the Congress to amend the Immigration and Nationality Act. Hereinafter: 1965 INA Amendment.

¹¹⁴An Act of 17th March 1980 of the Congress to amend the Immigration and Nationality Act to revise the procedures for the admission of refugees, to amend the Migration and Refugee Assistance Act of 1962 to establish a more uniform basis for the provision of assistance to refugees, and for other purposes. Hereinafter: 1980 Refugee Act.

group, or political opinion(...)"¹¹⁵.

The 1980 Refugee Amendment is commonly regarded as both as an adjustment into the U.S.'s legal system of the 1951 Geneva Convention¹¹⁶ and, more generally, as a step towards a more efficient system of refugee protection. In Article 207 the Act develops the principle of the set quota of refugees accepted every year already expressed in the INA by stating:

"Before the start of each fiscal year the President shall report to the Committee on the Judiciary of the House of Representatives and of the Senate regarding the foreseeable number of refugees who will be in need of resettlement during the fiscal year and the anticipated allocation of refugee admissions during the fiscal year"¹¹⁷.

This quota can be further enlarged by the President of the United States or the Attorney General in case of emergency¹¹⁸. Moreover, the 1980 Refugee Act established the Office of U.S. Coordinator for Refugee Affairs and the Office of Refugee Resettlement.

Since 1980 the quota set for refugee admission in the U.S. has constantly changed. While it drastically diminished during the 80s, it peaked again in 1993, the year in which the annual quota was set to 142.000 refugees. From that year onward, the quota has been further reduced, also due the terrorist attacks of 2001. The quota reached an high number again in the last year of Presidency of Barack Obama, the fiscal year 2016. In the last four years the maximum number of accepted refugees has almost halved every fiscal year, reaching the quota announced by Donald Trump in November 2019 of 18.000 refugees for the 2020 fiscal year¹¹⁹, the lowest ceiling ever recorded in U.S. history¹²⁰. This trend of constantly lowering the refugee quota seems not to be accompanied by a diminishing number of emergencies in the world, hence it might be said that it is a political decision in line with Trump's anti-immigration policy, rather than an accurate prevision.

In the years following 9/11, the Courts of the United States have imposed an increasingly heavier burden of proof as regards the claims of the concerned refugee that he or she is persecuted on the basis of the grounds set in Section 101 of the INA. Moreover, this process was supported by subsequent Acts of the

¹¹⁵Sec. 101(a)(42), 1965 INA.

¹¹⁶See: Supreme Court of the United States, judgement of 9th March 1987, 480 U.S. 421, *Immigration National Service v Cardoza-Fonseca*.

¹¹⁷Sec. 207(d)(1), INA.

¹¹⁸Sec. 207 (d)(3)(B)(b), INA, stating that "the number of refugee admissions should be increased because of an unforeseen emergency refugee situation, to the extent that time and the nature of the emergency refugee situation permit".

¹¹⁹Proposed refugee admissions for fiscal year 2020, Report to Congress submitted on behalf of the President of the United States to the Committees on the Judiciary United States Senate and United States House of Representatives in fulfilment of the requirements of sections 207(d)(1) and (e) of the Immigration and Nationality Act.

¹²⁰MIGRATION POLICY INSTITUTE, *U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present, March 2020*, available at www.migrationpolicy.org.

Congress, as for instance the 2005 Real ID Act¹²¹. Such a restriction of the possibility of being granted asylum, however, could result in refugees being unjustly rejected¹²².

Another important Act, even if preceding 2001, is the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”)¹²³, which also amends the INA. This Act introduced in the U.S. legal system the expedited removal for those persons that migrate illegally or without travel documents, meaning that these persons do not have the chance of regularly being heard by a judge in a Court¹²⁴.

Finally, in 2017 the Executive Order no. 13780¹²⁵ of President Donald Trump temporarily banned the entry of migrants (and non-migrants) coming from seven Middle Eastern countries, including Syria¹²⁶. This latter part of the Order dangerously denied the entry of Syrian refugees to the U.S. without a specific deadline.

3.2 *Sale v Haitian Centers Council, Inc.*

After twenty-nine years of dictatorship carried out by François Duvalier and his son Jean-Claude and after four subsequent military dictatorship, the citizens of Haiti finally elected as their President Jean-Bertrand Aristide on 7th February 1991. However, this period of presidency was much short, as he was forced to leave Port-au-Prince during a military *coup* led by Raoul Cédras in September of the same year. He was finally restored as President in 1994 and served two more mandates, until his second deposition in 2004. Such a political unrest has produced a considerable flow of Haitian refugees ever since the 1970s, which definitely peaked in 1993. The relative proximity of Haiti to the United States made this latter a possible country of asylum for people escaping by the sea (and for this reason often referred to as “boat people”).

However, the support by the U.S. Government to the Duvalier regime gave the pretext to the U.S. Coast Guard to interdict and return in a ten-years time span thousands of Haitian refugees to their country of origin on the basis of the interdiction-at-sea program set by the Agreement reached in 1981 among Ronald Reagan and Jean-Claude Duvalier. The Agreement identified Haitians as economic refugees, hence, at least in theory, no violation of the principle of *non-refoulement* occurred as people were intercepted at sea. It must

¹²¹An Act of 11th May 2005 of the Congress to establish and rapidly implement regulations for state driver's license and identification document security standards, to prevent terrorists from abusing the asylum laws of the United States, to unify terrorism-related grounds for inadmissibility and removal, and to ensure expeditious construction of the San Diego border fence.

¹²²S. L. ARENILLA, *Violations to the principle of non-refoulement under the asylum policy of the United States*, in *Anuario Mexicano de Derecho Internacional*, vol. 15, 2015, pp. 283-322.

¹²³An Act of 30th September 1996 of the Congress making omnibus consolidated appropriations for the fiscal year ending 30th September 1997, and for other purposes.

Hereinafter: IIRIRA.

¹²⁴Sec. 235(3)(b), INA as amended by IIRIRA.

¹²⁵Executive Order 13780 of 17th January 2017 of the President of the United States Protecting the Nation from Foreign Terrorist Entry into the United States.

¹²⁶Sec. 5(b) of the Executive Order no. 13780, in which Trump declared that “(p)ursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest”.

be pointed out that a series of misconceptions toward Haitians, often seen as “HIV-carriers”, initially brought the U.S. to differentiate among them and Cubans, favouring the entrance of the latter category, identified as refugees escaping from Fidel Castro’s regime¹²⁷ under the 1966 Cuban Adjustment Act¹²⁸. Eventually, on 24th May 1992, President George Bush issued Executive Order no. 12807, also known as Kennebunkport Order, which instructed the U.S. Coast Guard to interdict immigrants beyond the U.S. national waters and return them, hence to deny to Haitian refugees the chance to be subject to the Immigration and Naturalization Service refugee screening¹²⁹. This Executive Order amended the preceding Executive Order no. 12324¹³⁰ issued by President Donald Reagan, which had the same objective.

It is important to notice that both the 1981 Agreement and the Kennebunkport Order restricted the right to leave the country for Haitian refugees, annulling also the possibility of escaping toward countries other than the United States¹³¹.

It was on Reagan’s and Bush’s approach towards migration and on his Executive Order, *inter alia*, that the Supreme Court of the United States built its judgement on the case *Sale v Haitian Center Council, Inc.* in 1993, a case that became of a central importance for what concerns the principle of *non-refoulement*.

The plaintiff was the Haitian Center Council, a no-profit organization operating in that period in the U.S. to assist Haitian Refugees. The Haitian Center Council, defended by the students of the Yale Law School Clinic, did not refer to any specific case, but rather to the general practice of the Bush Administration of interdicting Haitian refugees escaping from Cédras, in continuity with the interdiction programme established under Reagan. To circumvent clear violations of international law by rejecting refugees, the U.S. had started in 1991 to detain refugees in the Guantanamo Bay Naval Base, Cuba, to process there their asylum requests. The Naval Base in Guantanamo was defined as a “HIV concentration camp” and a “rights-free zone”, as some reported violation of human rights¹³², not dissimilarly to what happens in Libya. The Kennebunkport Order, through interdiction-at-sea, aimed at emptying the refugee camp in Guantanamo while simultaneously discouraging further inflows.

While such practices are different from the Third Country Agreement between the European Union and Turkey analysed in the second chapter of the present work, it might be said that the United States in early 90s was trying externalize the U.S. border to circumvent the prohibition of *refoulement*.

¹²⁷P. GAVIGAN, *Paper prepared for the Conference on Regional Responses to Forced Migration in Central America and the Caribbean*, 1st October 1997, available at www.oas.org. This preference towards Cuban refugees, however, changed in 1994, when incoming Cubans increased and the U.S. Coast Guard started to interdict them too.

¹²⁸An Act of 2nd November 1966 to adjust the status of Cuban refugees to that of lawful permanent residents of the United States, and for other purposes.

¹²⁹Executive Order 12807 of 24th May 1992 of the President of the United States on the Interdiction of Illegal Aliens. Hereinafter: Kennebunkport Order.

¹³⁰Executive Order 12324 of 29th September 1981 of the President of the United States on the Interdiction of Illegal Aliens.

¹³¹According to Article 13(2) of the Universal Declaration of Human Rights “[e]veryone has the right to leave any country, including his own, and to return to his country”.

¹³²H. H. KOH, *supra* note 6, p.14.

The core case of the Haitian refugees was divided in two “wings”¹³³, one relating to the illegal detention of refugees in Guantanamo (*Haitian Centers Council, Inc. v McNary*)¹³⁴ and the other one about the cases of *refoulement* (*Sale v Haitian Centers Council, Inc.* itself). While the first case was won by the applicants, resulting in the evacuation of 205 HIV-positive Haitian refugees from the camp of Guantanamo to the U.S., the Supreme Court ruled in *Sale*, on a majority of eight over nine judges, that neither the 1967 Protocol to the 1951 Geneva Convention, nor the 1980 Refugee Act “place (...) any limit on the President's authority to repatriate aliens interdicted beyond the territorial seas of the United States”¹³⁵. The Supreme Court based this ruling on the following four findings.

Firstly, as the plaintiff suggested that the INA applied extraterritorially, the Supreme Court took into consideration the wording of the 1952 INA, before it was amended by the Refugee Act of 1980. In Section 243(h) the 1952 Act stated:

“The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason”¹³⁶.

By focusing on the wording “within the United States”, which was eliminated by the 1980 Amendment, the Supreme Court ruled that the INA may not apply extraterritorially, as that was demonstrated to be the objective that the drafters of the first version of the Act had in mind. However, Harold Koh¹³⁷, which spoke in defence of the Haitian Centers Councils, pointed out that such a ruling does not fully respect Article 31 of the Vienna Convention on the Law of the Treaties, which provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”¹³⁸.

Secondly, in Section IV of the judgement the Court engaged in an interpretation of Article 33 of the 1951 Geneva Convention providing for *non-refoulement*. The Court relied on the *travaux préparatoires* of the 1951 Geneva Convention, where the delegates of Switzerland and the Netherlands expressed their concern about the possibility of an extra-territorial application of the Geneva Convention, but they were specifically referring to phenomena of mass migrations. No other delegate challenged the statements of these two countries, giving the impression that there was a tacit consent on that issue among the drafters of the

¹³³H. H. KOH, *The Enduring Legacies Of The Haitian Refugee Litigation*, in *New York School of Law Review*, vol. 61, no. 1, 2016, pp. 31-68.

¹³⁴This did not prevent the United States Government from detaining in Guantanamo Cubans, Jamaicans and Filipinos refugees and Al Qaeda detainees in the following years. See: H. H. KOH, *supra* note 133, p. 47.

¹³⁵Supreme Court of the United States, judgement of 21st June 1993, 509 U.S. 155, *Sale, Acting Commissioner, Immigration And Naturalization Service, et al. v Haitian Centers Council, Inc., et al.* Hereinafter: *Sale Case*.

¹³⁶*Sale Case*, section IV.

¹³⁷H. H. KOH, *supra* note 6, p. 17.

¹³⁸Art. 31, VCLT.

Convention¹³⁹.

Following that, the Court made a distinction between “expel” (which refers to a person that lives in a country of which he or she is not a national and from which he or she is deported) and “return” (a person which is about to cross the border of a State or has just crossed it, and which is soon deported, without having the possibility of applying for asylum). According to the two French-English dictionaries consulted by the Supreme Court, the word *refouler* translates as “repulse”, “repel”, “drive back”, and even “expel”, but not as “return”¹⁴⁰. Indeed, this meaning should be associated to the French words *renvoyer*¹⁴¹ or *repousser*¹⁴². For this reason, the prohibition of *refoulement* could not apply to refugees interdicted in the high seas.

Moreover, the Court noticed that the second paragraph of Article 33 of the 1951 Geneva Convention states that: “[t]he benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is(…)”¹⁴³. According to the judges, by referring to a “country in which he is”, the Convention excludes the high seas, which are not the territory of any country¹⁴⁴.

Thirdly, the Court reiterated the findings of a previous case, *Bertrand v Sava*, where the Court had ruled that the provisions contained in the 1967 Protocol to the 1951 Geneva Convention (hence, in the present case, the prohibition of *refoulement*) are not self-executing, but require an Act of the Congress. This brings back the argument that the Congress, in the wording of the 1952 Act, had deliberately excluded extra-territorial application of the principle of *non-refoulement*.

Fourthly, the Supreme Court found the Executive Orders of the President are not illegitimate, as Section 243(h) of the INA only refers to the Attorney General, not to the President nor to the Coast Guard. For this reason, in theory, the Executive Orders of the President of the United States are not subject to the prohibition of *refoulement* as provided for in the INA.

The only judge that opposed this decision was Harry Blackmun, who issued a strongly dissenting opinion to the *Sale* Case. Indeed, *inter alia*, Blackmun pointed out that the French newspaper *Le Monde* reported the case with the word “*refouler*”¹⁴⁵. Some saw his opinion as a spark of hope and this might have influenced many scholars and activists not to give up the cause of boat people¹⁴⁶. It might be said that the cause was definitely won almost twenty years later, when the ECtHR took an opposite decision in *Hirsi*.

The Inter-American Commission of Human Rights did not uphold the decision taken in the *Sale* Case

¹³⁹ *Sale* Case, section IV.

¹⁴⁰ *Sale* Case, section IV.

¹⁴¹ *Sale* Case, section IV.

¹⁴² A. FISCHER-LESCANO; T. LOHR; T. TODHIDIPUR, *Border Controls at Sea: Requirements under International Human Rights and Refugee Law*, in *International Journal of Refugee Law*, Vol. 21, No. 2, 2009, p. 256-296.

¹⁴³ Art. 33 para. 2, 1951 Geneva Convention.

¹⁴⁴ *Sale* Case, section IV.

¹⁴⁵ *Sale* Case, dissenting opinion of Judge Blackmun.

¹⁴⁶ H. H. KOH, *supra* note 133, p. 41-44.

by the Supreme Court. In 1997 the IACtHR stated in *The Haitian Centre for Human Rights et al. v United States* that:

“The Supreme Court of the United States, in the case of *Sale, Acting Commissioner, Immigration and Naturalization Service, Et. Al. v Haitian Centers Council, Inc., Et. Al.*, construed [the prohibition of *refoulement*] as not being applicable in a situation where a person is returned from the high seas to the territory from which he or she fled. Specifically, the Supreme Court held that the principle (...) did not apply to the Haitians interdicted on the high seas and not in the United States' territory.

The Commission does not agree with this finding. The Commission shares the view advanced by the United Nations High Commissioner for Refugees in its Amicus Curiae brief in its argument before the Supreme Court, that Article 33 had no geographical limitations”¹⁴⁷.

In 2007, the UN High Commissioner for Refugees issued an advisory opinion in favour of the extra-territorial interpretation of the principle of *non-refoulement*. In a footnote of the opinion is said: “UNHCR is of the view that the majority opinion of the Supreme Court in *Sale* does not accurately reflect the scope of Article 33(1) of the 1951 Convention”¹⁴⁸.

During the Presidential campaign of 1992, Bill Clinton firmly condemned the policy of interception-at-sea policy of Bush and Reagan Administrations. Surprisingly for many, after winning the elections Clinton decided to continue the interdiction program of his predecessors. According to Koh, this might have convinced some undecided judges of the Supreme Court to uphold the legality of *refoulement* in *Sale*¹⁴⁹.

The resurgence of violence in Haiti after Aristide's second deposition in 2004 produced a second inflow of refugees. One of the main legacies of the judgement of the Supreme Court in *Sale* can be seen in the continuity of the interdiction-at-sea practices, this time carried out by George W. Bush's Administration. While this continuity brought many scholars to question whether the principle of *non-refoulement* does really apply only within the territory of the State, the Obama Administration eventually made clear in 2014 in front of the Committee Against Torture in Geneva that the prohibition of torture under Article 3 of the Convention Against Torture is universal and applies anywhere¹⁵⁰. As it was pointed out in the first chapter of the present work, this would imply that also the principle of *non-refoulement* applies either within or without the territory of the United States.

¹⁴⁷IACtHR, judgement of 13th March 1997, Case 10.675, *The Haitian Centre for Human Rights et al. v United States*.

¹⁴⁸UNHCR, Advisory opinion of 26th January 2007 on the extraterritorial application of *non-refoulement* obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

¹⁴⁹H. H. KOH, *supra* note 6, p. 13.

¹⁵⁰H. H. KOH, *supra* note 133, p. 50.

3.3 Safe Third Countries

The INA itself provides for Safe Third Countries in Section 208, which states that:

“(…) the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien’s nationality or, in the case of an alien having no nationality, the country of the alien’s last habitual residence) in which the alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States”¹⁵¹.

This section of the chapter will compare the Agreement that the U.S. has made with Canada and the proposal of a similar Agreement with Mexico. While on the one hand the Agreement with Canada is often contested, on the other hand an Agreement with Mexico would provide a further level of migration control, which however may not be a good solution if Mexico happens to be as unsafe as Libya. Hence, the first subsection will give an overview of the Agreement with Canada, while the second will inquire whether an Agreement with Mexico is legally possible in terms of the principle of *non-refoulement*.

3.3.1 Canada: a contested reality

The Safe Third Country Agreement¹⁵² (“STCA”) was signed on 5th December 2002. The Agreement, reached in the aftermath of the 9/11 events, aimed at a better management of the refugee flows among the two countries. Much similarly to the European Union’s Dublin System, the STCA states that both the U.S. and Canada are to be considered as Safe Third Countries, hence the refugees that cross the border to Canada through one of the ports of entry are to be returned to the United States if they have been granted asylum there, and *vice versa*. Similarly to the European Union, the Agreement aims at reducing the phenomenon of “asylum shopping”, where refugees seek asylum in multiple countries¹⁵³.

The STCA refers to the principle of *non-refoulement* in its preliminary observations, as it takes into consideration the obligations of Canada and the United States under the 1951 Geneva Convention, the 1967 Protocol and the 1987 CAT.

Four exceptional cases are provided for in the Agreement: i) if the refugee is an unaccompanied

¹⁵¹Sec. 208(b)(2)(A), INA.

¹⁵²Agreement between the Government of Canada and the Government of the United States of America of 5th December 2002 for cooperation in the examination of refugee status claims from nationals of third countries. Hereinafter: STCA.

¹⁵³R. FALCONER, *Ping-Pong Asylum: Renegotiating the Safe Third Country Agreement*, in *Calgary School of Public Policy Publications*, vol. 12, no. 13, April 2019, pp. 1-14.

minor; ii) if he or she is connected with a familiar bond with at least one unaccompanied minor that has been granted asylum; iii) if he or she is crossing the border with the purpose of reuniting with a family member which has been recognized as a refugee or iv) if he or she is equipped with legitimate travel documents.

The STCA has been subject to criticism insomuch as it only refers to refugees that cross the border through ports of entry, meaning that not all the areas of the border between the two countries are covered by the Agreement, and this is said to favour the illegal crossing of the border in non-patrolled areas. Indeed, the U.S.-Canada border is long 8.893 kilometres and it is the longest land border dividing two countries.

Moreover, the STCA has been the protagonist in 2007 of the case *Canadian Council for Refugees, et al. v Her Majesty the Queen*¹⁵⁴, where the Federal Court of Canada found that the Agreement between Canada and the United States violated, *inter alia*, the Canadian Charter of Rights and Freedoms as the United States was not in full compliance with Article 33 of the 1951 Geneva Convention and Article 3 of the CAT. However, this decision was reversed in the Canadian Federal Court of Appeal one year later. The case was then brought in front of the Inter-American Commission of Human Rights under the name *John Doe et al. v Canada*¹⁵⁵, where the Commission recommended Canada to conclude the Agreement with the U.S. as it violates Canada's obligations under international law.

In 2017 the number of detected refugees crossing the border illegally incremented, bringing the Canadian Government to question whether it was the case of renegotiating the STCA under Article 10(4), providing for modifications of the Agreement. However, in the same year, President of the U.S. Donald Trump issued, along with the aforementioned Executive Order no. 13780¹⁵⁶, the Executive Order no. 13768¹⁵⁷, which activated the policy of mass deportation of illegal migrants that he had advocated for in his Presidential campaign.

While on the one hand some presumed that reforms to the Agreement could help decreasing the inflow of refugees, on the other hand others argued that under the Trump Administration and its policies towards refugees and migrants had rendered the U.S. not a safe country anymore. Eventually the Canadian Minister of Immigration, Refugees and Citizenship, Ahmed Hussen, declared that the United States continued to be a Safe Third Country¹⁵⁸. Moreover, the web page of the Canadian Government dedicated to the Agreement states:

“The United States meets a high standard with respect to the protection of human rights. It is an open democracy with independent courts, separation of powers and constitutional

¹⁵⁴*Supra* note 31.

¹⁵⁵IACtHR, 21st July 2011, Report N. 78/11, Case 12.586, *John Doe et al v Canada*.

¹⁵⁶*Supra* note 125.

¹⁵⁷Executive Order 13768 of 25th January 2017 of the President of the United States of America Enhancing Public Safety in the Interior of the United States.

¹⁵⁸House of Commons of Canada, Official Report of the Debate of 31st January 2017.

guarantees of essential human rights and fundamental freedoms”¹⁵⁹.

The debate over a renegotiation of the STCA heated again in mid-2019, without producing any effect so far.

It is useful to go through Canadian laws regarding the prohibition of *refoulement*. The Canadian Immigration and Refugee Protection Act provides for the principle of *non-refoulement* in Section 97¹⁶⁰, stating that:

“A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally:

- (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
- (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
 - (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
 - (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
 - (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
 - (iv) the risk is not caused by the inability of that country to provide adequate health or medical care”¹⁶¹.

3.3.2 Mexico: a possible alternative?

As the interdiction-at-sea strategy continued on the U.S. sea borders through the 1990s and 2000s, migrants, refugees and smugglers started to divert their routes so as to reach other countries by sea and continue their journey to the United States on land, towards the border between the United States and Mexico¹⁶².

One of the main objective of the current Trump Administration is to reduce the number of immigrants in the U.S. by pushing them to its only Southern land border, the one with Mexico. Apart from the aforementioned Executive Order no. 13768, the U.S. Government started in 2018 to push for a Safe

¹⁵⁹GOVERNMENT OF CANADA, *Canada-U.S. Safe Third Country Agreement, 2016*, available at www.canada.ca.

¹⁶⁰An Act of the Parliament of Canada of 1st November 2001 respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger.
Hereinafter: IRPA.

¹⁶¹Sec. 97, IRPA.

¹⁶²S. H. LEGOMSKY, *The USA and the Caribbean Interdiction Program*, in *International Journal of Refugee Law*, vol. 18, no. 3, 2006, pp. 677-695.

Third Country Agreement with Mexico that emulates the one with Canada. However, this Agreement seems to be implausible both on an international law view and on a logistical view.

Looking at the matter from an international law perspective, the STCA with Canada has already been declared illegal in the *John Doe* case, but an Agreement with Mexico would be disastrous. In a short report issued in April 2019, the UNHCR underlines that the inadequate asylum system, lacking a proper screening of refugees who are systematically detained, prevents a lot of refugees from being properly recognized as such¹⁶³. Moreover, the estimate number of unaccompanied minors registered in 2016 by the *Instituto Nacional de Migración* is 35.000, in large contrast with the number of unaccompanied minors that applied for asylum (136) and that were granted protection (77)¹⁶⁴. Such data suggest that the possibility of *refoulement* from Mexico to the countries of origin of refugees exists, and this would imply that, in case of a STC Agreement with Mexico, the U.S. would be responsible for secondary *refoulement*. In addition to that, it must be pointed out that if a Central American refugee is intercepted at the U.S.-Canada border and he or she is pushed back to the U.S., the same refugee would risk to be subsequently pushed back to Mexico and then to the country of origin, resulting in a multi-country violation of *refoulement*.

An Agreement with Mexico is also unfeasible on a logistical perspective, as the funds granted by the Mexican Government the *Comisión Mexicana de Ayuda a Refugiados* (“COMAR”) have been cut of 20% in 2019 in comparison with the previous years, making it more inefficient¹⁶⁵. Moreover, it is implausible that the Trump Administration would unilaterally fund the Agreement, as instead happened in the European Union-Turkey case¹⁶⁶.

Considered all these matters, it has to be said that Mexico has always been reluctant to sign a STC Agreement with the United States. Indeed, when the former head of the Department of Homeland Security Kirstjen Nielsen first launched the negotiations, the former Mexican Foreign Minister Luis Videgaray rejected the proposal fearing that the Agreement would be a pull-factor for migrants heading to Mexico. When Andrés Manuel López Obrador became President in Mexico in December 2018, the new Government continued to reject the Agreement. On 22nd July 2019 the current Mexican Foreign Minister Marcelo Ebrard formally rejected the STC Agreement¹⁶⁷.

¹⁶³UNHCR, *Mexico Factsheet*, 2019, available at www.reporting.unhcr.org.

¹⁶⁴INTERNATIONAL CRISIS GROUP, *Easy Prey: Criminal Violence and Central American Migration*, Report no. 57, 28th July 2016, available at www.crisisgroup.org.

¹⁶⁵L. KRAUZE, *The U.S. push to designate Mexico a 'safe third country' for refugees is a farce*, 2nd May 2019, available at www.washingtonpost.com.

¹⁶⁶During his Presidential campaign Donald Trump repeatedly stated that Mexico was supposed to pay for the infamous wall to be built at the border between the two countries. It is hard to imagine that he would fund an additional large-scale repatriation program, along those already enacted.

¹⁶⁷D. B. SOLOMON, *Mexico says no to safe third-country asylum discussion with U.S.*, 22nd July 2019, available at www.reuters.com.

3.4 Considerations

Twenty five years after *Sale*, Harold Koh pointed out an interesting theory of Itamar Mann¹⁶⁸ suggesting that the judgement of the Supreme Court was the result of a specific legal process that was diffusing at that time, which is transnationalism. At the end of the Cold War, as history seemed to be ended, the world was beginning to be interconnected and interrelated, as borders were becoming more unstable and supranational entities were more and more influential on a national level. As international law principles were becoming more intrusive in the national legal system, the *Sale* decision may be seen as a strategy adopted by the judges to resist transnationalism. This would explain how, almost twenty years later, a supranational Court (the ECtHR) delivered a totally different judgement (*Hirsi*).

Some scholars after *Sale* bitterly pointed out that the St. Louis incident had taught nothing to the United States. However, scholars and politicians often regard the Safe Third Country Agreement between the European Union and Turkey as a model for adjustments to the Agreement with Canada. In the light of events occurring in March 2020 and discussed in the second chapter of the present work is not easy to consider the Euro-Turkish Agreement as a model.

Given the fact analysed so far, it also might be said that the United States are very far from considering the principle of *non-refoulement* as *jus cogens*. As one may say that the lives of refugees seeking protection in the United States have become harder under Trump's Administration and will probably continue to be so if Donald Trump gets re-elected in autumn 2020, it must be pointed out that the lack of a change in the policy of interception-at-sea after the election of Bill Clinton is the evidence of something deeper: the United States, just as many other States, often find policies that breach the principle of *non-refoulement* too convenient to be abandoned.

¹⁶⁸H. H. KOH, *supra* note 133, p. 54.

4. The principle of *non-refoulement* in Australia

This fourth chapter will finally provide an overview of the principle of *non-refoulement* in Australia and in the broader South-Eastern Asia and Pacific regions. Among the legal instrument analysed in the first chapter, Australia is one of the founding States of the 1951 Geneva Convention, it is signatory to the 1967 Protocol and it has ratified both the 1966 ICCPR and the 1987 CAT. However, the strict policies of border control and territorial sovereignty enacted in Australia have loosened refugee protection in this country, often in contravention of its international obligations. Ever since the early 20th century, Australia has implemented acts aimed at isolating itself from migrants, especially for what concerns Chinese people, with the tacit consensus of the Great Britain, of which Australia was a dominion. In 1901 the Immigration Restriction Act institutionalized the so-called “White Australia Policy”, which was definitely abolished only in 1973¹⁶⁹. A scholar observed how a “longstanding fear of the Asian other” has always affected the Australian policy concerning immigration and refugee protection¹⁷⁰. Australians seem to have a “near hysterical fear about border protection”¹⁷¹, a even stronger attitude if compared to the ones observed in the EU and the U.S. in the previous chapters of the present work.

The chapter will firstly provide an overview of the laws in Australia concerning refugee protection. It will then briefly present the worldwide-known *Tampa* incident and it will analyse the opinion of the judges of the Australian High Court in comparison with the *Sale* and *Hirsi* cases, presented in the previous chapters. In the last sections, the chapter will analyse the complex system of border externalization of Australia, which affects a large number of neighbouring countries through bilateral agreements.

4.1 The Australian legal system concerning refugees

The Migration Act of 1958 was initially seen as the implementation in the local legal system of Australia’s obligation arising from the treaties signed at the end of the Second World War. In Section 5, the Migration Act states:

“[N]on-refoulement obligations includes, but is not limited to:

- (a) *non-refoulement* obligations that may arise because Australia is a party to:
 - (i) the [1951] Refugees Convention; or
 - (ii) the [International] Covenant [on Civil and Political Rights]; or
 - (iii) the Convention Against Torture; and

¹⁶⁹D. BACIS, *Immigrazione irregolare e tutela dei diritti: il caso australiano degli offshore detention centers*, in *Diritto, Immigrazione e Cittadinanza*, vol. 2, 2018, pp.1-25.

¹⁷⁰P. MATHEW, *Australian refugee protection in the wake of the Tampa*, in *The American Journal of International Law*, vol. 96, No. 3, 2002, pp. 661-676.

¹⁷¹T. WOOD, J. MCADAM, *Australian Asylum Policy All at Sea: An Analysis of Plaintiff M70/2011 v Minister for Immigration and Citizenship and the Australia-Malaysia Arrangement*, in *International and Comparative Law Quarterly*, vol. 61, no. 1, 2012, pp. 274-300.

(b) any obligations accorded by customary international law that are of a similar kind to those mentioned in paragraph (a)”¹⁷².

The 1958 Migration Act introduced the so-called universal visa requirement, according to which any alien entering Australia should possess a valid visa. Australia is the only country in the world that imposes a universal visa requirement on all non-citizens¹⁷³. This policy is highly controversial, especially when considering the difficult situation of refugee escaping from political persecution. According to the definition of refugee provided by the 1951 Geneva Convention, any refugee finds himself or herself outside of the country of origin or of habitual residence because of a well-founded fear of persecution from which State authorities of the aforementioned country are unable or unwilling to protect him or her. Hence, it is highly implausible that the State of origin of the refugee would grant him or her the possibility of receiving a valid visa for the country to which refugee is travelling to seek asylum. Moreover, it is interesting to notice that, as the inflow of Vietnamese refugees started in 1976, the Australian government temporarily introduced the practice of allowing/compelling asylum seekers to apply for directly with the Australian consulate in the country of origin of refugees¹⁷⁴. This practice today has been declared inadmissible in the European Union by the CJEU in 2017¹⁷⁵.

Through numerous amendments, the Act gradually imposed heavier restriction on aliens arriving at the Australian borders, as a result of the refugee flows from the South-Eastern Asian countries which were facing unrest. Eventually, after the inflow of Cambodian refugees in the 1980s, the Migration Reform Act of 1992¹⁷⁶ imposed the mandatory detention at the borders of Australia of all aliens lacking a visa, until they were granted a permit or were expelled. In 2004, the High Court of Australia (“HCA”) delivered a judgement that legitimized the indefinite detention of stateless refugees in case no country is willing to receive them¹⁷⁷.

Today the 1958 Migration Act reads in Section 197C:

“(1) (...) it is irrelevant whether Australia has *non-refoulement* obligations in respect of an unlawful non-citizen.

(2) An officer’s duty to remove as soon as reasonably practicable an unlawful non-citizen (...) arises irrespective of whether there has been an assessment, according to law, of Australia’s

¹⁷²An Act of 1st May 1958 of the Federal Parliament of Australia relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Hereinafter: 1958 Migration Act.

¹⁷³A. L. HIRSCH, *The Borders Beyond the Border: Australia’s Extraterritorial Migration Controls*, in *Refugee Survey Quarterly*, vol. 36, 2017, pp. 48-80.

¹⁷⁴D. BACIS, *supra* note 169, p. 7.

¹⁷⁵CJEU, judgement of 7th March 2017, case C-638/16 PPU, *X and X v Belgium*.

¹⁷⁶An Act of 7th December 1992 of the Federal Parliament of Australia to reform the law relating to migration.

¹⁷⁷HCA, judgement of 6th August 2004, judgement 37[2004], *Al Kateb v Godwin*.

non-refoulement obligations in respect of the non-citizen”¹⁷⁸.

In addition to that, Australia distinguishes among “on-shore” and “off-shore” refugees. The first category identifies refugees that have reached Australia by plane and with a regular visa, as this is seen as the only way to enter the country as a refugee with valid claims or, as it is commonly said in the Australian political discourse, “by the front door”. The second category encompasses all the persons that are resettled from outside Australia and have applied to be transferred there¹⁷⁹. This distinction clearly excludes refugees coming from the sea, as they are considered to be illegal migrants which should have requested protection in their first country of arrival. Indeed, as Australia claims to protect itself from “asylum shoppers”, it must be pointed out that boat people coming from the Middle East, Africa and Asia, hardly ever may consider transit countries as safe. In addition to that, the Government usually considers on-shore and off-shore refugees as a single quota, meaning that to every on-shore refugee arriving with a valid visa corresponds an off-shore refugee that will not be resettled to Australia¹⁸⁰.

To contrast the activity of smuggling and human trafficking, the Australian government has initiated in 2010s an intense campaign of awareness through the media and the social media. Quotes used in the campaign include: “No way you will make Australia home” and “If you come by boat without a visa you won’t be settled to Australia”. Moreover, the Migration Act imposes sanctions on carriers of refugees without valid claims in Section 229¹⁸¹.

Until 2015 it was possible to appeal unsuccessful asylum requests to the Australian Refugee Review Tribunal. This court became a division of the Administrative Appeals Tribunal in July of the same year.

For what concerns refugee protection, Australia is very different from the cases of the United States and Europe analysed in the previous chapters of the present work, as the aforementioned legal provisions may demonstrate. However, to better grasp the difference among these cases, it is necessary to provide an account on the *Tampa* affair and the measures that have been taken by the different Australian Governments to face refugee inflows, especially the externalization of the borders that occurred through a number of bilateral agreements.

4.2 The *Tampa* incident and its consequences

On 26th August 2001 a 20-meters wooden fishing boat that had departed from Indonesia was found sinking by the Australian SAR authorities 140 kilometres from the Australian Christmas Island. Although

¹⁷⁸Section 197C, 1958 Migration Act.

¹⁷⁹Discussion Paper of the Department of Home Affairs on Australia’s Humanitarian Program 2019–20.

¹⁸⁰A. L. HIRSCH, *supra* note 173, p.58.

¹⁸¹Section 229, 1958 Migration Act, stating that: “The master, owner, agent, charterer and operator of a vessel on which a non-citizen is brought into Australia on or after 1 November 1979 each commit an offence against this section if the non-citizen, when entering Australia: (a) is not in possession of evidence of a visa that is in effect and that permits him or her to travel to and enter Australia; and (b) does not hold a special purpose visa; and (c) is not eligible for a special category visa; and (d) does not hold an enforcement visa; and (e) is a person to whom subsection 42(1) applies”.

the boat was still located in the Indonesian SAR area, the Australian authorities contacted the Norwegian freighter MV *Tampa*, which rescued 433 Afghan refugees, in full compliance with the law of the seas¹⁸². The freighter, hosting a crew of 27 persons and designed to accommodate a maximum of 40 persons, had departed from Fremantle to reach Singapore.

Initially the MV *Tampa* headed towards Indonesia to bring the rescued refugees there, but this perspective caused unrest onboard because the refugees feared violence in Indonesia, and started to put forward suicide threats. The captain of the freighter Arne Rinnan announced that the crew had started to run out of water and food and that there were at least one injured and four unconscious persons and three pregnant women on board¹⁸³. Hence, he decided to turn back towards Christmas Island on the 29th August and reached the Australian territorial waters, four nautical miles off from the coast of the Island. In that moment, forty-five men of the Australian Special Armed Services (“SAS”) took control of the MV *Tampa* to prohibit it from disembarking refugees, and the port of the Christmas Island was closed to all boats entering or leaving it.

It is interesting to notice that, if compared to the *Hirsi* case and the criteria used by the judges of the ECHR to assess on which State laid the responsibility for the breach of the international obligations, it still was quite unclear which State was legally responsible for the refugees for three reasons. Firstly, the sinking boat was found in the Indonesian SAR area, yet was located in international waters. Secondly, the MV *Tampa* was flying the flag of Norway, but it would have been absurd to suggest that refugees were to be taken there, as it would have implied many days of navigation in distress and tension. Thirdly, while the freighter had herself entered the territorial waters of Australia, the act of the SAS troops of taking effective control of the MV *Tampa* would imply that the responsibility of assisting the refugees had passed to Australia.

As the troops took control of the freighter, much similarly to what had already happened with the *Sale* case, the solicitor of the organization Victorian Council for Civil Liberties, Eric Vadarlis, brought the case before the Federal Court of Australia, challenging the Government and, in particular, the Minister for Immigration and Multicultural Affairs, Philip Ruddock. The case then became known as *Ruddock v Vadarlis*.

On 30th August 2001 the Norwegian ambassador in Australia visited the *Tampa* and was delivered a letter whereby the refugees collectively requested asylum¹⁸⁴. On the following day the Government of Australia announced that a resettlement agreement had been reached with New Zealand and Nauru, who were willing to accept the refugees, providing that, after a procedure of screening in these countries, they

¹⁸²Art. 98, UNCLOS, providing for the duty to render assistance.

¹⁸³P. MATHEW, *supra* note 170, p.661.

¹⁸⁴E. WILLHEIM, *MV Tampa: The Australian Response*, in *International Journal of Refugee Law*, vol. 15, no. 2, 2003, pp. 159–191.

would be taken back to Australia. Hence, refugees were taken to the Australian naval vessel *HMAS Manoora*.

The day of 11th September 2001 will always be remembered as a turning point of contemporary history. The events of the United States of America affected many more countries, and Australia is one of them. On the same day, several hours earlier, Justice Anthony North delivered his judgement on the *Ruddock v Vadarlis* case, finding that the Government of Australia had no right to detain refugees on the *Tampa* and that such a detention under the control of SAS forces was in contravention of the *habeas corpus* principle. Hence, he ordered the refugees were to “be brought ashore to a place on the Australian mainland”¹⁸⁵. The terrorist attack that took place on the other side of the world, however, reversed the judgement in the Full Court of the Federal Court of Australia, to which the Government had appealed. Indeed, one week later, Justice Robert French read the judgement stating that the Government had the “prerogative power to expel or exclude non-citizens from Australia”¹⁸⁶. Justice French added:

“Australia has obligations under international law by virtue of treaties to which it is a party, including the Refugee Convention of 1951 and the 1967 Protocol. Treaties are entered into by the Executive on behalf of the nation. They do not, except to the extent provided by statute, become part of the domestic law of Australia. The primary obligation which Australia has to refugees to whom the Convention applies is the obligation under Article 33 (...). It is questionable whether entry by the Executive into a convention thereby fetters the executive power under the Constitution (...). In this case, in my opinion, the question is moot because nothing done by the Executive on the face of it amounts to a breach of Australia's obligations in respect of *non-refoulement* under the Refugee Convention”¹⁸⁷.

Chief Justice Michael Black dissented.

The events taking place on board of the *Tampa* had some important implications on the principle of *non-refoulement* and on the behaviour of Australia towards refugee protection.

In late September 2001 a series of seven bills amended the 1958 Migration Act and provided for a validation of the controversial Australian policies. In particular: the Border Protection (Validation and

¹⁸⁵Full Court of the Federal Court of Australia, judgement of 18th September 2001, case FCA1329, *The Honourable Philip Ruddock MP, Minister for Immigration and Multicultural Affairs, the Honourable Daryl Williams, Attorney-General, the Honourable Peter Reith, Minister of Defence and the Commonwealth of Australia v Victorian Council for Civil Liberties inc, Human Rights and Equal Opportunity Commission and Amnesty International*.

Hereinafter: *Ruddock v Vadarlis appeal*.

¹⁸⁶*Ruddock v Vadarlis appeal*, para. 23.

¹⁸⁷*Ruddock v Vadarlis appeal*, para. 203.

Enforcement Powers) Act¹⁸⁸ created the power of interdiction of vessels suspected to carry refugees; the Migration Amendment (Excision from Migration Zone) Act¹⁸⁹ “removed” from the Australian migration zone numerous islands, comprising the Christmas Island, provided the legal ground for the denial of protection visa to refugees entering by boat and granted to the Minister of Immigration some major discretionary power; and the Migration Amendment (Consequential Provisions) Act¹⁹⁰ introduced the notion of “declared country”, which in practice is equal to the notion of safe third country and introduced a new visa category that, *inter alia*, made family reunification impossible¹⁹¹.

Since 2001 the laws concerning refugees have constantly, yet not substantially changed. The *Tampa* affair provided for a legal precedent for the systematic violation of the principle of *non-refoulement* in Australia, fully justified by the protection of State’s borders.

In June 2014, 157 refugees of Sinhalese and Tamil ethnicities were intercepted by Australian forces and turned back to Sri Lanka, where they were delivered to the Sri Lankan authorities, the same from which the refugees were escaping. Since 2012, Australia had set an “enhanced screening at sea” practice, based on a brief screening carried out by Australian forces that asked several questions to asylum seekers before actually send them back¹⁹². The case of 2014 was brought before the High Court¹⁹³, which legitimized the action of the Government on the basis of the Migration and Maritime Powers Legislation Amendment of 2014¹⁹⁴.

In addition to these *ad hoc* operations of interception, Australia launched a more complex program known under the names of Operation Relex and Pacific Solution. The first was led by the Australian Defence Forces, aiming at interception at sea, and lasted until 2006. The Pacific Solution, instead, originated directly in the midst of the *Tampa* affair, as Nauru and New Zealand had accepted to receive the refugees on 1st September 2001. While the details of the relationship of Australia with third countries will be further inquired in the following sections of the present chapter, it is important to summarize the timeline of the Pacific Solution as directly stemming from the *Tampa* affair.

The Australian Labour Party focused part of its campaign for the 2007 Federal Elections on the issue of detention of refugees in the centres located in Nauru and Papua New Guinea. For this reason, when Kevin

¹⁸⁸An Act of 27th September 2001 of the Federal Parliament of Australia to validate the actions of the Commonwealth and others in relation to the MV Tampa and other vessels, and to provide increased powers to protect Australia’s borders, and for related purposes.

¹⁸⁹An Act of 27th September 2001 of the Federal Parliament of Australia to excise certain Australian territory from the migration zone under the Migration Act 1958 for purposes related to unauthorised arrivals, and for related purposes.

¹⁹⁰An Act of 27th September 2001 of the Federal Parliament of Australia to make consequential provision for dealing with unauthorised arrivals in places excised from the migration zone under the Migration Act 1958 for purposes related to unauthorised arrivals, and for related purposes.

¹⁹¹P. MATHEW, *supra* note 170, p. 663.

¹⁹²A. L. HIRSCH, *supra* note 173, p. 66.

¹⁹³HCA, judgement of 28th January 2015, 1[2015], *CPCF v Minister for Immigration and Border Protection*.

¹⁹⁴An Act of 15th December 2014 of the Federal Parliament of Australia to amend the law relating to migration and maritime powers, and for related purposes.

Rudd, the leader of the Party was elected as Prime Minister, the Pacific Solution was abandoned and the detention centre in Nauru was closed in favour of the opening of a Reception and Processing Centre on the Christmas Island in 2008. This policy, however, did not last long as Australia experienced a peak of arrivals by boat in the following two years.

The new Labour Government led by Julia Gillard approached the problem in June 2012 by creating an expert panel to resolve the problem of boat people arrivals. Two months later the panel issued a 22-points report that, *inter alia*, recommended the re-opening of the off-shore detention centres¹⁹⁵. From that moment onward the Pacific Solution became fully operative once again.

In 2013, after the second Rudd Government, the Liberal Government led by Tony Abbott launched the Operation Sovereign Borders (“OSB”). The Operation, led by the Australian Defence force, is based on a more systematic policy of interception at sea and a “zero tolerance” attitude. Finally, in the same year, in compliance with recommendation no. 7 of the panel of experts, the Parliament of Australia passed a Bill that excised the whole mainland from the Australian migration zone¹⁹⁶.

4.3 Safe third countries

When compared to the European Union and the United States of America, the amount of safe third country agreements that Australia has reached with Pacific States is quite impressive. Apart from the efforts of reducing the arrivals of boat people in the aftermath of the *Tampa* incident, one of the main aims of the inter-Pacific cooperation led by Australia is to fight human trafficking and smuggling.

For this purpose Australia co-chairs, along with Indonesia, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crimes, which initiated in 2002. The agreement is attended by State and non-State members, among which are UNHCR, IOM and the United Nations Office on Drugs and Crime (“UNODC”), and it is mostly funded by Australia. While on the one hand such a regional effort to combat trafficking in persons is undoubtedly positive, on the other hand since the early 2000s the Bali Process has been the legal basis for a number of bilateral agreements between Australia and its neighbours, creating a sort of “cooperative deterrence” scheme throughout the Pacific area¹⁹⁷.

The agreements with the States that will be analysed in the following subsection resemble more the ones of Italy with Libya and the European Union and Turkey, rather than those among the United States and Canada. However, it is important to point out that, while these agreement have helped reducing the inflow of refugees in Australia, especially after the years 2010s, much similarly to what has happened at the Greek-Turkish border, some of these agreement have reportedly been proved to be against the fair treatment of refugees. Indeed, the southern Asian and the Pacific regions are the ones that count the highest number of

¹⁹⁵A. L. HIRSCH, *supra* note 173, p. 77.

¹⁹⁶K. BARLOW, *Parliament excises mainland from migration zone*, 16th May 2013, available at www.abc.net.au.

¹⁹⁷A. L. HIRSCH, *supra* note 173, p. 70.

States that did not sign and ratify the most basic legal instrument for the protection of refugees: the 1951 Geneva Convention.

When Prime Minister Gillard announced in 2011 that Australia was negotiating for a regional processing centre in East Timor, some scholars saw this act as the use of one of the poorest countries in the world as a “dumping ground” for refugees¹⁹⁸.

4.3.1 Papua New Guinea

Papua New Guinea shares a land border with Indonesia and is located North of Australia, from which it became independent in 1949, and for this reason numerous refugee detention centres are located in that State. One of the most famous ones was located on the island of Manus and became fully operative as a result of the 2001 Pacific Solution.

After its closure during the Rudd Government and the reopening in 2013, the situation within the detention centre became increasingly critical. Since 2014 seven men have been reported dead while hosted in the Manus Regional Processing Centre.

Moreover, the Papua New Guinea’s High Court has expressly declared the Center in Manus illegitimate on 26th April 2016. According to the Papuan High Court’s opinion expressed in the case *Namah v Pato*, the existence of the Centre contravenes Section 42 of the Papua New Guinea’s Constitution, concerning the “liberty of the person”. The High Court then ordered that the Centre should be closed, as it formally happened in October 2017¹⁹⁹.

However, the effective closure of the Manus Regional Processing Centre has proved to be a very long process, especially as Australia is reluctant to accept the refugees in the Centre to evacuate it. Eventually, shortly before the conclusion of the Obama Administration, an agreement between the United States and Australia was reached for the resettlement in the U.S. of 1,250 refugees held in Manus. While the following President Donald Trump seemed to disagree with the resettlement agreement²⁰⁰, the policy of resettlement continues to be supported by the U.S.

The Refugee Council of Australia’s latest statistics, dating back to November 2019, show that the almost 700 refugees held in the Manus Centre have been relocated to three separate detention Centres on the island of Manus, then to the capital city of Port Moresby in August 2019. By the end of August 2019, a total of 619 refugees from Papua New Guinea and Nauru had been transferred to the United States and 258 from both States were awaiting to be resettled to the U.S. In addition to that, 7 refugees had been moved to Cambodia in compliance with an agreement between Cambodia and Australia reached under the Bali

¹⁹⁸T. WOOD, J. MCADAM, *supra* note 171, p. 279.

¹⁹⁹D. BACIS, *supra* note 169, p. 15.

²⁰⁰C. PHIPPS, *Trump rages at 'dumb deal' with Australia over refugee resettlement – as it happened*, 2nd February 2017, available at www.theguardian.com. The tweet reads “Do you believe it? The Obama Administration agreed to take thousands of illegal immigrants from Australia. Why? I will study this dumb deal!”.

Process²⁰¹.

4.3.2 Malaysia

Following recommendation no. 10 of the expert panel issued by Prime Minister Gillard²⁰², a further bilateral agreement was reached in May 2011 with Malaysia for the detention of refugees arriving by boat to Australia. According to the agreement, fully funded by Australia and supported by an “Operational Guideline”, Malaysia accepted to receive from Australia 800 asylum seekers, while 4000 UNHCR-recognized refugees that fulfilled all Australian requirements were to be resettled from Malaysia to Australia. Hence, Malaysia became a “declared country” under the recovered Pacific Solution, and this agreement became colloquially known as the “Malaysian Solution”²⁰³.

This agreement was immediately challenged directly before the Australian High Court in the case *Plaintiff M70/2011 v Minister for Immigration and Citizenship*. In that case the High Court recognized that the Australian legal system is a dualist one, hence it requires that the international obligations of Australia ought to be adjusted into local legislation, as indeed had happened for the 1951 Geneva Convention, which had been implemented by the 1958 Migration Act. However, the High Court found that the Malaysian Solution contravened the Migration Act, whose Section 198A(3) states:

“In considering the national interest for the purposes of subsection (2), the Minister:

(a) must have regard to whether or not the country has given Australia any assurances to the effect that:

- (i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and
- (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of refugee in Article 1A of the Refugees Convention as amended by the Refugees Protocol;(…)”²⁰⁴.

Since Malaysia is not a party to the 1951 Geneva Convention, nor to any other legal instrument analysed in the first chapter of the present work, it is clear that it cannot guarantee the protection of refugees. Indeed, apart from the evidence that can be found in numerous reports of Amnesty International and the

²⁰¹REFUGEE COUNCIL OF AUSTRALIA, *Offshore processing statistics*, 27th October 2019, available at www.refugeecouncil.org.au

²⁰²Report of 13th August 2012 of the Expert Panel on Asylum Seekers.

²⁰³D. BACIS, *supra* note 169, p. 19.

²⁰⁴Section 193A(3), 1958 Migration Act.

HRW²⁰⁵, under Malaysian laws a UNHCR-recognized refugees is still considered as illegal migrants, punishable with six lashes for this crime²⁰⁶. Under the ICCPR, this punishment is considered as torture²⁰⁷. In addition to that, the plaintiffs, Shia Muslims, feared persecution on the basis of their religious beliefs in Malaysia²⁰⁸. The High Court also declared that the agreement with Nauru did not constitute a legal precedent.

On a 6 to 1 majority, the Court decided that the declarations of Prime Minister Gillard for a Malaysian Solution were invalid, as Malaysia was not bound by the 1951 Refugee Convention or the 1958 Migration Act. Hence, the High Court forced the Government to reconsider its policies and relationship with Malaysia. However, in 2014 a Memorandum of Understanding to manage irregular migration was reached with Malaysia by the Minister of Immigration Scott Morrison²⁰⁹, who is currently serving as Prime Minister.

4.3.3 Indonesia

In the cases presented in this chapter, the majority of refugees had departed from Indonesia, which still seems to be the most likely country of departure for seaborne asylum seekers. It is for this reason that Australia has always been interested into developing a common agenda of border protection. In addition to that, terrorist attacks of the jihadist group Jemaah Islamiyah occurring in Indonesia, seem to have complemented the Australian “fear of the other”, preparing the ground for an intense cooperation among the two States.

While cooperation with Indonesia was one of the recommendations of the panel of experts of 2012, it must be pointed out that Indonesia is not a member to the 1951 Geneva Convention, but only to the CAT, to the point that many scholars have compared it to Libya and Turkey²¹⁰. For this reason, many have noticed that the risk of secondary *refoulement* in Indonesia is quite high²¹¹.

Apart from sharing the chair of the Bali Process, Australia and Indonesia have stipulated a number of different agreements concerning migrants and refugees, among which are the Lombok Treaty of 2006, providing for a common framework of security, counter-terrorism and smuggling contrast, and the creation of the Jakarta Centre for Law Enforcement in 2004.

Moreover, since 2001 Australia has operated much diplomatic pressure on Indonesia resulting in two opposite trends. On the one hand, in August 2013 Indonesia accepted the Australian push to adopt a

²⁰⁵ See: T. WOOD, J. MCADAM, *supra* note 171.

²⁰⁶ T. WOOD, J. MCADAM, *supra* note 171, p. 298.

²⁰⁷ *Ibid.*

²⁰⁸ HCA, judgement of 31st August 2011, HCA 32[2011], *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship*.

²⁰⁹ A. L. HIRSCH, *supra* note 173, p. 72.

²¹⁰ F. MUSSI, N. FEITH TAN, *Comparing Cooperation on Migration Control: Italy-Libya and Australia-Indonesia*, in *Irish Yearbook of International Law*, vol. 10, 2015, pp. 87-109.

²¹¹ J. MANSFIELD, *Extraterritorial Application and Customary Norm Assessment of Non-Refoulement: The Legality of Australia's Turn-Back Policy*, in *University of Notre Dame Australia Law Review*, vol. 17, 2015, pp. 18-58.

legislation that establishes a visa requirement on refugees coming from Iran, much similarly to the universal visa requirement in Australia. On the other hand, a Presidential Decree for the protection of almost 14,000 refugees was passed in Indonesia in 2017.

4.4 Considerations

The Australian case was added at the end of this thesis to emphasise the similarities with the United States and the European Union. Indeed, on the one hand the heritage of the *Sale* case is evident in the judgement of *Ruddock v Vadarlis*, while on the other hand the policies of border externalization and safe third countries much resemble the European case. However, the lack of protection of refugees against the possibility of *refoulement* may be even stronger in Australia.

Not only the Asian-Pacific region is one of the worst places to be a refugee because of the low accession rate to the international legal instruments, but also because of the systematic violations of refugee rights are frequent even in the countries that Australia declares to be safe. As an example, refugees have no right to work, to receive education or to be entitled to healthcare in Indonesia²¹². The policies of detention and rejection of Australia amount to a further and significant “erosion of refugee protection in the Pacific”²¹³.

Similarly to the United States, Australia proudly avails itself of a efficient mechanism of resettlement of off-shore refugees, which however strictly contrast with its policy of closed borders. Moreover, the reprise of the Pacific Solution was considered to be a success by the public opinion as the inflow of refugees has drastically reduced, at the expense of refugee rights.

The principle of *non-refoulement* is very far from being considered as *jus cogens* in Australia, as the judiciary, and the High Court in particular, seems to mostly favour the sovereignty of the State in controlling its border, rather than Australia’s international obligations.

²¹²A. L. HIRSCH, *supra* note 173, p. 71.

²¹³T. WOOD, J. MCADAM, *supra* note 171, p. 275.

Conclusion

Customary rules are the foundational basis upon which rests international law. In theory the violation of these rules could dangerously jeopardize the fairness of the relations among sovereign States belonging to the international community, and for this reason it would be unthinkable. However, State practice is rather far from being perfectly in compliance with customary rules, especially for what concerns the principle of *non-refoulement*, against which States have adopted a number of different actions. In the words of Stephen Legomsky:

“[the] so-called *non-entrée* [or *non-refoulement*] strategies span a wide range. They can include filing deadlines, safe country of origin limitations, the return of asylum seekers to safe third countries or to first countries of asylum, accelerated procedures, detention, criminal prosecutions for unlawful entry, denials of work authorization while asylum is pending, penalties for applications found to be 'frivolous' or 'manifestly unfounded', pre-screening procedures at foreign embarkation points visa regimes, penalties on commercial carriers, and interdiction at sea”²¹⁴.

A wide number of legal instruments have been signed in the past century to protect refugees. In the majority of these instrument, the prohibition of *refoulement* is expressly stated or implied from the prohibition of torture and inhuman treatment. After the two World Wars, more than in any other historical moment, it seemed that the States that agreed to be bound by these safeguards for refugees would have respected their obligations to build a more sustainable corpus of international norms. Nevertheless, the push-back of Haitian refugees directed towards the United States of America in 1992 became a valid precedent for the reasoning of the Australian judges after the *Tampa* affair in 2001. Only a supranational court, the ECtHR, would eventually recognize in 2011 that the rejection of refugees at the borders of a State amounts to a violation of the rules that govern the relations among States belonging to the international community and, in the specific case of *Hirsi*, of the regional legal instruments that doubly bound States.

The central question of this work has been whether the principle of *non-refoulement*, which is commonly thought to have reached the status of customary rule of international law, is also regarded as a rule of *jus cogens*. Not only the judgements of the case *Sale and Ruddock v Vadarlis* can demonstrate that the national courts tend to rule in favour of their home countries, rather than in favour of international obligations, but also the mere practice of State officials that reject refugees and turn them back to potential situation of torture seems to eradicate any doubt on the fact that the principle of *non-refoulement* continues not to be perceived as *jus cogens*. One of the reason why this happens is that States have adopted a quite

²¹⁴S. H. LEGOMSKY, *supra* note 162, p. 677.

modern strategy to circumvent their obligations with the “safe third country” instrument. This work has provided a large overview of the States considered safe by the European Union, the United States and Australia and has tried to explain why countries like Libya, Turkey, Mexico, Malaysia or Indonesia cannot protect rejected refugees. This kind of agreement results to be extremely convenient for most developed countries to avoid legal challenges in their national territories, since the externalization of the border technically allow the violation of refugee rights outside the jurisdiction of national and supranational courts. At the same time, scholars have noticed that there exist a substantial difference among the EU-Turkey agreement and the Pacific Solution: while in the first case the political leverage of Turkey was quite evident in the agreement and it is even stronger in the events of early 2020, one cannot say the same in the second case, where, except in the case of Indonesia, Pacific States seem to have much less bargaining power when confronting Australia.

Apart from that, there might be more reasons why the principle is violated. For instance, the lack of universal accession to the 1951 Geneva Convention may explain why some countries override the rights of refugees quite easily. Moreover, among the legal instruments analysed in the first chapter of the present work, it seems that the most complete and protective ones are those that bound the nations that tend to be “refugee-producers”, more than destination countries. The Cartagena Declaration of 1984 and the OAU Convention of 1969 are undoubtedly the best legal instruments existing for what concerns refugee protection, but they are both limited to a number of States and, in the case of the Cartagena Declaration, represent a mere instrument of soft law.

A reform of the 1951 Geneva Convention seems to be the best way to urge better compliance of the principle of *non-refoulement*, coupled with a larger accession by States. It is also necessary to address the status of environmental refugees, as discussed in the *Teitiota* case. However, this historical moment in particular appears to be the least adequate to reform the foundational instrument of refugee protection. Another reason why the principle is violated may be because States are progressively closing their borders under an extremely sovereign spirit. As the prohibition of *refoulement* is already *per se* in a complex interplay with the notion of sovereignty of the State borders, it is clear that we are living in a political stage where State leaders are more willing isolate themselves, either figuratively or practically. A clear example of that is the *Sea Watch* affair.

In June 2019 the ship *Sea Watch 3*, owned by a German NGO carrying out SAR operations in the Mediterranean Sea, rescued more than 50 persons, a part of which was disembarked in Italy due to their precarious conditions. The crew and the rest of the rescued people, all nationals of Western African countries, were left on the high seas, prohibited from entering Italy in compliance with the ban imposed by

the Italian Minister of Interior Matteo Salvini on the basis of the Law Decree no. 53/2019²¹⁵. The people on board of the Sea Watch and the captain of the ship Carola Rackete requested an *interim* measure to the ECtHR, claiming that the ban on the entrance of the ship in the Italian national waters violated Article 2 and 3 of the ECHR. The court decided in the case *Rackete and Others v Italy, Interim measure* that the situation on board of the ship did not require an obligation on behalf of the Italian Government to disembark the applicants, as the most vulnerable subject had been already assisted²¹⁶. This brought to the violation of the ban and the entering of the ship in the port of Lampedusa after seventeen days of navigation. Eventually in February 2020 the Italian Court of Cassation confirmed that, by violating the ban, captain Rackete had fulfilled her obligations under international law to render assistance to the rescued persons, and that:

“A ship on the sea (...) cannot be considered a “safe place” as it does not consent the due respect to the fundamental rights of the rescued persons. Neither can be considered as fulfilled the duty of rescuing the shipwrecked on board of the ship (...) as these persons have the right of presenting the request of international protection according to the Geneva Convention of 1951, a kind of operation that certainly cannot be carried out on a ship”²¹⁷.

The brief analysis of this case is one of the many examples of the implications that the current anti-refugee and anti-migration sentiments, spanning across all the world, may have on refugee rights and on a principle that in theory should never be violated.

As a matter of fact, violations of the principle of *non-refoulement* are frequent at many more borders across the world. In 2015 Norway unilaterally declared that Russia is a safe place for Syrian refugees in order to repeal them as they were crossing the border separating the two countries by riding bikes, exploiting a legal loophole²¹⁸. In 1995 Tanzania closed its borders to Rwandan and Burundian Hutu refugees²¹⁹, much similarly to what has been done in 2015 by Viktor Orban in Hungary.

Finally, having considered that the prohibition of *refoulement* is frequently infringed by national authorities and justified by the judiciary, it is important to stress the need for the principle to reach a new level of awareness among the States. Indeed, only when the principle will be universally perceived not as a limitation to State sovereignty but as a way to protect vulnerable persons from the risk of torture and inhuman and degrading treatment it will be possible to assert that international law is respected.

²¹⁵Decreto-Legge of the Italian Government of 14 June 2019, no. 53, “disposizioni urgenti in materia di ordine e sicurezza pubblica”.

²¹⁶ECtHR, Press Release of 25th June 2019, case *Rackete and Others v Italy - request for interim measure refused in the case of Sea Watch*.

²¹⁷Italian Court of Cassation, sect. III, judgement no. 6626/2020 of 16th January 2020.

²¹⁸A. LUHN, *Norway tells refugees who used cycling loophole to enter to return to Russia*, 14th January 2016, available at www.theguardian.com

²¹⁹M. BIGG, *Tanzania Shuts Border As Refugees Close In. Rwandan Hutus trying to flee Burundi*, 1st April 1995, available at www.sfgate.com

List of abbreviations

AALCO = Asian-African Legal Consultative Organization
CAT = Convention Against Torture
CEAS = Common European Asylum System
CJEU = Court of Justice of the European Union
COMAR = Comisión Mexicana de Ayuda a Refugiados
DTA = United Nations Declaration on Territorial Asylum
EASO = European Asylum Support Office
ECOSOC = United Nations Economic and Social Council
ECHR = European Convention on Human Rights
ECtHR = European Court of Human Rights
EUNAVFOR MED = European Union Naval Force Mediterranean
FRA = European Union Fundamental Rights Agency
Frontex = European Border and Coast Guard Agency
HCA = High Court of Australia
HRW = Human Rights Watch
IACtHR = Inter-American Court of Human Rights
IBM = Integrated Border Management
ICCPR = International Covenant on Civil and Political Rights
IIRIRA = Illegal Immigration Reform and Immigrant Responsibility Act
INA = Immigration and Nationality Act
IOM = International Organization for Migration
MoU = Memorandum of Understanding
NGO = Non-Governmental Organization
OAS = Organization of American States
OAU = Organization of African Unity
OSB = Operation Sovereign Borders
SAR = Search and Rescue
SAS = Australian Special Armed Services
STCA = Safe Third Country Agreement
UDHR = Universal Declaration of Human Rights
UNCLOS = United Nations Convention on the Law
UNHCR = United Nations High Commissioner for Refugees
UNODC = United Nations Office on Drugs and Crime

Bibliography

- J. ALLAIN**, *The Jus Cogens Nature of Non-Refoulement*, in *International Journal of Refugee Law*, vol. 13, no. 4, 2002, pp. 533-558.
- J. ANCELIN**, *Le principe de non-refoulement et l'Union européenne à l'épreuve de la crise syrienne*, in *Études internationales*, vol. 49, no. 2, 2018, pp. 355-389.
- S. L. ARENILLA**, *Violations to the principle of non-refoulement under the asylum policy of the United States*, in *Anuario Mexicano de Derecho Internacional*, vol. 15, 2015 pp. 283-322.
- D. BACIS**, *Immigrazione irregolare e tutela dei diritti: il caso australiano degli offshore detention centers*, in *Diritto, Immigrazione e Cittadinanza*, vol. 2, 2018, pp. 1-25.
- C. BALMER**, *Britain says EU mission should turn back migrant boats*, 15th September 2016, available at: www.reuters.com.
- K. BARLOW**, *Parliament excises mainland from migration zone*, 16th May 2013, available at www.abc.net.au.
- M. BIGG**, *Tanzania Shuts Border As Refugees Close In. Rwandan Hutus trying to flee Burundi*, 1st April 1995, available at www.sfgate.com
- R. BYRNE, A. SHACKNOVE**, *The Safe Country Notion in European Asylum Law*, in *Harvard Human Rights Journal*, vol. 9, 1996, pp. 185-228.
- H. CARON**, *Refugees, Readmission Agreements, and "Safe" Third countries a recipe for refoulement*, in *Journal of Regional Security*, vol. 12, no. 1, 2017, pp. 27-50.
- A. COEN**, *International order, the rule of law, and US departures from refugee protection*, in *The International Journal of Human Rights*, vol. 22, no. 10, 2018, pp. 1269-1284.
- M. DEN HEIJER**, *Reflections on Refoulement and Collective Expulsion in the Hirsi Case*, in *International Journal of Refugee Law*, vol. 25, no. 5, 2013, pp. 265-290.
- A. DUFFY**, *Expulsion to Face Torture? Non-refoulement in International Law*, in *International Journal of Refugee Law*, vol. 20, no. 3, 2008, pp. 374-390.
- E. EL-HINNAWI**, *Environmental Refugees*, Nairobi, 1985.

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Guidance on How to Reduce the Risk of Refoulement in External Border Management when Working in or together with Third Countries*, in *International Journal of Refugee Law*, vol. 29, no. 4, 2017, pp. 711-715.

R. FALCONER, *Ping-Pong Asylum: Renegotiating the Safe Third Country Agreement*, in *Calgary School of Public Policy Publications*, vol. 12, no. 13, Calgary, 2019, pp. 1-14.

A. FISCHER-LESCANO, T. LOHR, T. TODHIDIPUR, *Border Controls at Sea: Requirements under International Human Rights and Refugee Law*, in *International Journal of Refugee Law*, vol. 21, no. 2, 2009, - pp. 256-296.

J. FITZPATRICK *Temporary Protection of Refugees: Elements of a Formalized Regime*, in *The American Journal of International Law*, vol. 94, no. 2, 2000, pp. 279-306.

V. FLEGAR, *Vulnerability and the Principle of Non-Refoulement in the European Court of Human Rights: Towards an Increased Scope of Protection for Persons Fleeing from Extreme Poverty*, in *Contemporary Readings in Law and Social Justice*, vol. 8, no. 2, 2016, pp. 148-169.

S. FRATZKE, *International Experience Suggests Safe Third-Country Agreement Would Not Solve the U.S.-Mexico Border Crisis*, June 2019, available at www.migrationpolicy.org

T. GAMMELTOFT-HANSEN, J. C. HATHAWAY, *Non-Refoulement in a World of Cooperative Deterrence*, in *Columbia Journal of Transnational Law*, vol. 53, no. 2, 2015, pp. 235-284.

P. GAVIGAN, *Paper prepared for the Conference on Regional Responses to Forced Migration in Central America and the Caribbean*, 1st October 1997, available at www.oas.org.

G. S. GOODWIN-GILL, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, in *International Journal of Refugee Law*, vol. 23, 2011, pp. 433-457.

GOVERNMENT OF CANADA, *Canada-U.S. Safe Third Country Agreement, 2016*, available at www.canada.ca.

A. L. HIRSCH, *The Borders Beyond the Border: Australia's Extraterritorial Migration Controls*, in *Refugee Survey Quarterly*, vol. 36, 2017, pp. 48-80.

INTERNATIONAL COMMITTEE OF THE RED CROSS, *Note on Migration and the Principle of Non-Refoulement*, in *International Review of the Red Cross*, vol. 99, no. 1, 2017, pp. 345-357.

INTERNATIONAL CRISIS GROUP, *Easy Prey: Criminal Violence and Central American Migration*, Report

no. 57, 28th July 2016, available at www.crisisgroup.org.

INTERNATIONAL ORGANIZATION ON MIGRATION, *Glossary on Migration*, in *International Migration Law*, vol. 34, 2019.

J. KLABBERS, *International Law*, Oxford, 2017, II ed.

S. KLEPP, *A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea*, in *European Journal of Migration and Law*, vol. 1, 2010, pp. 1-22.

H. H. KOH, *Reflections on Refoulement and Haitian Centers Council*, in *Harvard International Law Journal*, vol. 23, no. 1, 1994, pp. 1-20.

H. H. KOH, *The Enduring Legacies Of The Haitian Refugee Litigation*, in *New York School of Law Review*, vol. 61, no. 1, 2016, pp. 31-68.

L. KRAUZE, *The U.S. push to designate Mexico a 'safe third country' for refugees is a farce*, 2nd May 2019, available at www.washingtonpost.com.

E. LAUTERPACHT, D. BETHLEHEM, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, Cambridge, 2001.

S. H. LEGOMSKY, *The USA and the Caribbean Interdiction Program*, in *International Journal of Refugee Law*, vol. 18, no. 3, 2006, pp. 677-695.

A. LUHN, *Norway tells refugees who used cycling loophole to enter to return to Russia*, 14th January 2016, available at www.theguardian.com

J. MANSFIELD, *Extraterritorial Application and Customary Norm Assessment of Non-Refoulement: The Legality of Australia's Turn-Back Policy*, in *University of Notre Dame Australia Review*, vol. 17, 2015, pp. 18-58.

P. MATHEW, *Australian refugee protection in the wake of the Tampa*, in *The American Journal of International Law*, vol. 96, no. 3, 2002, pp. 661-676.

MIGRATION POLICY INSTITUTE, *U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present*, March 2020, available at www.migrationpolicy.org.

F. MUSSI, N. FEITH TAN, *Comparing Cooperation on Migration Control: Italy-Libya and Australia-Indonesia*, in *Irish Yearbook of International Law*, vol. 10, 2015, pp. 87-109.

I. PAPANICOLOPULU, G. BAJ, *Controllo delle frontiere statali e respingimenti nel diritto internazionale e nel diritto del mare*, in *Diritto, Immigrazione e Cittadinanza*, no. 1, 2020, pp. 23-50.

C. PHIPPS, *Trump rages at 'dumb deal' with Australia over refugee resettlement – as it happened*, 2nd February 2017, available at www.theguardian.com

J. PIRJOLA, *Shadows in Paradise - Exploring Non-Refoulement as an Open Concept*, in *International Journal of Refugee Law*, vol. 19, no. 4, 2007, pp. 639-660.

REFUGEE COUNCIL OF AUSTRALIA, *Offshore processing statistics*, 27th October 2019, available at www.refugeecouncil.org.au

J. RISTIK, *The right of asylum and the principle of non-refoulement under the European Convention of Human Rights*, in *European Scientific Journal*, vol. 13, no. 28, 2017, pp. 108-120.

S. RYANTO, *The Refoulement Principle and Its Relevance in the International Law System*, in *Indonesian Journal of International Law*, vol. 7, no. 4, 2010, pp. 732-756.

R. SCHÜTZE, *European Union Law*, Cambridge, 2017, II ed.

M. SCOTT, *Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?*, in *International Journal of Refugee Law*, vol. 26, no. 3, 2014, pp. 404–432.

K. SEUNGHWAN, *Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context*, in *Leiden Journal of International Law*, vol. 30, 2017, pp. 49–70.

D. B. SOLOMON, *Mexico says no to safe third-country asylum discussion with U.S.*, 22nd July 2019, available at www.reuters.com.

V. STOYANOVA *The Principle of Non-Refoulement and the Right of Asylum-Seekers to Enter State Territory*, in *Interdisciplinary Journal of Human Rights Law*, vol. 3, no. 1, 2009, pp. 1-12.

S. TERVISANUT, *The Principle of Non-Refoulement And the De-Territorialization of Border Control*, in *Leiden Journal of International Law*, vol. 27, 2014, pp. 661–675.

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *Legal considerations on refugee protection for people fleeing conflict and famine affected countries*, Geneva, 2017.

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *Mexico Factsheet*, 2019, available at www.reporting.unhcr.org

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *UNHCR welcomes Brazil's decision to recognize thousands of Venezuelans as refugees*, available at www.unhcr.com

E. WILLHEIM, *MV Tampa: The Australian Response*, in *International Journal of Refugee Law*, vol. 15, no. 2, 2003, pp. 159–191.

T. WOOD, J. MCADAM, *Australian Asylum Policy All at Sea: An Analysis of Plaintiff M70/2011 v Minister for Immigration and Citizenship and the Australia-Malaysia Arrangement*, in *International and Comparative Law Quarterly*, vol. 61, no. 1, 2012, pp. 274-300.

Legal cases

CJEU, judgement of 17th December 1970, case 11-70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

CJEU, judgement of 21st January 2011, case 30696/09, *M.S.S. v Belgium and Greece*.

CJEU, judgement of 7th March 2017, case C-638/16 PPU, *X and X v Belgium*.

ECtHR, judgment of 18th January 1978, case 5310/71, *Ireland v United Kingdom*.

ECtHR, judgement of 7th July 1989, case 14038/88, *Soering v United Kingdom*.

ECtHR judgement of 15th November 1996, case 22414/93, *Chahal v United Kingdom*.

ECtHR, judgement of 12th December 2001, case 52207/99, *Bankovic v Belgium*.

ECtHR judgement of 28th February 2008, case 37201/06, *Saadi v Italy*.

ECtHR, judgement of 29th March 2010, case 3394/03, *Medvedyev and Others v France*.

ECtHR, judgement of 23rd February 2012, case 27765/09, *Hirsi Jamaa and Others v Italy*.

ECtHR, Press Release of 25th June 2019, case *Rackete and Others v Italy - request for interim measure refused in the case of Sea Watch*.

Federal Court of Canada, judgement of 29th November 2007, case FC 1262, *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v Her Majesty the Queen*.

Full Court of the Federal Court of Australia, judgement of 18th September 2001, case FCA1329, *The Honourable Philip Ruddock MP, Minister for Immigration and Multicultural Affairs, the Honourable Daryl*

Williams, Attorney-General, the Honourable Peter Reith, Minister of Defence and the Commonwealth of Australia v Victorian Council for Civil Liberties inc, Human Rights and Equal Opportunity Commission and Amnesty International.

HCA, judgement of 6th August 2004, no. 37[2004], *Al Kateb v Godwin*.

HCA, judgement of 31st August 2011, no. 32[2011], *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship*.

HCA, judgement of 28th January 2015, no. 1[2015], *CPCF v Minister for Immigration and Border Protection*.

IACtHR, judgement of 13th March 1997, Case 10.675, *The Haitian Centre for Human Rights et al. v United States*.

IACtHR, 21st July 2011, Report N. 78/11, Case 12.586, *John Doe et al v Canada*.

IACtHR, advisory opinion of 30th May 2018, OC-25/18, Advisory Opinion requested by the Republic of Ecuador, 2018.

Italian Court of Cassation, sect. III, judgement no. 6626/2020 of 16th January 2020.

Supreme Court of the United States, judgement of 9th March 1987, 480 U.S. 421, *Immigration National Service v Cardoza-Fonseca*.

Supreme Court of the United States, judgement of 21st June 1993, 509 U.S. 155, *Sale, Acting Commissioner, Immigration And Naturalization Service, et al. v Haitian Centers Council, Inc., et al.*

United Nations Committee Against Torture, judgement of 2nd January 2020, CAT/C/68/D/882/2018, *Flor Agustina Calfunao Paillalef v Switzerland*.

United Nations Human Rights Committee, judgement of 7th January 2020, CCPR/C/127/D/2728/2016, *Ioane Teitiota v New Zealand*.

UNHCR, advisory opinion of 26th January 2007, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

Treaties and Official Documents

Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries, 2002.

An Act of the Federal Parliament of Australia of 1st May 1958, no. 62, relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

An Act of the Federal Parliament of Australia of 7th December 1992, no. 184, to reform the law relating to migration.

An Act of the Federal Parliament of Australia of 27th September 2001, no. 126, to validate the actions of the Commonwealth and others in relation to the MV Tampa and other vessels, and to provide increased powers to protect Australia's borders, and for related purposes.

An Act of the Federal Parliament of Australia of 27th September 2001, no. 127, to excise certain Australian territory from the migration zone under the Migration Act 1958 for purposes related to unauthorised arrivals, and for related purposes.

An Act of the Federal Parliament of Australia of 27th September 2001, no. 128, to make consequential provision for dealing with unauthorised arrivals in places excised from the migration zone under the Migration Act 1958 for purposes related to unauthorised arrivals, and for related purposes.

An Act of the Federal Parliament of Australia of 15th December 2014, no. 135, to amend the law relating to migration and maritime powers, and for related purposes.

An Act of the Parliament of Canada of 1st November 2001, S.C. 2001, c. 27, respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger.

An Act of the United States Congress enacted on 27th June 1952, no. 82-414, to revise the laws relating to immigration, naturalization, and nationality.

An Act of the United States Congress enacted on 3rd October 1965, no. 89-236, to amend the Immigration and Nationality Act.

An Act of the United States Congress enacted on 2nd November 1966, no. 89-732, to adjust the status of Cuban refugees to that of lawful permanent residents of the United States, and for other purposes.

An Act of the United States Congress enacted on 17th March 1980, no. 96-212, to amend the Immigration and Nationality Act to revise the procedures for the admission of refugees, to amend the Migration and Refugee Assistance Act of 1962 to establish a more uniform basis for the provision of assistance to refugees, and for other purposes.

An Act of the United States Congress enacted on 30th September 1996, no. 104-208, making omnibus consolidated appropriations for the fiscal year ending 30th September 1997, and for other purposes,.

An Act of the United States Congress enacted on 11th May 2005, no. 109-13, to establish and rapidly implement regulations for state driver's license and identification document security standards, to prevent terrorists from abusing the asylum laws of the United States, to unify terrorism-related grounds for inadmissibility and removal, and to ensure expeditious construction of the San Diego border fence.

Asian-African Legal Consultative Organization, Bangkok Principles On Status And Treatment Of Refugees, 2001.

Budget of the European Union for the year 2020, 2019.

Charter of Fundamental Rights of the European Union, 2000.

Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena Declaration on Refugees, 1984.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, 1990.

Convention for the Protection of the Human Rights and Fundamental Freedoms, 1950.

Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.

Convention on Human Rights, 1969.

Convention on the Status of Refugees, 1933.

Convention Relating to the Status of Refugees, 1951.

Council of the European Union, Resolution on Harmonized Approach to Questions Concerning Host Third Countries, 1992.

Decision (CFSP) 2020/472 of the Council of the European Union of 31st March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI).

Decision of the management board of Frontex on the budget of the agency for 2005, 2005.

Decreto-Legge of the Italian Government of 14th June 2019, no. 53, “disposizioni urgenti in materia di ordine e sicurezza pubblica”.

Discussion Paper of the Department of Home Affairs on Australia’s Humanitarian Program 2019–20, 2019.

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

Directive 2013/32/CE of the European Parliament and of the Council of 23rd June 2013 on common procedures for granting and withdrawing international protection.

Executive Order of the President of the United States of 29th September 1981, no. 12324, on the Interdiction of Illegal Aliens.

Executive Order of the President of the United States of 24th May 1992, no. 12807, on the Interdiction of Illegal Aliens.

Executive Order of the President of the United States of 25th January 2017 , no. 13768 Enhancing Public Safety in the Interior of the United States.

Executive Order of the President of the United States of 17th January 2017, no. 13780, Protecting the Nation from Foreign Terrorist Entry into the United States.

General Comment no. 20 of the United Nations Human Rights Committee of 10th March 1992 on the Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment).

International Convention on Maritime Search and Rescue, 1979.

Official Report of the Debate of the House of Commons of Canada of 31st January 2017.

Press Release of the Council of the European Union 144/16 of 18th March 2016 concerning the EU-Turkey statement.

Press release of the European Commission of 6 April 2016, Commission presents options for reforming the Common European Asylum System and developing safe and legal pathways to Europe.

Protocol no. 4 to the Convention for the Protection of the Human Rights and Fundamental Freedoms, 1963.

Protocol no. 6 to the Convention for the Protection of the Human Rights and Fundamental Freedoms, 1983.

Protocol no. 13 to the Convention for the Protection of the Human Rights and Fundamental Freedoms, 2002.

Protocol Relating to the Status of Refugees, 1967.

Recommendation no. 434 of the Parliamentary Assembly of the Council of Europe of 1st October 1965 granting of the right of asylum to European refugees.

Regulation of the Council of the European Union of 26th October 2004, no. 2007/2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

Regulation 656/2014 of the European Parliament and of the Council of 15th May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

Regulation 2016/399 of the European Parliament and of the Council of 9th March 2016 on a Union Code on the rules governing the movement of persons across borders.

Regulation 2016/1624 of the European Parliament and of the Council of 14th September 2016 on the European Border and Coast Guard and amending Regulation 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No. 863/2007 of the European Parliament and of the Council, Council Regulation 2007/2004 and Council Decision 2005/267/EC, 2016.

Regulation 2019/1896 of the European Parliament and of the Council of 13th November 2019 on the European Border and Coast Guard and repealing Regulations No.1052/2013 and 2016/1624, 2019.

Report of 13th August 2012 of the Expert Panel on Asylum Seekers.

Resolution 217 A(III) of the UN General Assembly of 10th December 1948, on the Universal Declaration of Human Rights.

Resolution 2200 A(XXI) of the United Nations General Assembly of 16th December 1966, on the International Covenant on Civil and Political Rights.

Resolution 2312 A(XXII) of the United Nations General Assembly of 14th December 1967, on the Declaration on Territorial Asylum, 1967.

Trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e la Grande Giamahiria Araba Libica Popolare Socialista, 2008.

Treaty on the Functioning of the European Union, 2007.

Treaty on European Union, 2007.

United Nations Convention on the Law of the Sea, 1982.

Vienna Convention on the Law of the Treaties, 1969.

Acknowledgements

I have first encountered the principle of *non-refoulement* in a summer afternoon in Trastevere, while attending the lectures of the UNICRI's Summer Course on Migration and Human Rights. I later was able to deepen my knowledge in this topic thanks to the suggestions of Prof. Alberto Cervone, to whom goes my gratitude.

This thesis would have never been possible if Prof. Roberto Virzo didn't accept to be my supervisor, and for this reason I am profoundly grateful. Thanks to Prof. Virzo I was able, against all the odds, to write my final research paper on the subject I loved the most during my Bachelor studies. Moreover, I would have been lost without the precious advices of Dott. Giorgio Briozzo, who has guided me during these months with extreme patience. I would also like to thank Prof. Christopher Hein for answering to all my questions, even when they were too many, and for allowing me to participate in his lectures.

This thesis is also the last effort of three years of learned lessons, both within and out Luiss. Because of the Covid-19 pandemic, I never had the opportunity to properly thank my mentors, Barbara, Gaetano and Manuele, and the amazing staff of the Political Section of the United States Embassy in Rome. They have patiently guided me towards a more mature and responsible version of myself, as have also done all the wonderful persons that I have met in Borgo Mezzanone. Thank you for showing me how the real world can be challenging, yet beautiful in some inexplicable ways.

I would have never survived these three incredible years without my beloved Nonna D. Thank you for your lasagna, your support and your infinite love, which I feel even from kilometres apart.

My greatest gratitude goes to my parents and the countless sacrifices they make to let me follow my crazy dreams. They have taught me kindness and have learned to let me go to find my own place in the world, and because of that I am the luckiest daughter in the whole world. I hope I will always make you proud, as much as you always make me happy. The same gratitude goes to my brother Paolo, with whom I have shared everything, from toys to music to pain. I know for sure that eventually you will become the strongest person and the most brilliant engineer.

Last but not least, I am grateful for the friends that never gave me up, even when it was hard and I wasn't at my best. Thank you for getting me up from the ground and for remaining by my side long enough to watch me fly again. You know who you are.

Riassunto dell'elaborato in lingua italiana

Il principio di *non-refoulement* è una norma del diritto internazionale che prevede che i rifugiati giunti al confine di uno Stato diverso dal loro Paese di origine non vengano respinti dal suddetto Stato, in quanto potenzialmente soggetti a tortura o altri trattamenti inumani. Il presente elaborato intende fornire un'analisi dell'evoluzione storica del principio negli strumenti giuridici internazionali e regionali, nonché della condotta di Unione Europea, Stati Uniti e Australia.

La domanda di ricerca centrale è se, alla luce degli avvenimenti illustrati nei capitoli secondo, terzo e quarto, nonché secondo l'analisi testuale dei trattati nel capitolo primo, il principio di *non-refoulement* può essere considerato come parte dello *ius cogens*, ovvero l'insieme delle norme dalle quali non è possibile derogare. Pochi dubbi sussistono ancora sul fatto che il principio di *non-refoulement* possa essere considerato invece una norma consuetudinaria secondo l'articolo 38 dello Statuto della Corte Internazionale di Giustizia, che descrive “una pratica generale accettata come diritto”. Allo stesso tempo viene analizzata la pratica diffusa di “safe third country”, ovvero di dichiarare tramite trattati o accordi di natura prevalentemente economica alcuni Paesi sicuri per i rifugiati. La maggiore criticità di questo genere di accordi è che la maggior parte delle volte vengono stretti con Paesi che non sono in grado di proteggere i rifugiati per via di una evidente mancanza della tutela dei diritti dei rifugiati stessi. È inoltre molto alto il rischio di un *chain refoulement*, ovvero di un ritorno forzato del rifugiato dal Paese di arrivo fino allo Stato di origine, passando per i Paesi terzi.

Dopo una breve introduzione sulla storia dell'evoluzione del principio, vengono analizzati la Convenzione di Ginevra relativa allo statuto del rifugiato del 1951 e il Protocollo del 1967, detto “Protocollo di New York”, che elimina la limitazione geografica e temporale della Convenzione. La Convenzione, nell'articolo 33, proibisce il respingimento dei rifugiati che temano per la propria incolumità sulla base della propria “razza, religione, nazionalità, appartenenza a un particolare gruppo sociale o ideologia politica”, eccetto nel caso in cui ci sono dubbi ragionevoli e fondati sul fatto che il rifugiato in questione costituisca un pericolo per l'ordine pubblico nel Paese di arrivo. Considerate le eccezioni all'applicazione piena del principio elencate nel comma F dell'articolo 1 della Convenzione e le clausole di esclusione del paragrafo 2 dell'articolo 33, difficilmente è possibile affermare che secondo il regime stabilito dalla Convenzione stessa il principio di *non-refoulement* appartiene allo *ius cogens*.

Successivamente viene analizzata la Dichiarazione delle Nazioni Unite sull'asilo territoriale, approvata nell'Assemblea Generale dell'ONU nel 1967 tramite la Risoluzione 2132 (XXIII), che prevede il principio di *non-refoulement* nell'articolo 3. La Dichiarazione presenta tre importanti caratteristiche per gli scopi della presente ricerca: *in primis*, abbraccia sia la situazione di respingimento al confine sia di espulsione del rifugiato già presente nel territorio dello Stato; secondariamente, prevede limitazioni sull'applicazione del principio in caso di “influssi di massa”; infine, pone le basi per le politiche di “safe

third country”. Prese in considerazione le limitazioni previste nel paragrafo 2 dell’articolo 3 della Dichiarazione appare evidente che nemmeno in questo caso il principio può essere considerato *ius cogens*.

Il terzo strumento giuridico analizzato è la Convenzione Internazionale dei Diritti Civili e Politici del 1966, uno degli strumenti giuridici che maggiormente protegge i diritti umani. La ICCPR, nell’articolo 7, prevede che nessun essere umano sia soggetto a torture o trattamenti inumani. Tradizionalmente il principio di *non-refoulement* è desunto dal testo di questo articolo, in quanto i rifugiati respinti sono potenzialmente esposti a tortura nel Paese di origine. In aggiunta a ciò, l’organismo responsabile per l’applicazione della ICCPR, la Commissione dei Diritti Umani, assicura da sempre l’applicazione del principio di *non-refoulement* tramite l’interpretazione dell’articolo 7. Per quanto concerne la natura del principio secondo la ICCPR, si deduce chiaramente dall’articolo 4 della Convenzione stessa che non sono ammesse deroghe all’articolo 7, dunque è possibile che in questo contesto il principio sia parte dello *ius cogens*.

Viene dunque analizzata la Convenzione contro la tortura e altre pene o trattamenti crudeli, inumani o degradanti, approvata dall’Assemblea Generale tramite la Risoluzione 39/46 del 10 dicembre 1984. La CAT prevede esplicitamente il divieto di *refoulement* nell’articolo 3. Una delle criticità maggiori di questo articolo è che, secondo un approccio testuale, è possibile desumere che solo le persecuzioni perpetrate dallo Stato di provenienza del rifugiato possano essere prese in considerazione, escludendo dunque tutti gli attori internazionali che non siano statali. Analogamente alla Commissione dei Diritti Umani, la Commissione Contro la Tortura assicura che non vengano commesse violazioni della Convenzione. Viene dunque accennato brevemente un recente caso della Commissione Contro la Tortura concernente il principio di *non-refoulement*, *Flor Agustina Calfunao Paillalef c Svizzera*. Rimane incerto se in questo caso il principio è parte dello *ius cogens* o meno.

Il principio di *non-refoulement* è previsto anche in alcuni strumenti giuridici regionali, dei quali viene fornita una accurata descrizione nella ricerca. Il primo tra questi è la Convenzione dell’Organizzazione dell’Unità Africana Concernente gli Aspetti Specifici dei Problemi dei Rifugiati in Africa, firmata ad Addis Abeba, Etiopia, nel settembre 1969. La Convenzione è vincolante per 45 dei 54 Stati dell’odierna Unione Africana, tra i quali la Libia, Paese non firmatario della Convenzione di Ginevra del 1951. L’articolo II della Convenzione prevede il divieto pressoché assoluto di *refoulement*. A cagione di ciò sarebbe possibile considerare il principio come *ius cogens* in questo contesto, pur tuttavia considerando la limitazione posta dall’articolo III, che non si riferisce tuttavia all’articolo II in senso stretto. È bene però considerare che alcuni studiosi hanno adottato un approccio critico verso quest’ultima asserzione, in luce delle limitazioni poste nell’articolo I(5), pressoché identiche a quelle contenute nella Convenzione di Ginevra del 1951. La Convenzione pone inoltre molta importanza sul principio di ripartizione degli oneri tra Stati per quanto concerne influssi ingenti di rifugiati e allarga la definizione di rifugiato al punto tale che potrebbe essere deducibile l’inclusione nella definizione dei cosiddetti “rifugiati ambientali” (dei quali viene fornita una

spiegazione più dettagliata alla fine del primo capitolo), una misura che potrebbe rivelarsi cruciale negli anni a venire.

Successivamente vengono presi in considerazione due strumenti giuridici che riguardano il continente americano, ovvero la Convenzione Americana dei Diritti Umani del 1969 e la Dichiarazione di Cartagena 1984. La prima prevede il divieto di *refoulement* nell'articolo 22, paragrafo 8, che pone una velata enfasi sulla persecuzione basata sull'ideologia politica. Nel 2018 la Corte Inter-Americana dei Diritti Umani, ente esecutivo della Convenzione, ha rilasciato una opinione dalla quale è possibile desumere che il principio di *non-refoulement* si applica in questo contesto anche a rifugiati perseguitati per il proprio orientamento sessuale. La Dichiarazione di Cartagena è invece il primo strumento giuridico, sebbene non-vincolante, che riconosce esplicitamente il principio di *non-refoulement* come parte dello *ius cogens*. Se da un lato l'applicazione del principio non viene ampiamente riconosciuta nell'intero continente americano, dall'altro lato la Dichiarazione di Cartagena ha avuto un impatto importante sulla legislazione interna di almeno sedici Stati dell'America Latina, come per esempio in Brasile nel dicembre 2019. Analogamente alla Convenzione degli Stati africani, è possibile desumere anche la protezione dei rifugiati ambientali.

Infine vengono presentati i Principi Asiatici-Americani sullo Status e Trattamento dei Rifugiati del 2001, comunemente conosciuti come "Principi di Bangkok". Mentre l'articolo III dei Principi di Bangkok prevede il divieto di *refoulement*, il testo dell'articolo I riconosce espressamente la persecuzione in base al genere, per la prima volta tra i trattati analizzati in questa ricerca. Essendo i Principi di Bangkok un "riassunto" delle norme degli strumenti giuridici precedenti, non è facilmente possibile dichiarare che il principio è parte dello *ius cogens*, in quanto sono poste limitazioni identiche a quelle della Convenzione di Ginevra del 1951.

Il primo capitolo si conclude con l'analisi di un recentissimo caso della Commissione dei Diritti Umani, *Teitiota c Nuova Zelanda*, concernente un cittadino dello Stato di Kiribati espulso dalla Nuova Zelanda, Paese dove aveva trovato rifugio dal cambiamento climatico che sta rendendo inabitabile la sua isola di origine. Sebbene la Commissione abbia trovato in questo caso la richiesta del signor Teitiota infondata, il testo della sentenza pone le basi del riconoscimento dei rifugiati ambientali. In futuro sarà possibile osservare come ciò si evolverà nel diritto internazionale. Per fornire un contesto al caso *Teitiota* viene spiegata la questione dei rifugiati ambientali.

Il secondo capitolo della ricerca si focalizza sull'applicazione del principio di *non-refoulement* nel contesto del Consiglio di Europa e dell'Unione Europea. Il capitolo ha inizio con l'analisi di un ultimo strumento giuridico regionale, la Convenzione Europea dei Diritti Umani ("CEDU"), firmata a Roma nel 1950. Considerata tra i maggiori garanti dei diritti umani al mondo, la CEDU non prevede nell'articolo 3 il divieto diretto di *refoulement*, ma piuttosto di tortura e trattamenti in umani e degradanti, analogamente alla ICCPR. Questa visione è stata da subito rafforzata dall'Assemblea Parlamentare del Consiglio di Europa e

dalla Corte Europea dei Diritti Umani, secondo la quale il principio di *non-refoulement* è inderogabile, dunque parte dello *ius cogens*.

Viene dunque analizzato il caso della Corte Europea dei Diritti Umani *Soering c Regno Unito* del 1989. Il caso vide coinvolto un giovane cittadino tedesco accusato di omicidio plurimo in Virginia, USA, il quale aveva trovato rifugio nel Regno Unito e del quale gli Stati Uniti richiedevano l'extradizione. In questo caso la Corte considerò che il trattamento che Soering avrebbe ricevuto se fosse stato riconsegnato agli USA avrebbe implicato la violazione da parte del Regno Unito dell'articolo 3 della CEDU. Soering riteneva infatti che il cosiddetto "death row phenomenon" ovvero la detenzione nel braccio della morte in prigione in un'attesa di lunghezza indeterminata dell'esecuzione della pena capitale avrebbe avuto effetti negativi sulla salute mentale del giovane, equivalenti a un trattamento inumano.

Il caso *Soering* pose le basi per la famosa sentenza della Corte Europea dei Diritti Umani nel caso *Hirsi Jamaa e altri c Italia* del 2011, centrale per gli scopi di questa ricerca. Il caso riguardò l'operazione della Guardia Costiera Italiana e della Guardia di Finanza di intercettazione di tre imbarcazioni di rifugiati, che avvenne nel maggio 2009 nella zona SAR maltese. Le circa 200 persone a bordo delle imbarcazioni vennero trasportate sulle imbarcazioni delle forze dell'ordine italiane e successivamente al porto di Tripoli, Libia, da dove erano partite. Tramite l'ufficio dell'UNHCR con sede a Tripoli, Hirsi Jamaa e altre ventitré persone intercettate, di nazionalità somala ed eritrea, si rivolsero alla Corte ritenendo che il governo italiano avesse violato l'articolo 3 della CEDU, nonché l'articolo 4 del Protocollo n°4 della CEDU, che vieta le espulsioni collettive. Per giungere alla sentenza finale a favore di Hirsi Jamaa e gli altri rifugiati, la Corte prese in considerazione: il Codice della navigazione italiano, che designa come parte del territorio nazionale le imbarcazioni battenti bandiera italiana; il trattato di amicizia, partenariato e cooperazione tra Italia e Libia stipulato nel 2008; gli obblighi internazionali italiani; il rapporto della Commissione per la prevenzione della tortura del Consiglio di Europa; i rapporti dell'UNHCR e della ONG Human Rights Watch; la mancata adesione della Libia alla Convenzione di Ginevra del 1951; i *travaux préparatoires* della CEDU; la giurisprudenza della Corte stessa, in particolare del caso *Bankovic* e del caso *Medvedyev*; e infine la mancanza di un'adeguata procedura di identificazione degli intercettati. Nella sua opinione concordante, il Giudice Pinto de Albuquerque definì il principio di *non-refoulement* "una norma dello *ius cogens*". In questa parte del capitolo viene inoltre fornita una breve spiegazione dell'evoluzione del rapporto italo - libico.

La seconda parte del capitolo si concentra dunque sull'Unione Europea e il divieto di *refoulement* attraverso l'analisi dei più rilevanti strumenti giuridici dell'Unione. *In primis*, viene presentata la Carta dei Diritti Fondamentali dell'Unione Europea del 2000, che a sua volta contiene il principio di *non-refoulement* nell'articolo 18, paragrafo 2. Inoltre viene brevemente presentata la politica comune europea in materia di asilo attraverso il Sistema Schengen (e il Regolamento 2016/399 e l'articolo 3, che prevede il divieto di *refoulement*), la Direttiva Qualifiche (Direttiva 2011/95, che prevede il principio di *non-refoulement*

nell'articolo 21), e la Direttiva Procedure d'Asilo (Direttiva 2013/32/CE, che prevede il principio nell'articolo 9).

Successivamente viene presentata l'Agenzia europea della guardia di frontiera e costiera ("Frontex"), assieme alle menzioni che vengono fatte del principio di *non-refoulement* nei regolamenti che hanno segnato l'istituzione e l'evoluzione dell'Agenzia stessa, specie il Regolamento 656/2014 e il Regolamento 2016/1624. Viene dunque fornita una breve analisi delle operazioni portate avanti da Frontex, ovvero le operazioni *Triton* e *Themis*. Sebbene non sia un'operazione di Frontex, l'operazione EUNAVFOR MED Sophia viene in seguito descritta come operazione di interesse per gli scopi della presente ricerca, per via delle operazioni di addestramento delle forze dell'ordine e di intercettazione nelle acque del Mediterraneo al fine di fermare il traffico migratorio illegale e la tratta di persone, e le controversie manifestatesi nel corso dell'operazione stessa.

Il secondo capitolo si conclude con l'analisi del *Memorandum of Understanding* stipulato tra l'UE e la Turchia nel 2016 sulla base della cosiddetta "London Resolution", al fine di limitare l'influsso di rifugiati siriani negli Stati Membri dell'UE. Il tentato colpo di stato che seguì di pochi mesi l'accordo, la sospensione della CEDU in Turchia e il mancato accesso di quest'ultima al Protocollo di New York sono solo alcuni dei punti che sollevano tutt'oggi la preoccupazione generale sulla legittimità dell'accordo in luce del principio di *non-refoulement*. Infine viene chiarito il concetto di "esternalizzazione del confine", che tornerà nei capitoli terzo e quarto.

Il terzo capitolo di questa ricerca analizza l'applicazione del principio di *non-refoulement* negli Stati Uniti di America. Sin dalla fine delle Guerre Mondiali gli Stati Uniti sono stati soggetti a larghi influssi di rifugiati, provenienti dapprima dall'Europa e dalla Cina e poi da altre regioni. L'Immigration and Nationality Act del 1952 e l'Amendment Act del 1980 prevedono una quota fissa di rifugiati accettati nel territorio nazionale, stabilita annualmente. Il numero, deciso dal Presidente degli USA, è cambiato costantemente negli anni, raggiungendo il minimo storico nell'anno 2020. Viene dunque brevemente illustrato l'impatto dell'attacco terroristico alle Torri Gemelle del 2001 sulle sistema giuridico statunitense in materia di asilo.

In seguito viene fornita una dettagliata descrizione del caso *Sale c Haitian Center Council*. Dapprima viene descritta la situazione politica nello Stato di Haiti negli anni 80 e 90 e del coinvolgimento degli USA, specie nelle figure dei Presidenti Donald Reagan, autore di un accordo con il Governo haitiano del dittatore Duvalier, e George Bush, che, tramite il Kennebunkport Order, diede avvio alle intercettazioni in mare internazionale delle imbarcazioni che trasportavano rifugiati haitiani. Fu in questo contesto di respingimenti in mare ed esternalizzazione del confine statunitense, e per via della detenzione dei rifugiati nella base navale di Guantanamo Bay, che la ONG Haitian Center Council intentò un processo contro il Governo americano. Il caso venne diviso in due parti, una riguardante la detenzione a Guantanamo Bay e l'altro la pratica di *refoulement* dei rifugiati haitiani. Mentre il primo caso venne effettivamente giudicato a favore dei

rifugiati, il secondo non ebbe lo stesso esito. La Corte Suprema basò la sua decisione sui seguenti quattro aspetti: *in primis*, secondo il testo originale dell'INA il principio di *non-refoulement* si applica esclusivamente nel territorio dello Stato; secondariamente, la Corte si riferì alle riserve della Svizzera e dei Paesi Bassi trovate nei *travaux préparatoires* della Convenzione di Ginevra del 1951 sull'applicazione extraterritoriale del principio in caso di influssi di massa di rifugiati, nonché sulla traduzione letterale del termine "*refouler*" dalla lingua francese a quella inglese; successivamente la Corte reiterò la decisione precedente *Bertrand c Sava*, nella quale asserì che le norme internazionali non hanno immediata applicazione nel sistema legale statunitense ma richiedono un Atto di implementazione del Congresso; infine la Corte ritenne che gli Executive Orders del Presidente non sono perseguibili nel contesto dell'INA, in quanto quest'ultimo si riferisce solo alla figura dell'Attorney General. La sentenza della Corte Suprema appare non solo in forte contrasto con il giudizio espresso dalla Corte Europea espresso quasi due decenni dopo, ma anche con i pareri dissenzienti del giudice della Corte Suprema Harry Blackmun e della Commissione Inter-Americana dei Diritti Umani nella decisione del 1997 *The Haitian Centre for Human Rights et al. c United States*. Infine viene fornito un breve riassunto delle posizioni delle Amministrazioni Clinton e Obama nei confronti del principio di *non-refoulement*, la prima in continuità con Reagan e Bush, nonostante la forte campagna elettorale in dissenso con le politiche di respingimento e detenzione dei rifugiati, e la seconda velatamente a favore dell'applicazione extraterritoriale del principio.

L'ultima parte del capitolo analizza il rapporto degli USA con Canada e Messico in luce degli accordi di "safe third country", previsti *inter alia* nell'INA stesso. Per quanto riguarda il Canada, i due stati nordamericani siglarono all'indomani dell'attacco alle Torri Gemelle un trattato che riconosce entrambi gli Stati come sicuri, dunque rende legittimo il respingimento dei rifugiati al confine tra i due Stati. Sebbene il trattato preveda il pieno rispetto del principio di *non-refoulement*, numerose critiche sono state sollevate nei casi *Canadian Council for Refugees, et al. c Her Majesty the Queen* e *John Doe et al. c Canada*, tanto da portare a un acceso dibattito politico sulla rinegoziazione del trattato stesso nel 2017 e nel 2019, soprattutto in luce delle controverse politiche dell'Amministrazione Trump.

Per quanto concerne il Messico, non esiste al momento alcun accordo simile a quello raggiunto con il Canada. Sebbene l'Amministrazione Trump abbia fortemente spinto verso la negoziazione di un accordo con lo Stato centramericano è improbabile che quest'ultimo venga mai raggiunto, sia dal punto di vista legale, considerati i rapporti dell'UNHCR e la precaria situazione finanziaria dei servizi di accoglienza dei rifugiati in Messico, sia dal punto di vista logistico. Inoltre, il Governo Messicano è messo definitivamente fine alle negoziazioni nel luglio 2019.

Il quarto e ultimo capitolo si focalizza sull'applicazione del principio di *non-refoulement* in Australia e nelle più ampie regioni del Pacifico e del Sud-Est Asiatico. Dopo una breve descrizione del sistema vigente prima delle due Guerre Mondiali, il capitolo presenta il Migration Act del 1958, che prevede il divieto di

refoulement nella Sezione 5, oltre ad introdurre l'obbligo di visto universale per i cittadini non australiani, una norma alquanto controversa. Successivamente viene introdotto il Migration Reform Act che impone la detenzione obbligatoria degli stranieri che arrivano in Australia fino al momento in cui non ne viene appurato lo status di rifugiato o ne viene ordinata l'espulsione. In aggiunta a ciò, l'Australia distingue tra rifugiati "on-shore", ovvero coloro giunti con un visto regolare, e "off-shore", ovvero coloro che vengono fatti reinsertire in Australia da Paesi terzi. L'Australia ha inoltre dato inizio nell'ultimo decennio a una campagna social piuttosto attiva contro gli sbarchi.

Viene dunque descritto il caso *Tampa*, avvenuto nella tarda estate del 2001. Il 26 agosto una nave cargo norvegese recuperò 433 rifugiati afgani alla deriva nella zona SAR indonesiana. Inizialmente diretta in Indonesia, la nave fece rotta verso l'Isola di Natale, territorio australiano, dopo che la situazione a bordo divenne ingestibile, raggiungendo le acque territoriali australiane il 29 agosto. Dunque le forze dell'ordine australiane bloccarono il porto dell'isola e presero il controllo della nave. Mentre i giudici della Corte Federale Australiana sembrarono inizialmente favorevoli allo sbarco dei rifugiati, gli eventi dell'attacco alle Torri Gemelle influirono indubbiamente sul ribaltamento della decisione della Corte.

L'incidente della *Tampa* diede avvio a una serie di riforme del Migration Act che portarono all'intercettazione sistematica delle imbarcazioni di rifugiati, alla rimozione dalla zona di migrazione australiana di un gran numero di isole e all'introduzione della nozione di "Paese dichiarato", equivalente a un "safe third country". Inoltre, ebbe inizio la cosiddetta "Pacific Solution", ovvero l'accordo con Nuova Zelanda e Nauru, e successivamente Nuova Papua Guinea, per il respingimento dei rifugiati verso questi Paesi. La ricerca prosegue dunque con la descrizione delle varie posizioni dei Governi australiani di Kevin Rudd e Julia Gillard, che rispettivamente sospesero e riattivarono la Pacific Solution, e del Governo Liberale di Tony Abbott, che promosse la politica di "tolleranza zero" nei confronti degli sbarchi.

Per quanto concerne il rapporto con Paesi terzi, vengono analizzati gli accordi con Papua Nuova Guinea, Malesia e Indonesia. In Papua Nuova Guinea è esistito un centro di detenzione per i rifugiati che arrivavano in Australia sull'Isola di Manus fino al 2017, quando la Corte Suprema papuana ha dichiarato che il centro è illegittimo. Da allora si stima che quasi 700 rifugiati sono stati trasferiti in altri centri nel Paese e che circa 250 da Nauru e Papua Nuova Guinea siano stati ricollocati negli USA sulla base di un accordo tra questi ultimi e l'Australia risalente agli ultimi mesi dell'Amministrazione Obama.

Riguardo la Malesia, l'accordo di "safe third country" raggiunto nel 2011 venne immediatamente contestato di fronte alla Corte Suprema Australiana, la quale decise che il patto violava il Migration Act, dal momento che la Malesia non è parte della Convenzione di Ginevra del 1951 e che, stando ai rapporti di numerose ONG, viola sistematicamente i diritti dei rifugiati.

Infine, per quanto riguarda l'Indonesia, quest'ultima non è parte della Convenzione di Ginevra del 1951, ragione per cui è stata spesso comparata a Libia e Turchia. Ciò tuttavia non ha limitato l'Australia

stipulare con l'Indonesia vari accordi per la gestione dei flussi migratori tra i due Paesi, che tra l'altro co-gestiscono il cosiddetto "Bali Process".

La ricerca ha prodotto molteplici osservazioni sul principio di *non-refoulement*, sulla sua natura e sul comportamento di alcuni Stati della comunità internazionale. *In primis*, è impossibile asserire che il principio è parte dello *ius cogens*, considerate le riserve nei trattati e il comportamento degli Stati analizzati, specie nei casi *Sale* e *Tampa*. Inoltre, continuano a sussistere dubbi sull'efficacia reale e sulla legalità degli accordi di "safe third countries" in tutti i casi analizzati, sebbene esistano delle differenze tra gli accordi stessi. Infine, è possibile asserire che gli strumenti giuridici analizzati non raggiungono un giusto numero di Stati per via del limitato tasso di adesione alla Convenzione di Ginevra del 1951 e del fatto che gli strumenti giuridici regionali sembrano meglio tutelare i diritti dei rifugiati.

Sebbene una riforma della Convenzione di Ginevra sembrerebbe un giusto passo verso la maggiore tutela del principio di *non-refoulement*, il periodo storico che ci troviamo a vivere, caratterizzato dalla chiusura figurativa ed effettiva dei confini statali, non permette di ragionare in questa direzione. Viene riportato brevemente l'incidente della *Sea Watch 3* del giugno 2019 e la decisione della Corte di Cassazione Italiana, la quale ha dichiarato nel Febbraio 2020 che una nave in mare non è un luogo adeguato per presentare una domanda di protezione internazionale. Da questa decisione è possibile dedurre che, secondo la Corte di Cassazione, è compito del soccorritore portare i potenziali rifugiati sul territorio nazionale.

È infine possibile concludere che solamente quando il principio di *non-refoulement* verrà percepito come legittimo dagli Stati, allora sarà pienamente rispettato.