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The right of asylum and the discipline in force for the Italian and Slovenian state: the case of "informal readmissions" along the Balkan Route.

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Table of contents

Abstract ***3***

Introduction ***4***

1. The Right to Asylum ***6***

1.1. European asylum law: the 1951 Geneva Convention relating to the Status of Refugees *10*

1.2. European asylum law *16*

1.3. Italian asylum legislation *32*

1.4. Slovenian asylum legislation. *46*

2. The Balkan Route ***54***

2.1. The right of asylum and the practice of rejection at the border *60*

2.2. The Schengen Borders Code and border control policies *60*

2.3. The removal and return of persons considered "irregular". *63*

2.4. The practice of rejections in the Italian legal system: the so-called "informal readmissions" .. *66*

2.5. The practice of rejections in the Slovene legal system: the so-called "informal readmissions". *68*

2.6. The Case of Mr. M.Z. vs. the Italian Ministry of the Interior of 2020 ..... *70*

2.7. The position of the Italian Ministry of the Interior *71*

2.8. The Order of the Court of Rome of 18 January 2021 ..... *72*

2.9. The Case A. M. v. Republic of Slovenia of 2020 ..... *75*

2.10. The position of the Government of the Republic of Slovenia *76*

2.11. The judgment of the Slovenian Supreme Court of 2021 ..... *77*

2.12. Concluding remarks *81*

3. The situation after the issuing of the two judgements ***84***

3.1. The situation today *84*

3.2. The new European pact on migration and asylum brief historical evolution. *85*

3.3. The new European pact on migration and asylum 2020 ..... *88*

Conclusion ***97***

Methodology ***100***

Annex 1- List of interviewees ***101***

Annex 2 – Interview's guide ***102***

Bibliography ***103***

Sitography ***106***

Summary ***107***

Abstract

The right to asylum dates back to ancient times; as early as ancient Greece, the inviolable right of a person to benefit from protection from violence in a given place was recognized. Over the years, this right has undergone various transformations, from being a prerogative of the Church, to being part of the powers of the State. Following the development of international law and human rights, the institution of asylum has also been transformed. It has been recognized as a perfect subjective right of the individual, i.e. a request for protection that the individual makes to a State and, more generally, to the international community. This is the starting point for the discussion, which aims to provide an overview of the right to asylum as regulated at international and European level, and then to focus on its provision within the national systems of two countries: Italy and Slovenia. Through the examination of two decisions issued in 2021, respectively by the Tribunal of Rome and the Slovenian Supreme Court, an attempt will be made to highlight the criticalities related to compliance with asylum obligations, in light of national, EU and international law, during the implementation of informal relocation practices. A brief analysis of the proposed new European Migration Pact will then be provided, in such a way as to present a comprehensive overview of asylum legislation, giving an idea of what might be the future developments in this area.

Introduction

The right to asylum is an ancient right, defined by the Universal Declaration of Human Rights as the last useful instrument to which people can appeal in order to be rehabilitated as legal subjects, through the guarantee of respect for those rights that have been violated in the foreigner's country of origin. The institution under consideration here is now part of the international, European and national legislation, in fact, as will be seen in this discussion *"the legislation that constitutes the so-called Common European Asylum System, is now a specification of international guarantees in favor of individuals subject to persecution; now the result of autonomous political choices [...] subject to the minimum constraint of the fundamental rights of the Charter [...]"*[1], however, some criticalities emerged in its implementation, related to the compliance with substantive and procedural obligations related to it, in the light of national, EU and international law, by the Member states, during the implementation of informal transfer practices.
These practices are called "informal readmissions" and are regulated by bilateral readmission agreements concluded between Member states.

This analysis will compare two countries, Italy and Slovenia, both affected by the migratory flows of the so-called Balkan route. Both countries are considered to be transit countries rather than arrival countries, and both are access points to the European Union for people travelling to the Balkans. Finally, both countries adopted the practices described above, but above all both were the subject of two important decisions, one issued by the Court of Rome and the other by the Slovenian Supreme Court, related to the informal transfer of people. The two decisions under examination both highlight the critical aspects in relation to the guarantees provided by the right to asylum, in the transfer of the persons concerned, through informal means, if they were adopted outside European, international and national legislation, and through the jurisprudence of the Court of Justice of the EU and the European Court of Human Rights, they recall the procedural and substantive guarantees related to the institution of asylum, which is also the aim of this work.

In order to do so, I have chosen to structure this paper by examining in a first chapter, the notion of the right to asylum, briefly going through the stages of its evolution, which from ancient Greece, has led it to be recognized today as a perfect subjective right, conferred on the individual as a holder of legal subjectivity. I will then go on to examine the international instruments that have contributed to the development of this institution, namely the Universal Declaration of Human Rights and the Geneva Convention on the Status of Refugees of 1951. Subsequently, an attempt will be made to provide an overview of what has been the

[1] S. Amadeo and F. Spitaleri, *Le garanzie fondamentali dell'immigrato in Europa*, Torino, Giappichelli Editore, 2015, pp. 362-363.

evolution of the institution of asylum in the European, Italian and Slovenian contexts, in order to provide the basis for understanding possible constraints or possible future developments, of such right.

In the second chapter I will focus more on the Balkan area, and in particular on the Balkan route, a territory made up of different countries, where people on the move enter and leave the European Union, until they reach Italy or Austria, and then continue to the countries chosen as their destination. Through the analysis of the European legislation on border controls, I will focus on the practice of rejections, in particular of the so-called "informal readmissions" in the Italian and Slovenian contexts, and then I will examine the two decisions of the Court of Rome and of the Slovenian Supreme Court, mentioned before, in which interesting profiles emerge, related to the criticality of compliance with substantive and procedural obligations related to the implementation of the right to asylum.

To conclude, it has been decided to offer a brief analysis of how the situation regarding the right to asylum has evolved since the issuance of the two decisions mentioned above. This examination was possible by taking into consideration a subsequent decision issued by the Tribunal of Rome following the appeal of the Ministry of the Interior, but also considering the Ombudsman's action after the decision of the Slovenian Supreme Court, and finally, to the work carried out by the association Linea d'Ombra and the Consorzio Italiano di Solidarietà (ICS). Finally, in order to provide an overall view, it seemed appropriate to offer an outline of the potential future evolution of the right to asylum, through the examination of the proposed New European Pact on Migration and Asylum. The latter, as will be seen, although it introduces some innovations, also remains in partial continuity with the past, such as, for example, the system for determining the Member State responsible for examining asylum applications, for which the Dublin III Regulation has been reconfirmed.

1. The Right to Asylum

The legal institution of asylum has its roots in ancient Greece; in fact, its etymology derives from the Greek *ásylon*, meaning "inviolable". The term is composed of "*a"* privative and "*sŷlon"*, i.e., "violence", the combination of which indicates a form of general immunity, attributable to a place or a person.[2] The inviolability attached to this term determines a kind of immunity from coercive power, for both the place of asylum and the individual who finds refuge in there.

"Asylum is a form of protection, benefiting individuals or groups of individuals, offered by a political and/or religious authority in a place considered, for specific reasons, to be inviolable"[3]. Thus, beyond its many forms[4], the content of the right to asylum has always been to grant or[5] benefit[6] from a form of protection. This institution, therefore, historically affirms itself as a form of protection, guaranteed to all those who were no longer protected by the legal authority to which they were subject, or to individuals who were formally protected but substantially lacking in guarantees to defend their life, physical integrity and freedom, due to potential or suffered violence.

Initially characterized by *ratio loci*, in ancient Greece and later with the advent of Christianity, the protection guaranteed by the institution of asylum was attributable to places considered sacred, and therefore outside the ordinary control exercised by the community. The holiness of the place depended on respect for the authority that exercised control over that piece of territory. Christian asylum, generally represented by sacred places, such as sanctuaries or churches, began to be overcome with the rise of nation-states and the consequent loss of power by the Church. Between the 16th and 17th centuries, the process of emancipation of monarchies from the Empire and the Church began to take place on the European continent, culminating in the definition, in the

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[2] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso*, Torino, Giappichelli Editore, 2012.

[3] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso*, *cit.*

[4] F. Cherubini, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, Bari, Cacucci Editore, 2012, pp. XVI-XVIII. "Territorial asylum"; "Extraterritorial asylum"; "Diplomatic asylum"; "Religious asylum"; concerning socialist countries, their ideological connotation formulated asylum as protection of workers, as highlighted by the Soviet Constitution of 1936, in article 129: *"[t]he USSR affords the right of asylum to foreign citizens persecuted for defending the interests of the working people, or for their scientific activities, or for their struggle for national liberation".*

[5] F. Cherubini, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, *cit. "If granted, the institution of the right of asylum falls within the sphere of active legal situations, i.e. those in which the acting subject is endowed with a certain type of authority. Some examples may be the gods, the Church or the State".*

[6] In this case, however, we are referring to a passive legal situation, which consists in obtaining the right not to be subjected to any form of violence, a right granted to the individual directly from the place where he or she is located or through recognition by institutions.

first half of the 17th century, of a first form of international community made up of independent states. States asserted their supremacy over the territory they effectively controlled, which also implied a progressive removal of competing powers[7], including the Empire and the Church, claiming absolute prerogative, which included asylum. In the 13th century, the need began to emerge to place greater limits on the categories of people who could benefit from the protection provided by asylum, which was fundamental both for secular power, which would inevitably increase, and for ecclesiastical power, which was no longer able to sustain the scale of the phenomenon. From this moment on, the exceptions to the recognition of this right began to increase, to the point of *"emptying out the rule and [the] principle of canon law, according to which no one is to be excluded from asylum"*[8], and to replace it with *"the opposite principle of asylum granted only in specific cases"*[9]. Starting with France in the 17th century, the right of asylum became an established practice as a prerogative of the secular judge, followed by the other states on the European continent. The State was assigned the task of assessing the existence of the requirements for which a foreigner can be granted protection within the territory under the jurisdiction of that State. Clearly, the place of asylum also changes, which, with the advent of nation states, *"coincides with the territory subject to the exclusive jurisdiction of the State, delimited by its borders, whose inviolability follows from territorial sovereignty, recognized and respected by the other sovereign entities that make up the international community"*. [10] The end of Christian asylum also meant that those who were persecuted could not escape secular jurisdiction through the protection granted by the Church. Thus, a type of asylum, defined as "external", or international, was established, according to which those in need of protection could only look for it outside the borders of their own state, in territories under the jurisdiction of another state. The latter gives itself the power to grant protection to the foreigner, who do not have the right to enter or remain[11] in the territory of a State other than his own; instead, are the States that, depending on their own needs, mainly related to political reasons, may decide to grant a right of protection to foreigners. Asylum thus becomes *"a sign of the existence of the State, of its exclusive power within its territory and of its independence from other sovereign entities"*[12]. Over the years, specifically with the consolidation of human rights and international law, there has also been an evolution of the institution of asylum. The first ones are set as limits to state sovereignty, recognizing an individual[13] right of people to move to seek protection

[7] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso*, *cit.*, p. 15. *"Asylum [defines] a sphere of power, exclusive to ecclesiastical institutions, through which the church claims its own jurisdictional autonomy in competition with the justice administered by secular powers".*

[8] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso*, *cit.*, p. 16.

[9] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso*, *cit.*, p. 16.

[10] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso*, *cit.*, p. 5.

[11] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso*, *cit.*, p. 16. It stated that this happens when the host State intends to put an end to such a stay.

[12] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso*, *cit.*, p. 18.

[13] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso*, *cit.*, p. 185. It stated that with the end of the Second World War, a process of codification of the right of asylum began to take shape at a global level, both at the internal

elsewhere. The right of asylum, as opposed to state prerogatives in matters of immigration, limits the state's power to deny foreigners access to its territory; the individual has the right to obtain protection. As a subjective right, asylum *"is a claim that the individual makes on the international community in general and, specifically, on the State to which he applies for international protection"*[14]; therefore, if this claim is supported by specific guarantee instruments, then one cannot but consider the individual as such holder of legal subjectivity, conferred directly on him by the international community. According to authoritative doctrine[15], the ever more evident affirmation of human rights with annexed forms of protection and control, has contributed to include the right to emigrate or expatriate among the rights eligible of protection in the international sphere. The most important instrument is the Universal Declaration of Human[16] Rights, in which asylum protects the individual as a foreigner, i.e., a person who is outside his or her State of origin and seeks protection in another State whose legal system is foreign to him or her. On the basis of Article 13(2) and Article 14(1), which state that: "*everyone has the right to leave any country, including his own [...]"; "everyone has the right to seek and to enjoy, in other countries, asylum from persecution"*, the Universal Declaration outlines a right of asylum that is closely intertwined with the protection of human rights, making it the last useful instrument to which individuals can appeal in order to be rehabilitated as a legal subject. Indeed, the right to asylum acts as a guarantee of protection that ensures a foreigner, whose rights have been violated in his or her State of origin, to enjoy once again those rights[17] in the territory of another State. It should be pointed out that at the

level of individual States; and at an international level, on the basis of the Universal Declaration of Human Rights. At a time when the international order was evolving towards greater recognition of the fundamental rights and freedoms of human beings, divergences began to emerge in the doctrine on the right to asylum. In fact, asylum went from being part of the interests of the State to being part of the rights of the individual, thus dividing the doctrine on the status recognized to the individual at the international law level, i.e. an order that traditionally recognizes among its subjects the States and not individuals, since the former are considered by the traditional doctrine to be the direct addressees of international norms, while the latter are the object of international law. However, recently a majority part of the doctrine has moved in the direction of recognizing the legal subjectivity of individuals, mainly for two reasons: the first is represented by the fact that *"from the birth of the United Nations onwards, the number of multilateral conventions having as their object the protection of individuals at the international level has multiplied, so that the proliferation of instruments of protection for the benefit of human beings as such"* can no longer be ignored by the conservative doctrine; and secondly, the principle of personal responsibility in criminal matters has progressively been affirmed, which entails the recognition of the individual as a passive and active subject of international law. That is to say, respectively, responsible and liable for any violations of established prohibitions but also entitled (if one's rights have been infringed) to exercise a power of action at the international level (e.g. the guarantees provided by the ECHR).

[14] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso*, *cit.*, p.216.

[15] M. A. Calamita, M. Di Filippo, S. Marinai, F. Casolari, and M. Gestri, *Lineamenti di diritto internazionale ed europeo delle migrazioni*, Milano, CEDAM, 2021.

[16] It was established in 1948 by a resolution of the General Assembly of the United Nations (UN), this is the reason why it has a non-binding character.

[17] Generally, the human rights referred to are those in the sphere of individual freedoms. The right to life, liberty and security, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right not to be subjected to

international level there is no effective legal formalization of the right to asylum: in the Geneva Convention of 1951, the right to asylum is never mentioned. On the contrary, at regional level, towards the end of the 1960s and the beginning of the 1970s, a flourishing process of codification of the right to asylum, understood, as already specified, as an individual's right, began to develop. Some examples are the American Convention on Human Rights of 1969, the Convention of the Organization for African Unity (African Union), the Islamic Universal Declaration of Human Rights, the Arab Charter of Human Rights, while at the European level it is worth mentioning the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union.

Although neither the 1951 Geneva Convention nor any other international instrument contains rules conferring the right of asylum on individuals[18], according to the majority doctrine the prohibition of "*non-refoulement"* is able to compensate for this deficiency, imposing itself as a partial justification of the subjective right of asylum at international level, since it is the main precondition for the institution of asylum to be applied. In fact, the principle of *"non-refoulement"*, provided for in Article 33 of the 1951 Geneva Convention, states: *"no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories 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".*

This principle extends the scope of the legal situation protected by the prohibition of *refoulement*, since it applies not only to the individual who has already been granted refugee status but to all individuals who, if returned to their State of origin or to other States, might fear for their life and liberty, regardless of whether they are within the territorial boundaries of the receiving State or at its borders[19]. The criterion determining a state's obligations to respect a person's human rights is that of "effective authority"[20], in other words, the individual must fall under the jurisdiction of a state.

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arbitrary arrest, detention or exile, freedom of assembly and association, freedom of thought, conscience and religion and freedom of opinion and expression.

[18] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso, cit.*, p.236.

[19] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso, cit.*, pp. 243-245.

[20] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso, cit.*, pp.245-251. It is argued for an extraterritorial application of the prohibition of *refoulement*, based on the interpretation of the United Nations High Commissioner for Refugees (UNHCR), later confirmed also by the European Court of Human Rights. In Hirsi Jamaa and Others v. Italy, the European Court of Human Rights (ECtHR) upheld the appeal of 24 persons rejected to Libya by Italy. Among the various violations of rights attributed to Italy, the Court also recognized the violation of Article 3 of the ECHR (*"No one shall be subjected to torture or to inhuman or degrading treatment or punishment"*), thus declaring Italy extraterritorial responsibility. From the analysis of the judgment, it emerges that, according to Art. 1 of the ECHR (*"The High Contracting Parties shall recognize the rights and freedoms set forth in Title I of this Convention for everyone subject to their jurisdiction"*), the migrants intercepted at sea were *de jure* and *de facto* under the control, and therefore under the jurisdiction, of the Italian authorities. For this reason, their transfer to Libya, according to Art.3 of the ECHR, was also in violation of Art.33 of the 1951 Geneva Convention. The ECtHR upheld the extraterritoriality of the principle of *non-refoulement* through the application of the ECHR.

Even though the right of *"non-refoulement" has* now acquired the status of a customary norm of general international law[21], and therefore places constraints on the State power in order to protect the rights of persons who emigrate to seek protection in another territory, it should also be stressed that it does not replace[22] the migration policies of the various States. At the same time, however, it must be acknowledged that the prohibition of *refoulement* considerably circumscribes the discretion of States, not by giving the State an obligation to grant asylum but rather by giving the applicant the right to benefit from asylum, so that he can live free from persecution and threats to his life and freedom.

1.1.European asylum law: the 1951 Geneva Convention relating to the Status of Refugees

In the early years after the Second World War, large-scale migratory movements of millions of displaced persons and refugees began to take place throughout Europe, who were forced to flee their countries for political reasons or because of the territorial changes brought about by the Peace[23] Treaties. These geopolitical events, but especially their consequences on the legal and social level, led to the progressive introduction of instruments aimed at protecting the fundamental rights of those who, forced to flee, sought asylum in other European territories. In 1951, the international conference was convened, which later, on 28 July of the same

[21] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso, cit.,* p.251. It is argued that there are two requirements that must be met by a provision of a conventional source in order to deserve the special status of a customary norm of international law, and they were established by the International Court of Justice in 1969 in a well-known judgment. The first element implies that international participation in the convention to which the provision is a party must be "extensive and representative", and in this regard *"from 1951 onwards, the principle of non-refoulement has become part of international and regional treaty instruments and in formally non-binding normative documents of undisputed symbolic and programmatic value"*, to which must be added the States that are directly bound by the Convention of 51' and the Additional Protocol of 67'. As regards the second element, the Court argues that it is necessary to find the existence of a *"general opinio juris, testifying the international recognition of the binding nature of the rule expressed in the provision"*. A first example in this sense is represented by the UN General Assembly, which, on the occasion of the fiftieth anniversary of the 51' Convention, issued a unanimous resolution stressing the importance of full respect for the principle of *non-refoulement*; a second example is represented by the fact that *"since the 1980s there have been numerous declarations [by] the Executive Committee of the UNHCR, [which] has qualified the prohibition of refoulement as a basic principle of international law [...]"*. This last example is particularly significant of a *"general opinion about the principle, since it is represented [in the Committee] also by those States which, among those particularly affected in their interests by the burdens arising from the reception of refugees, are not party either to the Convention or to the Protocol of 67"*; a final example in support of the thesis of the principle of *non-refoulement* as a rule of customary law is the fact that it is part of the national legislation of most States in the world.

[22] M. A. Calamita, M. Di Filippo, S. Marinai, F. Casolari, and M. Gestri, *Lineamenti di diritto internazionale ed europeo delle migrazioni, cit*. It is argued that the precepts of customary origin that have been consolidated in the course of time, act as external conditions to the choices of States, setting them (general) limits that must not be exceeded when the competent authorities elaborate the political and juridical choices concerning the management of the various phenomena of movement of people. Once these "limits" are respected, States are left with a wide discretion in shaping their migration policy.

[23] M. Giovannetti, and N. Zorzella, *IUS MIGRANDI. Trent'anni di politiche e legislazione sull'immigrazione in Italia*, Milano, Franco Angeli, 2020, pp. 751-759.

year, led to the ratification of the Geneva Convention relating to the Status of Refugees. The Convention is the main instrument and also the first document to address the refugee issue at the international level, determining the conditions necessary for granting refugee status and the rights and duties connected to it.
Moreover, although it was inadequate to regulate phenomena other than persecution, and sometimes even larger, in Europe, it played a key role in enabling the development of a European asylum policy, which will be discussed below.
The 1951 Geneva Convention can be divided as follows: definition of a refugee (Art.1(A)(2)); provisions governing the treatment of recognized refugees (Art.2-30 and Art.34); and finally, rules for determining the admission and removal of asylum seekers and refugees (Art.31-33).
Article 1(A) defines a refugee as a person who: *"owing to 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, unwilling to such fear, is unwilling to return to it"*. Based on this definition and the statement by UNHCR[24], the recognition of refugee status is not constitutive but merely declaratory[25], in fact, an individual is recognized as a refugee if he fulfils all the conditions laid down in Article 1(A) of the Refugee Convention.
Precisely because of its nature[26], this Convention had, at least in the first years after its entry into force, two limitations, one temporal and one geographical, which consequently did not allow it to be conceived as a universally valid protection instrument. The temporal constraint implied that, the events that led a person to claim refugee status had to have occurred before 1 January 1951. Regarding, to the geographical constraint, on the other hand, under Article 1B (1), the Convention specifies that its application by the Contracting States may be limited to persons originating from Europe, or alternatively the State has the option of subscribing to the clause to cover events that occurred elsewhere[27]. With the adoption of the 1967 Additional Protocol, in

[24] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992. Paragraph 28 states: *"[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognised because he is a refugee"*.

[25] This interpretation, in addition to what has been specified in the previous paragraph in relation to the principle of *non-refoulement*, places on states several obligations of both a procedural and substantive nature, aimed at protecting the refugee even before he or she is recognized as such.

[26] The Geneva Convention originated as a result of a series of international agreements concluded ad hoc to deal with the particularly serious wars that characterized the European continent in the 20th century, and which also led to the need to establish ad hoc rules for the protection of refugees caused by the various conflicts.

[27] The Convention was intended as an instrument of legal protection and international protection for persons who had been involved in the events of war that took place between the Second World War and the beginning of the "Cold War", exclusively on the European continent.

New York, the temporal reservation was eliminated, thus committing the contracting States to all those events that lead individuals or groups of people to seek for international[28] protection. The Protocol, as a new autonomous agreement for states that had not previously acceded to the Refugee Convention, does not provide for any geographical restriction. However, for all those who had already ratified the Convention, the geographical reservation was maintained, and will only be removed in the late 1980s.

Before going on to analyze the European legislation that has sought to extend and better define the provisions[29] of the 1951 Geneva Convention, it is worth briefly reviewing the institution of *non-refoulement* in order to outline its main features.

The prohibition of *refoulement,* as already pointed out above, introduced certain conditions to the discretion of States in the choices made regarding the admission and removal of foreigners from their territory. In fact, by upholding the impossibility for each Contracting State to expel or return, in any way, a refugee to the borders of territories where his life or freedom could be threatened, this principle places on the receiving States the obligation to allow the foreigner to remain temporarily on their territory, in such a way as to ascertain his status (*"fair procedure"*).

This procedure must be carried out in compliance with the standard imposed by the *"due process of law"*, through which the State must ensure that it has obtained all the information necessary to comply with the prohibition of *refoulement*. As pointed out by the doctrine, the guarantee of access to a *"fair procedure"* also implies a right of the individual to enter and remain in the territory of the receiving State as long as necessary for the completion of the procedure and in compliance with the necessary jurisdictional[30] guarantees.

The guarantee of *"non-refoulement"*, as mentioned above, has been widely recognized in international law. However, it should be noted that its effects have extended well beyond the scope of the 1951 Geneva Convention, qualifying it as a guarantee for the respect of the inviolable human rights of all individuals, and not only of those who can be identified in the definition of refugee or asylum seeker. This process has taken place in three different stages. First, through the introduction of specific "*non-refoulement"* provisions in various human[31] rights instruments. Secondly, the broad interpretation by international bodies of the obligation for States not to subject any individual to torture or inhuman and degrading treatment, has consequently led to a prohibition of deportation of individuals towards a country where they could be exposed to a serious risk of suffering such treatment, either because of "active" behavior on the part of State bodies or in the event of tolerance or inability to react to violations committed by private individuals.

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[28] N. Petrović, *Rifugiati, profughi, sfollati – Breve storia del diritto d'asilo in Italia*, Milano, Franco Angeli, 2016, p.26.

[29] Following with the examination of the Qualification Directive 2011/95/EU, the provisions of the Refugees Convention and its essential features will be duly explained in the light of developments in the European legislation.

[30] F. Cherubini, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, *cit.*, pp. 63-64. "In case of an unfavorable decision, the State must provide the applicant with effective remedies".

[31] Parahraph 1 Chapter 1.

Lastly, the principle of *"non-refoulement" has* a different legal basis from the Geneva Convention, it does not contain, among its application, as prerequisites, the demonstration of the existence of grounds for individual persecution or discrimination. The consequence of this, is that all the States which have acceded to these provisions are obliged to guarantee the protection provided by the prohibition of *refoulement* to a much wider circle of individuals than that expressly protected by the Geneva Convention of 1951.
Paragraph 2 of Article 33 of the Convention establishes certain exceptions to access to the protection guaranteed by the prohibition of *refoulement*, which may be invoked if the person is considered to be a danger to the security of the country; or constitutes a threat to the community, because of a final conviction for a serious crime or offence. However, the applicability of these exceptions has diminished over time, mainly because, as mentioned above, the provisions of the Geneva Convention must also be accompanied by those provisions, stemming from human rights treaties, which directly or indirectly provide protection from *refoulement*, stating that even in situations of national emergency or maintenance of public order, *"whoever the foreigner is and whatever his previous conduct, it is not permissible to balance the risk of exposing him to serious violations of human rights with the need to protect state interests"*. [32]

In conclusion, it is useful to underline how the various international human rights monitoring bodies have included in the prohibition of *refoulement* also the so-called indirect or chain refoulement. Indirect or chain refoulement takes the form of a situation in which the receiving State sends a person to an intermediate State where there is no immediate risk of persecution or potentially serious human rights violations, although there is sufficient evidence to conclude that the individual in question may be further sent from the intermediate State to a third State where the aforementioned risk is highly likely to materialize. In these circumstances, in order for the receiving State to comply with the prohibition of *refoulement,* it is required to act in accordance with the standards of *"due diligence"* and thus, before taking a decision to return the person to an intermediate State, to take into account certain factors which characterize that State, such as, for example, the lack of ratification of the Geneva Convention of 1951 or other instruments for the protection of human rights, the absence of provisions in the internal legislation for the protection of human rights but, above all, the implementation of consolidated and systematic practices of violations, and referrals to third States known for their policies and/or actions harmful to the rights of individuals. This is sufficient reason to establish a prohibition of *refoulement* or expulsion by the receiving State.

Before proceeding to the examination of the evolution of the birth and evolution of the Common European Asylum System, and of the acts that compose it, and that represent the exercise of the EU competences in the field of asylum, it is necessary to offer a brief overview of the relationship between the European Union law on human rights, and the Geneva Convention of 51' and the European Convention on Human Rights. First of

[32] M. A. Calamita, M. Di Filippo, S. Marinai, F. Casolari, and M. Gestri, *Lineamenti di diritto internazionale ed europeo delle migrazioni, cit.*

all, it should be specified that the Geneva Convention of 51' is not part of the European Union as such, but all its member states are part of it, thus the shared nature of the competence in asylum matters[33]. Accordingly, the Court of Justice has derived the obligation to interpret and apply the European Union's rules on asylum in accordance with the Geneva Convention, which acts as a parameter of validity for acts of secondary law adopted by the European institutions. Indeed, according to the numerous references in European law to the 51' Convention, such as Article 78 TFEU, which states that, *"the common asylum policy shall be in accordance with the Geneva Convention of 51' and the Protocol of 67'"*, and consequently the institutions are bound to respect them when approving secondary acts. As regards the relationship between the ECHR and the Union Treaties on fundamental rights, the ECHR was adopted in 1950 by the countries that are members of the Council of Europe, it takes its inspiration from the Universal Declaration of Human Rights and is a binding instrument for the States Parties in defence of the fundamental rights of the individual, mostly civil and political rights contained therein.

In other words, in the European continent, it represents a standard of protection below which States cannot fall. On the contrary, fundamental rights began to be included in the Community panorama only as a result of the interpretation work carried out by the EU Court of Justice. In fact, as early as 1969 the Court began to describe fundamental human rights as *"general principles of Community law, the safeguarding of which must be ensured within the framework of the structure and purposes of the Community"*[34], it then goes on to state that *"the content and scope of these rights must be recognized by drawing inspiration from the constitutional traditions common to the member states and from the international treaties on the protection of human rights, to which the member states have cooperated or acceded, including in particular the European Convention on Human Rights"*[35]. The Court was motivated by the concern to protect the unity and effectiveness of the new European order, attributing to its jurisdiction the assessment of the legality of the acts derived, in this case, in the light of human rights, and then extending this jurisdiction also to the assessment of the legality of the conduct undertaken by the member states, in compliance with European law. In this way the Court wanted to *"remove [Community law] from the control of the legislative and judicial bodies of the Member States"*[36]. The Charter of Nice, or the Charter of Fundamental Rights of the European Union, is the result of this intention expressed by the Court, which, precisely in relation to the jurisprudential orientation outlined above, acquired binding legal force following the reform of the Treaty of Lisbon. Again, although the Union is not a contracting party to the ECHR, the relationship between the ECHR and the Charter is the same as that described above in relation to the Geneva Convention of 1951: in Community law, the ECHR acts as a parameter of legitimacy for acts of secondary legislation and, moreover, obliges States to interpret such acts in accordance with the ECHR.

[33] F. Cherubini, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, *cit.*, pp.179-180.

[34] V. Zagrebelsky, R. Chenal, and L. Tomasi, *Manuale dei diritti fondamentali in Europa*, Il Mulino, 2022, p. 77.

[35] V. Zagrebelsky, R. Chenal, and L. Tomasi, *Manuale dei diritti fondamentali in Europa, cit.*, p.77.

[36] V. Zagrebelsky, R. Chenal, and L. Tomasi, *Manuale dei diritti fondamentali in Europa, cit.*, p. 77.

A fundamental difference should also be mentioned with regard to the relationship between these three instruments of protection. Although the ECHR and the Geneva Convention of 51' are currently "linked" in the same way to the European Union, the ECHR has the capacity to *"penetrate much deeper into EU law"*[37]. In fact, the latter is equipped with a judicial review body, the Strasbourg Court, which gives the individual the power of procedural initiative, exercisable once all the judicial remedies provided internally by the States have been exhausted without success. This was made possible by the adoption of Protocol n. 11 in 1998. Article 34 of the ECHR provides that *"[t]he Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right"*, from this moment onwards the possibility of individual persons to lodge a complaint has become a subjective legal situation binding on all States Parties. In addition, this provision allows individual action to be brought by all persons "whether they are nationals of a State Party or of a non-contracting State*"*[38], if the rights contained in the ECHR have been infringed in any way when the person concerned was subject to the jurisdiction of a State Party. This mechanism provides individuals with an extremely higher level of protection than that provided by the Geneva Convention of 51' and by the EU instruments, in fact, with reference to the Charter, the recognition of human rights in the EU turns out to be purely "internal", as recognized by the Court of Justice, which does not provide any guarantee of individual redress for individuals and acts the protection of fundamental rights as an *"indirect effect of its activity of interpretation of [EU] law".*[39]

Article 18 establishes the right to asylum, stating that *"[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community"*, which is not expressly stated in the ECHR. In this regard, it is necessary to focus particularly on the principle of *non-refoulement*, enshrined in Article 19. The latter provides that *"collective expulsions are prohibited. […] 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"*. Again, EU law, unlike the ECHR, expressly mentions the prohibition of refoulement, provided for in the 51' Convention, however, in the Explanations annexed to the Charter, it is stated that *"paragraph 2 [of that Article] incorporates the relevant case law of the European Court of Human Rights relating to Article 3 of the ECHR"*[40]. This is to be read in conjunction with Article 52(3) of the Charter, which provides that *"where the [Charter] contains rights corresponding to those guaranteed by the ECHR, the meaning and scope of*

[37] V. Zagrebelsky, R. Chenal, and L. Tomasi, *Manuale dei diritti fondamentali in Europa, cit.*, pp. 187-188.

[38] F. Mastromartino, *Il diritto di asilo – Teoria e storia di un istituto giuridico controverso, cit.*, p. 211.

[39] V. Zagrebelsky, R. Chenal, and L. Tomasi, *Manuale dei diritti fondamentali in Europa, cit.*, p. 86.

[40] S. Amadeo and F. Spitaleri, *Le garanzie fondamentali dell'immigrato in Europa*, Torino, Giappichelli Editore, 2015, pp. 216-217.

those rights shall be the same as those conferred by that Convention"[41], and implies, in addition to the fact that no limits may be placed on these articles which do not comply with the standards of the ECHR, that in the interpretation of these provisions reference must necessarily be made to the case-law of the ECtHR. The CJEU then goes on to find another source of prohibition of refoulement in EU law, namely Article 4 of the Charter, which states that *"[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment"*, which is perfectly in line with Article 3 ECHR and further reinforces the right of the individual not to be refused entry if there is a risk that the fundamental rights of the person concerned may be seriously undermined. To conclude this short parenthesis, Article 53 of the Charter should be mentioned. This is fundamental in the interpretation of EU law, as it states that *"nothing in the [...] Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, [...] in the constitutions of the Member States"*[42], it follows from the above that in the case of several sources relevant to the same right, the application of the most favorable standard must prevail. However, following rulings by the CJEU, it has been pointed out that this criterion can only be applied *"in the absence of a harmonization rule and if the primacy and effectiveness of Union law is not affected"*[43].

1.2. European asylum law

The 1957 Treaty of Rome establishing the European Economic Community (EEC) contained no provisions on the right to asylum[44], but this did not prevent asylum issues from being linked to the completion of the European single market. A more effective mechanism for addressing the issue of asylum as part of the completion of the internal market was identified in 1986 when the Single European Act was signed, identifying internal borders as a clear physical obstacle to free movement and thus to the realization of the "internal market" project. By amending the Treaty of Rome, in particular Article 8A, the Single European Act identified the creation of *"an area without internal frontiers in which the free movement of goods, persons, services andcapital is ensured"*[45] as one of the constituent elements of the single market and included this area among the Community competences. However, this approach was not shared by all members of the EEC, which is the reason why issues arising from the abolition of internal borders were dealt with in intergovernmental rather than Community cooperation.

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[41] I. Anrò, *Carta dei diritti fondamentali dell'Unione europea e CEDU: dieci anni di convivenza*, in "Federalismi.it", 2020, n.19.

[42] V. Zagrebelsky, R. Chenal, and L. Tomasi, *Manuale dei diritti fondamentali in Europa, cit.*, p. 86.

[43] V. Zagrebelsky, R. Chenal, and L. Tomasi, *Manuale dei diritti fondamentali in Europa, cit.*, p. 86. C. Favilli, L'Unione che protegge e l'Unione che respinge. Progressi, contraddizioni e paradossi del sistema europeo di asilo, in "Questione Giustizia", 2018, n.2.

[44] F. Cherubini, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, *cit.*

[45] European Union, *Instaurazione progressiva di uno spazio di libertà, di sicurezza e di giustizia*, available at the following link: at https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=LEGISSUM%3Aa11000

It is possible to identify what has been said so far as the first phase of the process of European harmonization of asylum policies, which more formally began with the 1986 London European Council, with the introduction of measures to be taken in order to promote the establishment of a common asylum policy (hereinafter CEAS). In 1985, following intergovernmental cooperation on the dismantling of common border controls between France and Germany, which was gradually joined by Belgium, Luxembourg and the Netherlands, the Schengen Agreement was developed. The Schengen Agreement was the first binding intergovernmental instrument to regulate the free movement of persons, including non-EU citizens, by gradually abolishing internal borders and strengthening external border controls. The Schengen Agreement establishes a link between, on the one hand, the construction of the common market and, on the other hand, the harmonization of external border controls, allowing for the creation of a common policy on the entry of foreign nationals from third countries, which also includes asylum seekers. In fact, Article 20 of the Agreement states: *"[t]o the extent necessary, [the Parties] shall also provide for the harmonization of their laws on certain aspects of the law on aliens with respect to nationals of States which are not members of the European Communities"*. The Convention implementing the Agreement entered into force in 1990, initially among the five founding countries and subsequently among the other EU Member States that acceded to it. Despite formal accession, the Convention only began to be fully applied in the various countries that were party to it after the fulfilment at national level of certain measures to adapt[46] to a uniform system of external border controls.

The Convention took a further step in the direction of a community framework for asylum by laying down common conditions for the entry of third-country nationals and distinguishing them from those relating to the entry of asylum seekers, for whom a specific article, 29(1[47])-(2), was provided.

Furthermore, reiterating what had already been expressed during the European Council meeting in London in 1986[48], the Convention in Chapter VII established a first draft of rules[49] to be followed to identify the State responsible for examining the asylum application, thus trying to avoid the phenomenon of so-called asylum shopping[50] and refugees in orbit[51].

[46] For example, in Italy, the Convention only began to be fully implemented in 1998, following the country's fulfilment of certain requirements, including the abolition of the "geographical reservation" to the Geneva Convention.

[47] Article 29 of the Convention implementing the Schengen Agreement paragraph 1, *"The Contracting Parties undertake to ensure the examination of any application for asylum made by an alien in the territory of one of them"*; paragraph 2: *"This obligation does not imply that a Contracting Party must in all cases authorize the applicant for asylum to enter or reside in its territory"*.

[48] F. Cherubini, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, cit.

[49] This purpose will be taken up by the Dublin Convention and subsequent Regulations (II-III).

[50] This phenomenon consists of a single person submitting several asylum applications in different Member States in order to increase the chances of success in obtaining international protection.

[51] This phenomenon occurs when asylum applications are rejected several times by different Member States, on the basis that no one feels responsible to examine them.

A further result of intergovernmental cooperation was the 1990 Dublin Convention[52], which is the most important instrument of the first phase of the European harmonization process. This Convention is the product of the working group on immigration that was created following the 1986 European Council meeting. The aim was to create a European policy to avoid and eliminate the so-called "abuses" in the right to asylum, mentioned above[53], by determining which Member State is responsible for examining asylum applications submitted within the European Community. The Dublin Convention fell within the same scope as the Schengen Convention, with the difference that not all States party to the former had also acceded to the latter. For these reasons, a protocol was signed in Bonn in 1995, which provided for the replacement of the Schengen Convention by the Dublin rules, clearly only in the areas of common discipline. Both these instruments were outside the European[54] *aquis*; in fact, the Dublin Convention would only be "communitarized" through the introduction of Regulation 343/2003 (known as "Dublin II"), later replaced by Regulation 604/2013 (known as "Dublin III"), which will be discussed below.

With the Maastricht Treaty, which was approved on 7 February 1992 and entered into force on 1 November 1993, cooperation on asylum was institutionalized and included among the activities of the European Union, although still on an intergovernmental and not yet Community level. The novelty introduced by the Treaty was the inclusion of the right to asylum among the sectors of common interest, through its introduction into the so-called "third pillar" of the Union[55], i.e. Cooperation in the sectors of Justice and Home Affairs (JHA). The asylum policy contained in Title VI of the Treaty on European Union (TEU) was thus included among the areas of common competence of the Member States, which have the task of agreeing on common positions and actions. Thus, Maastricht did not lead to the overcoming of the intergovernmental approach but, on the contrary, only provided for cooperation between states, not subject to any form of implementation and/or control by the EU institutions.

This approach has proved to be unsuccessful and insufficient in relation to the objectives set out in Article K1 of the TEU, *"For the purpose of achieving the objectives of the European Union, the Member States shall regard as matters of common interest certain areas, the first of which shall be asylum policy"*.[56] In this regard, and following the growing need to include the right to asylum as a Community competence, the Treaty of Amsterdam was signed in 1997 and entered into force on 1 May 1999. This Treaty gave the European Union competence in the field of asylum, thus establishing a greater, though not complete, "communitarization" of the right to asylum, which finds its legal basis in Title IV of the EC Treaty (TEC), entitled "Visas, asylum,

[52] F. Cherubini, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, *cit.*

[53] F. Cherubini, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, *cit.,* i.e. Refugees in orbit and asylum shopping.

[54] The Schengen *aquis* became part of Community law with the introduction of the Treaty of Amsterdam in 1999.

[55] F. Cherubini, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, *cit.*

[56] N. Petrović, *Rifugiati, profughi, sfollati – Breve storia del diritto d'asilo in Italia, cit.*, p.58. F. Cherubini, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, *cit.*

immigration and other policies related to free movement of persons". The main innovation introduced by Article 63 of the Treaty is the transfer of asylum matters to the so-called "first pillar" of the European Union, thus moving towards the progressive establishment of an "area of freedom, security and justice between Member States". From this moment on, the regulation of asylum started to be a matter of shared competence between the member states and the European[57] institutions. Article 63(1) and (2) empowers the Council of Ministers of the European Union to adopt, within a maximum period of five years from the entry into force of the Treaty, measures on asylum with a view to establishing a common policy.

Regarding the establishment of the regime established by the Treaty of Amsterdam, the 1999 Tampere Conference is of fundamental importance. The Tampere Conference was convened because of the difficulties experienced in the implementation of the measures laid down in the Treaty of Amsterdam. Of particular interest in this discussion is the European Council's reaffirmation, during the conference, of the *"absolute respect for the right to seek asylum"* and the importance the European Union gives to the 1951 Geneva Convention and the right of *non-refoulement.*

The Tampere Conference envisages a two-step approach to ensure the implementation of a Common European Asylum System.

The first phase involved the development of common tools and standards for identifying the state responsible for examining asylum applications, the development of minimum standards for the qualification of refugees and other forms of international protection, the definition of minimum standards for reception and asylum procedures. The objective of the second phase, on the other hand, resulted in the definition of a Common European Asylum System (CEAS), with uniform procedures and status in all EU Member States, outlined in the Hague Programme (2004-2009).

The Hague Programme adopted by the European Council in 2004 had as its main objective to *"improve the capacity of the European Union and its Member States to ensure fundamental rights, minimum procedural guarantees and access to justice in order to provide protection to persons in need of such protection under the Geneva Refugee Convention and other international treaties"*[58], by further refining the steps necessary to achieve by 2010, a common asylum policy, centered on common standards and moving beyond the system of "minimum standards".

With the entry into force of the Lisbon Treaty on 1 December 2009, under the Treaty on the Functioning of the European Union (TFEU) and more specifically Article 78, the right to asylum has been "communitarized".

[57] Associazione per gli Studi Giuridici sull'Immigrazione, *La Protezione Sussidiaria - Scheda*, 2012. It is stated that States have the right to legislate on asylum until the Union intervenes, which can exercise its powers in accordance with the principles of proportionality and subsidiarity. In other words, the States remain the main holders of these competences, and the Union is always required to demonstrate the necessity of its action, and always to act within the limits strictly necessary to achieve the objective.

[58] N. Petrović, *Rifugiati, profughi, sfollati – Breve storia del diritto d'asilo in Italia*, *cit.,* p. 122

[59]The latter states: "*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"*. The principles set out in the Lisbon Treaty are fully implemented in the so-called Stockholm Programme – *"An Area of Freedom, Security and Justice at the Service of Citizens"* (2010-2014) , which further defines the steps to be taken to achieve the full construction of a Common European Asylum System, starting with the revision of all EU legislation enacted between 2000 and 2005 in a more communitarian direction and consequently aimed at guaranteeing higher protection for both asylum seekers and holders of other international residence permits.
The three programmes mentioned[60] so far represented the framework within which the project to establish a common European asylum policy was defined. In particular, the legislative instruments adopted by the Union to achieve the previously established goals were:

- Council Regulation 343/2003 ("Dublin II"), later replaced by Regulation 604/2013 ("Dublin III") on the determination of the State responsible for asylum applications;
- Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons;
- Directive 2003/9/EC ("Reception Conditions Directive") on minimum standards for the reception of asylum seekers in Member States, later replaced by Directive 2013/33/EU;
- Directive 2004/83/EC ("Qualification Directive") on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or beneficiaries of international protection and the content of such protection, later replaced by Directive 2011/95/EU;
- Directive 2005/85/EC ("the Asylum Procedures Directive") on minimum standards for granting and withdrawing international protection status, later replaced by Directive 2013/32/EU.

Delays in the national transposition of the directives by individual Member States and the excessive discretion granted to them made it difficult to achieve the objective of creating common and uniform asylum conditions. The main complications have been found in the divergences between states in the granting of international protection, as well as in the examination of asylum applications and the way they are processed. In an attempt to reverse this trend, amendments were made to the above-mentioned[61] legal instruments.

[59] F. Cherubini, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, *cit.*

[60] Programme established at the Tampere Conference (1999); Hague Programme (2004) and Stockholm Programme (2009).

[61] The analysis of European asylum law instruments, which follows, will not be complete, as the aim is to highlight the provisions of main interest for the purposes of this discussion.

The first directive to be adopted is the Qualification Directive 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"*. [62] Directive 2011/95 intervenes in support of the authorities competent for the Member States to apply the Geneva Convention of 51', though, first of all, the adoption of certain harmonization acts aimed at resolving problems of interpretation of the definition of "refugee".

Chapter III, and more precisely Articles 9 and 10, establish the essential elements for granting refugee status, which are essentially two: "well-founded fear", in the territory of the State of which the applicant is a national; and "acts of persecution". With reference to the former, Directive 2011/95 states that the applicant must have a subjective and an objective element, respectively the perception of a genuine fear of being persecuted, and the fact that it must be "well-founded". On this point, the directive specifies that cases where the individual has already suffered persecution or direct threats of persecution in the past; or the individual has not suffered persecution in the past but fears to suffer persecution in the future; or the individual fears to suffer persecution for events that have occurred since he left his country of origin, are evidence to support the validity of the fear. As regards "acts of persecution", Directive 2011/95 has included in the definition all those acts which are sufficiently serious [63]by their nature and/or frequency as to constitute a serious violation of fundamental human rights, in particular those non-suspendable rights for which there are no exceptions, i.e. those protected by Article 15[64] ECHR.

The directive considerably expands on the provisions of the Geneva Convention of 51', stating that even the sum of several measures can be considered an "act of persecution" as long as the required level of severity is reached. Article 6 of the Qualification Directive specifies that "acts of persecution", in order to be defined as such, do not have to be carried out exclusively by state agents but, on the contrary, can also be attributed to private[65] actors, when the state is unwilling or unable to protect the individual.

An important merit of Directive 2011/95 is that it broadens the causal link necessary to grant a person international protection. In fact, it argues that the possession of racial, religious, national, social or political characteristics is irrelevant as the sole determinant of the act of persecution; on the contrary, it is sufficient that they contributed to or were connected with the persecution.

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[62] Qualification Directive 2011/95/EU available at: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32011L0095&from=IT

[63] An illustrative list of such acts is contained within Article 9(2) of the Qualification Directive 2011/95 and includes *"physical, psychological and sexual violence; discriminatory legislative, administrative, police or judicial measures; disproportionate or discriminatory prosecution or criminal sanctions; acts specifically directed against a sex or a child".*

[64] Article 15 (2) of the ECHR: *"The foregoing provision does not authorize any derogation from Article 2, except in the case of death caused by lawful acts of war, and from Articles 3, 4 (1) and 7".*

[65] Perpetrators of persecution can be the state; parties or organizations controlling the state or a substantial part of its territory as well as "non-state actors".

Article 11 of the Directive takes up the so-called "cessation clauses" provided for in the Geneva Convention of 51', i.e. situations where the individual no longer needs international protection. Such cases generally arise when the person avails himself of the protection granted by the State of origin or alternatively when he acquires a new nationality.

Article 12 underlines the elements of exclusion from refugee status under the 51' Convention. These are individuals already in receipt of protection from United Nations bodies or agencies; or persons responsible for serious international crimes, serious crimes committed outside the host state and shortly before entering it, acts contrary to the purposes and principles of the United Nations such as acts of international terrorism.

Article 14, on the other hand, takes up and extends the grounds for withdrawal, cessation or refusal to renew refugee status, which are mainly those laid down in Articles 11 and 12 of the Qualification Directive. However, paragraphs 4 and 5 of the Qualification Directive allow Member States to refuse to grant refugee status to an individual and to withdraw it if he has been convicted by a final judgment of a serious crime or constitutes a danger to the community of the Member State. Since this is not provided for in the Geneva Convention of 51', it has been addressed by the Court of Justice of the European Union, which has declared that the individual should continue to be entitled to all the rights guaranteed by the Geneva Convention to refugees who do not need to be legally present in the State.

In the context of the above-mentioned "communitarization", there is also a new institution of international protection, which extends the possibilities of recognition of the protections provided by the Geneva Convention on refugee status. The so-called "Subsidiary protection" was therefore introduced by Directive 2004/83 and is currently governed by the Qualification Directive 2011/95. This institution stems from the need to guarantee protection also to those persons from third countries who, according to Article 2 of the directive in question, *"do not qualify for refugee status but, nevertheless, there are reasonable grounds for believing that if they were to return to their country of origin they would face a real risk of suffering "serious harm" and for that reason are unable or unwilling to avail themselves of the protection of that country"*.
The element of "serious harm", which is a fundamental prerequisite for obtaining subsidiary protection, according to Directive 2011/95 can occur in three situations.
The first type of "serious harm" refers to the death sentence or execution; the second refers to torture or other forms of inhuman or degrading treatment or punishment; while the third and last type includes all situations of serious and individual threat to the life or to the person, resulting from indiscriminate violence in situations of internal or international armed conflict.
Finally, subsidiary protection is complementary to the refugee protection granted by the 1951 Geneva Convention, since the above-mentioned cases do not require the existence of particular "persecution" grounds to be verified, otherwise the protection deriving from refugee status should be recognized.

In addition to the abolition of the concept of "minimum standards", the Qualification Directive 2011/95 included provisions on the treatment of refugees and persons enjoying subsidiary protection in Chapter VII. These rules are much more favorable than those provided for in the 51' Convention. In terms of the rights granted, a person with refugee status is treated in the same way as a national of the host Member State, while the Qualification Directive gives beneficiaries of subsidiary protection the same treatment as refugees. The only exception provided for is in Article 29(2) and concerns the duration of the residence permit, which is no less than three years for holders of refugee status and no less than one year for beneficiaries of subsidiary protection.

Within the framework of a common European asylum system, Article 63 TEU introduced a further form of protection, called "temporary protection", regulated by Directive 2001/55/EC. This type of protection was provided for situations that can be defined as "exceptional", represented by a massive influx of third-country nationals, more specifically "displaced persons"[66], following events such as war, natural disasters, internal conflicts, which do not fall within the "acts of individual persecution" provided for by the 1951 Geneva Convention.
On the basis of Article 5 of Directive 2001/55, therefore, in the situations described above, it is possible, by decision of the European Council on a proposal from the European Commission, to apply the institution of temporary protection, which guarantees minimum forms of reception for a period of one year.
The directive also provided for a system *of burden-sharing*, both financial and based on actual reception, for Member States receiving displaced persons, with the aim of promoting a balance of effort between States within a system based on solidarity between them. However, it should be pointed out that this type of protection has not yet been applied.

A major limitation of the 1951 Geneva Convention is the lack of measures and/or guidance on the treatment of asylum seekers. This is a crucial issue, especially considering the time it takes to process an asylum application and any appeals, which makes it necessary to define reception standards shared by the various Member States and capable of ensuring a decent standard of living for asylum seekers throughout the process.

[66] Displaced persons are third country nationals or stateless persons who have had to leave their country or region of origin, or who have been evacuated, and whose safe and stable return is impossible because of the situation in the country itself. Directive 2001/55/EC recognizes in this category persons who have fled areas of armed conflict or endemic violence; persons at serious risk or victims of systematic or generalized human rights violations.

Directive 2013/33/EU [67], also known as the Reception Conditions Directive, intervenes in this sense, providing for "standards on the reception of applicants for international protection". This directive followed the previous one, 2003/9/EC, introducing new elements aimed at ensuring a higher level of protection, firstly by extending the scope of application also to applicants for subsidiary protection. Secondly, the directive introduces the obligation to ensure decent living conditions, resulting from guarantees of medical and psychological assessment of the person and quicker access to the labor market. Finally, the conditions and modalities under which detention of applicants for international protection can be envisaged are further specified.

A further objective of the CEAS was to fill in the gaps in the Geneva Convention of 51', also regarding procedures concerning the loss or acquisition of international protection. In this regard, the Asylum Procedures Directive 2013/32/EU[68] on "common procedures for granting and withdrawing international protection status" was adopted, replacing the previous one 2005/85/EC, which has been repealed. This directive is part of an extremely fragmented European regulatory framework within the national systems of individual Member States, to which the European Union has decided to set limits in order to better protect applicants for international protection.

In Chapter I of the Directive, concerning "general procedures", Article 3 states that *"This Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, as well as to the withdrawal of international protection"*, thus extending the application of the provisions contained in this Directive also to applications for subsidiary protection.

One of the main rules of the system is contained in Article 9 [69] , which emphasizes the right of the applicant to remain in the territory of the receiving State until the application has been processed. The only exceptions to this procedure relate to so-called subsequent applications [70]or cases where the host State intends to extradite the applicant to another Member State, third State or international court. In any case, both these exceptions are subject to the principle of *non-refoulement,* whether direct or indirect.

It is worth stressing here the relevance determined by Article 6 of the Asylum Procedures Directive, which underlines the obligation of host States to ensure to those persons who express their willingness, to effectively

[67] Reception Conditions Directive 2013/33/EU available at: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32013L0033&from=IT

[68] Asylum Procedure Directive 2013/32/EU available at: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32013L0032&from=PL

[69] Paragraph 2 Chapter 1.

[70] Article 40 of the Asylum Procedure Directive 2013/32/EU, *"Where a person who has applied for international protection in a Member State makes further statements or reapplies for international protection in the same Member State, that Member State shall examine the further statements or the elements of the subsequent application in the context of the examination of the previous application or the examination of the decision under review or appeal, in so far as the competent authorities can take into account and consider all the elements underlying the further statements or the subsequent application in that context".*

exercise their right to make an application for international protection, which must be registered within three working[71] days. It is also necessary, on the basis of Article 12, to ensure that applicants are properly informed, in a language they can understand, of the procedures to be followed in order to obtain international protection. This Article continues in paragraph (f) by stating the obligation of the State authorities to inform the applicant, by issuing a written document, of all decisions taken. In the event that the application for asylum is rejected, reasons must be given for the rejection and the possibility of appeal must be communicated to the applicant in writing.

In addition to the ordinary procedure for the recognition of international protection, the Asylum Procedures Directive provides for two further types of procedures: the priority procedure and the accelerated procedure. In the interest of the discussion, the accelerated procedure or also called "border procedure", regulated by Article 43, will be briefly analyzed. This procedure, as an exception from the general rules, can be implemented in border or transit zones, so, basically, before the person has entered the territory of the receiving State, only in certain specific cases; i.e. when a subsequent application is submitted; when the applicant comes from a "safe country of origin"; or in situations where the individual is considered a danger to the security of the nation or a threat to the public order of the receiving State, or if the person has been expelled for serious reasons by the receiving State. However, in all these cases the applicant must always be guaranteed an examination of the merits of his application, the only exceptions to this principle are the cases of inadmissibility of the application, which are exhaustively provided for in Article 33. These cases are those where the applicant is already a beneficiary of international protection in another Member State; or where the applicant comes from a "first country of asylum" or could be sent to a "safe third country"; or finally, in cases of subsequent applications where no new elements are added or have emerged and in situations where the application was made by a dependent[72] person. The inadmissibility decision may be taken at the border or in a transit zone and must be concluded within a reasonable period of time, which, if it exceeds four weeks, results in the direct admission of the applicant to the territory of the receiving State until the end of the procedure.

The notions of "first country of asylum"; "safe country of origin"; and "safe third country" are particularly relevant through the Asylum Procedures Directive, as all three represent an exception to the principle of *non-refoulement*, allowing the possibility of sending the applicant to one of the above-mentioned countries, provided that these are recognized as "safe".

[71] The possibility of extending the number of days for registering the application to six is only possible if the application was received by bodies which have no direct competence in relation to the registration of applications for international protection.

[72] Means that the applicant is dependent on the assistance of a child, parent or sibling, due to pregnancy, recent maternity, serious illness, severe disability or old age; or vice versa.

The hypothesis of "first country of asylum" regulated by Article 35 of the Asylum Procedures Directive, refers to a Member State that has already granted international protection to an applicant, and which has been assessed to be "sufficient" in particular regarding the respect of the principle of *non-refoulement.*

Article 37 of Directive 2011/32 establishes the concept of "safe country of origin". This article provides that each Member State may draw up a list of countries of origin that are regarded as safe, which must be notified to the European Commission and periodically reviewed in the light of any changes in the situation in the countries identified. Annex I[73] to the Directive states that "*A country is considered as a safe country of origin if, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict".* However, the Directive specifies that before defining a country as safe, it is necessary to examine the applicant's request for asylum and to ensure that the applicant has not shown serious reasons for not considering a particular country of origin as safe.

Finally, Article 38 provides for the possibility of associating the concept of safe country also to a "third country", with which the person has a sufficient link to believe he can be readmitted. In this sense, the rulings of the Court of Justice of the European Union have been relevant: in relation to the Hungarian legislation, the Court ruled *"excluding the circumstance that the mere act of transiting through the territory of a third country may constitute a valid and sufficient link for the readmission of the asylum seeker to that country".* [74]
The security of a third State can be based on a case-by-case analysis or by drawing up a list of countries, which must meet the requirements of Article 38, i.e. *"the applicant must not fear for his or her life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group; there is no risk of 'serious harm' as defined by the Qualification Directive; the principle of non-refoulement (in accordance with the Geneva Convention) and the prohibition of expulsion measures contrary to the*

[73] Annex I Asylum Procedure Directive 2011/32/UE adds that in making this assessment, the following must be taken into account: *"the extent to which protection against persecution and ill-treatment is provided by: the relevant laws and regulations of the country and the manner in which they are applied; respect for the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant on Civil and Political Rights and/or the United Nations Convention against Torture, in particular the rights from which there can be no derogation under Article 15(2) of that European Convention; respect for the principle of "non-refoulement" in accordance with the Geneva Convention; and a system of effective remedies against violations of those rights and freedoms*".

[74] M. A. Calamita, M. Di Filippo, S. Marinai, F. Casolari, and M. Gestri, *Lineamenti di diritto internazionale ed europeo delle migrazioni, cit.*

prohibition of torture and cruel, inhuman and degrading treatment are respected; the possibility exists to apply for refugee status and, if granted, to benefit from protection in accordance with the Geneva Convention"[75].

To close the framework of the Asylum Procedures Directive, a final reference should be made to Article 46, which governs the "right to an effective remedy". This Article places an obligation on States to ensure that the applicant has the opportunity to challenge an unfavorable decision before a court. It also grants the applicant the right to remain on the territory of the host State throughout the proceedings, subject to the exceptions provided for in paragraph 6[76] of that Article.

As mentioned above[77], the so-called Dublin system is the main instrument governing asylum in Europe. The current regulation is provided for by Regulation 604/2013[78] ("Dublin III"). The purpose of this regulation is to establish the *"criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national"*. Despite the amendments that have been made over the years, the general principle underlying the Regulation has remained unchanged: responsibility for examining the application for protection is attributed to a single Member State, primarily the one in which the applicant entered the European Union.
Chapter II of the said Regulation in Article 3 reiterates the obligation for Member States to examine *"any application for international protection lodged by a third country national or a stateless person on the territory of any Member State, including at the border and in transit zones"*, whose competence to examine such an application is identified on the basis of the criteria laid down in Chapter III. These criteria must be applied on a continuous basis, and in particular it is stated that "*Member States shall take into account any available evidence concerning the presence on the territory of a Member State of family members, relatives or persons otherwise related to the applicant, provided that such evidence is produced before another Member State accedes to the request to take charge or take back [...] and that the applicant's previous applications for international protection have not yet been the subject of a first decision on the merits"*, thus attempting to ensure greater guarantees for the reunification of asylum seekers. However, if it is not possible to identify the State on the basis of the above criteria, responsibility for examining the asylum application lies with the first State in which the application was lodged. If, on the other hand, the State is not responsible, the system provides for a so-called Dublin transfer to the country responsible, without analyzing the merits of the

[75] M. A. Calamita, M. Di Filippo, S. Marinai, F. Casolari, and M. Gestri, *Lineamenti di diritto internazionale ed europeo delle migrazioni, cit.*

[76] Article 46 (6) of the Asylum Procedure Directive 2013/32/EU.

[77] Paragraph 2 Chapter 1.

[78] Dublin Regulation 604/2013 available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:IT:PDF

application. In this respect, a fundamental role is played by the EURODAC[79] Regulation, which establishes a database of fingerprints to check whether the asylum seeker has previously applied for asylum or has simply transited to another Member State.

With a view to ensuring greater protection of the asylum seeker, the Dublin III Regulation has provided for cases in which the transfer of the asylum seeker cannot be implemented. Article 3 also states that it is impossible to transfer an applicant to the State identified as responsible if *"there are serious grounds for believing that there are systemic deficiencies in the asylum procedure and in the conditions of reception of applicants in that Member State which involve the risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union"*, thus giving a relative character to the presumption that the State identified as responsible will respect human rights, and making this hypothesis refutable. [80]

Although Dublin III is considered a pillar of the European asylum system, it is not without criticism as to its real effectiveness. The so-called "Dublin system" is the bulwark of the prohibition of secondary[81] movements, i.e. movements within the Schengen area after the state responsible for examining applications for international protection has been identified. Although this system has undergone some modifications over the years, it has never really changed in substance, thus fueling an ineffective and penalizing policy both for the asylum seeker and for the receiving State. The former because in the absence of a European act on immigration for work purposes and of a right of movement and residence, both for the so-called irregular migrants and for beneficiaries of international protection, it forces the individual to remain for life in the country "competent" to examine his application, without taking into account the aspirations of the individual. The second is because it is a system that tends to pour its effects mainly towards the Member[82] States located at the external borders of the European[83] Union.

In order to provide a complete analysis, it is appropriate here to mention two important rulings of the Court of Justice of the European Union involving Slovakia and Hungary. The first from 2017 relates to the relocation

[79] Dublin Regulation 603/2013 on the comparison of fingerprints for the effective application of Regulation 604/2013 - Dublin III available at the following link: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32013R0603&from=it

[80] Asilo in Europa, *Regolamento Dublino III-scheda*, 2013, available at the following link: https://www.asiloineuropa.it/2011/05/15/regolamento-dublino-iii-scheda/.

[81] M. Giovannetti, and N. Zorzella, *IUS MIGRANDI. Trent'anni di politiche e legislazione sull'immigrazione in Italia, cit.,* pp. 65-66.

[82] European Parliament, resolution on the evaluation of the Dublin system, 2008, available at the following link: https://www.europarl.europa.eu/doceo/document/TA-6-2008-0385_EN.html.

[83] M. Giovannetti, and N. Zorzella, *IUS MIGRANDI. Trent'anni di politiche e legislazione sull'immigrazione in Italia, cit.,* pp. 68-70.

system adopted by the Commission in 2015 to address the migration crisis. While the second one examines two laws adopted by Hungary in 2017 and 2017 that were not in compliance with EU law.

With reference to the relocation system described here, before continuing the discussion, it is worth mentioning an important judgment of the Court of Justice of the EU[84], regarding the appeal filed by Slovakia and Hungary against this provisional mechanism of compulsory relocation of asylum seekers. As mentioned above, in response to the "migration crisis", the Council of the European Union adopted a decision to help Italy and Greece deal with the influx of people they were experiencing. This decision provided for the relocation over two years of 120,000 asylum seekers to other EU Member States. It was taken under Article 78 (3) TFEU, which provides for the possibility of introducing temporary measures for the benefit of Member States when they are faced with emergency situations caused by a sudden influx of nationals from third countries. In the action brought by Slovakia and Hungary, both of which had voted against the adoption of that measure, with the support of Poland and Romania, the two countries relied on several aspects relating to the inappropriate legal basis; to certain procedural irregularities and finally to the substance of the decision, namely its actual suitability to respond to the "migration crisis". With regard to the first point, the Court argues that under Article 78 TFEU it is possible to derogate from the Dublin Regulation, i.e. an act adopted under the ordinary legislative procedure, without the adoption of a further legislative act. This is possible, according to the Court, because the legislative procedure is applicable when expressly provided for in the articles of the Treaties, and in this specific case Article 78 (3), as the legal basis of the contested measure, does not contain any reference to the need to adopt legislative procedures. In addition to what has been said, the Court goes on to say that by virtue of the emergency nature of the measures that may be adopted, they may also derogate from legislative acts, provided that they are limited in time and if it is excluded that they have *"the object or effect of replacing or amending in a permanent and general manner the legislative acts referred to above"*[85]. As regards the temporal question, the Court clarifies that *"the temporal scope of the contested decision (i.e. from 25 September 2015 to 26 September 2017) is precisely circumscribed, so that its temporary nature cannot be called into question"* [86], moreover, it appears to be a reasonable period of time to allow the measures to have a real impact on the two beneficiary countries. On the other hand, as regards the procedural flaws, respectively the failure to adopt an amended Commission act unanimously and the breach of the principle according to which the Council is obliged to consult the European Parliament following the new (substantial) amendments

[84] Judgement United Sections of the Court of Justice of the European Union, Slovakia and Hungary v. Council, C-643/15 e C-647/15, 2017, available at the following link: https://curia.europa.eu/juris/document/document.jsf?text=&docid=194081&pageIndex=0&doclang=IT&mode=lst&dir=&occ=first&part=1&cid=222836.

[85]Judgement United Sections of the Court of Justice of the European Union, Slovakia and Hungary v. Council, C-643/15 e C-647/15, 2017, *cit.*, paragraph 78.

[86] Court of Justice of the EU, press release n. 91/17, Luxemburg, 2017, available at the following link: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091it.pdf.

adopted, such as Hungary's request not to be listed as a beneficiary Member State of the relocation mechanism, the Court also rejected the grounds of appeal[87].

Finally, as regards the substance of the measure adopted, the Court held that it was not *"manifestly unsuitable to contribute to the achievement of its objective"*[88], it then goes on to reject the hypothesis of a retrospective assessment of the validity of the measure in question, stating that *"the European Union legislature must assess the future effects of new legislation, and its assessment may be called into question only if it appears to be manifestly incorrect in the light of the evidence available to it at the time when that legislation was adopted"*.[89] In this regard, according to the CJEU, the Council had duly analyzed the available data before adopting the measure in question. The CJEU went on to say also that the low number of relocations was not due to an erroneous assessment by the Council but rather to the lack of cooperation of some Member States, which the Council could not have foreseen at the time of adoption. Finally, after assessing the suitability of the act in question to achieve the objective pursued, the Court also ruled on the possibility of achieving the same objective but with measures that were less restrictive and detrimental to State sovereignty. In this regard, it was invoked Article 80 TFEU, concerning the principle of solidarity and fair sharing of responsibility between Member States, and stating that the objective could not be pursued by less restrictive measures, and that the binding nature of relocation was necessary in relation to the emergency situation to be faced. Following this judgement, Hungary stated that it would use *"all legal opportunities for amendment, to ensure that no one is relocated to the country against the will of the Hungarian people"*[90]. However, as will be seen later in another judgment, this country has been the subject of another ruling by the Court, for failure to comply with European law in its domestic asylum law.

With reference to the Hungarian-Serbian border, and in particular to Hungary's migration policies, it is appropriate here to allow a brief digression. In fact, in a judgment of 17 December 2020, the Court of Justice of the EU declared Hungary liable for having failed to fulfil its obligations under the European Union in relation to the recognition of international protection and return procedures for illegally staying third-country nationals. In this judgment, [91] the Court declared Hungary liable for infringements committed on the basis of its domestic asylum law, which, according to the Court, was in conflict with EU law.

The law on which the Court focused was adopted by the country in 2015, and provided in particular for the establishment of transit zones located on the Serbian-Hungarian border, where exclusively within them people

[87] Court of Justice of the EU, press release n. 91/17, cit.,

[88] Court of Justice of the EU, press release n. 91/17, *cit.*

[89] Court of Justice of the EU, press release n. 91/17, *cit.*

[90] Redazione internet Avvenire, *Sentenza. Migranti, Slovacchia e Ungheria disobbediscono all'UE e rialzano i muri*, in "Avvenire", 2017, available at the following link: https://www.avvenire.it/mondo/pagine/no-della-corte-ue-ai-ricorsi-contro-le-relocation.

[91] Judgement of the Court of Justice of the European Union, Commission v. Hungary, C-808/18, 2020, available at the following link: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:62018CC0808&from=it.

from Serbia were allowed to submit and apply for asylum; and then also introduced the notion of a "crisis situation caused by mass migration" as a justification for the derogation of the general rules, this condition was then further expanded by a new law adopted in 2017. In the same year, the European Commission had commented on the questionable compatibility of the new Hungarian law, with European asylum law. What was contested by the Commission, which was later followed by an appeal to the CJEU, related in particular to the violation of the guarantees provided by the Procedures, Reception and Return Directives. More specifically, the Commission claims that Hungary is guilty of *"restricting access to the procedure for international protection, setting up a system of generalized detention of applicants for such protection and proceeding to the forced return, on a border strip of land, of illegally staying third-country nationals, without respecting the guarantees provided for by the [Return] Directive"* [92].

As mentioned above, the CJEU ruled in this case that the conduct of the Hungarian government was unlawful, as it breached its obligation to ensure effective access to the asylum procedure by effectively preventing third-country nationals from Serbia from applying for asylum. According to the reasons given by the ECJ, this impediment stems mainly from two situations: the first, already described, is related to the possibility to apply only in transit zones previously identified by the Hungarian government, which according to the judgment in question, is in violation of Article 6 of the Procedures Directive, in fact *"[t]he applicant must be given the opportunity to submit his application in an effective, easy and quick manner"*[93], it should be added, as stated in the judgment, that the submission of the application for protection is a first fundamental step for the recognition of protection and in this sense it cannot be delayed in an unjustified way; while as regards the second one, reference is made to a well-established practice of the Hungarian authorities to limit the number of entries in the country, which is completely unrelated to EU law. *"Indeed, the Commission has shown that this practice was constant and generalized and that it actually prevented many third-country nationals or stateless persons transiting through Serbia from applying for international protection in Hungary."* [94]
Further violations committed by Hungary refer to the manner in which persons were subjected within the transit zones. In fact, the detention carried out by Hungary is in contradiction with the provisions of Community law, which regulates in Article 8 of the Reception Directive the mandatory grounds for detaining an asylum seeker, and the detention carried out by Hungary does not fall into any of these, considering that *"the detention in question is clearly related to the status of applicants for international protection, it is not related to the dangerousness of the persons concerned (also because it is unrelated to any individual*

[92] Court of Justice of the European Union, press release n. 161/20, Luxemburg, 2020, available at the following link: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-12/cp200161it.pdf.

[93] M. Borraccetti, and F. Ferri, *Rassegne di giurisprudenza europea. Direttive procedure, accoglienza e rimpatri: garanzie in situazioni di presunta crisi*, in "Diritto, Immigrazione, Cittadinanza", 2021, n.1.

[94] M. Borraccetti, and F. Ferri, *Rassegne di giurisprudenza europea, cit.*

examination of the individual applicant)"[95], To this the Court also adds the violation of procedural guarantees provided by EU law, including the need to order detention in writing and giving reasons. Thirdly, the Court then assesses whether there are grounds of public policy or national security, which would have justified the derogation from the measures provided for by EU law, under Article 72 TFEU. As stated in the judgment, the derogation provided for in the article in question is subject to a restrictive interpretation and cannot be determined by the Member State without the control of the EU institutions; in fact, it is up to that State to demonstrate the need to rely on that article. In this circumstance, according to the CJEU, Hungary has not sufficiently demonstrated the need to use it. Moreover, the Court points out that even remaining within EU law, specific provisions have been laid down by the Procedures and Reception Conditions Directives concerning the possibility of disapplying certain rules used in normal times when exceptional situations arise.[96]. A penultimate point addressed by the Court concerns the infringement of the Return Directive, following the forced removal provided for by the Hungarian legislation, of third-country nationals whose stay in the territory is illegal. On that point, the Court holds that, since that measure constitutes a removal, within the meaning of the Return Directive, it provides for the issuing of a return order, in compliance with the substantive and procedural safeguards laid down, *"[...] it being understood that the forced removal takes place only as a last resort. Moreover, for reasons similar to those set out above, the Court rejects Hungary's argument that it was permitted, pursuant to Article 72 TFEU, to derogate from the substantive and procedural safeguards established by the Return Directive".*[97] In conclusion, a final remark that should be reported, relates to Hungary's breach of Article 46 (5) of the Asylum Procedures Directive, according to which asylum seekers are entitled to remain on the territory until the asylum procedure, or possibly the appeal procedure, has been completed. *"In fact, the Court notes that, in the event that a 'crisis situation caused by mass immigration' has been declared, the Hungarian legislation makes the exercise of that right subject to procedures which do not comply with European Union law, in particular the obligation to remain in transit zones, which is tantamount to detention contrary to the Procedures and Reception Directives".* It should be pointed out here that this decision is similar to the Italian and Slovenian cases described below.

1.3.Italian asylum legislation

The Italian legal system recognizes asylum as a fundamental and inalienable human right. It is included in Article 10(3) of the 1948 Italian Constitution, which is one of the founding principles of the new Republic, and states: "*a foreigner who is prevented from exercising the democratic freedoms guaranteed by the*

[95] M. Borraccetti, and F. Ferri, *Rassegne di giurisprudenza europea, cit.*

[96] M. Borraccetti, and F. Ferri, *Rassegne di giurisprudenza europea, cit.*, i.e. "*in cases where there is a large number of applications to be processed and where the capacity for placement in detention centres or accommodation in reception centres is exhausted".*

[97] Court of Justice of the European Union, press release n. 161/20, *cit.*

Constitution in his own country has the right to asylum in the territory of the Republic, in accordance with the conditions laid down by the law".

According to the majority doctrine, the so-called constitutional right of asylum, mentioned above, must be considered a perfect subjective right of the foreigner (and also of the stateless person) to enter and stay in the territory of the Republic, at least in order to be able to submit an asylum application to the authorities. This right, according to the majority doctrine[98], is of an immediately preceptive and non-programmatic nature, which means that its direct applicability derives from the clarity and precision of the case outlined, despite the absence of ordinary laws establishing the conditions for its exercise.

This principle, as conceived, finds its cause of justification in the denial of the rights and freedoms recognized by the Italian Constitution, and indicates effectiveness as the criterion for ascertaining the hypothetical situation. [99]

It follows that the right to asylum guaranteed by the Constitution has a broader definition than that of "refugee" under the 1951 Geneva Convention. Indeed, while the latter requires the individual to have a well-founded fear of being persecuted individually on the grounds specified in Article 1 section A (2)[100], the Constitution does not include such a condition as determining the right to protection. The prerequisites for the applicability of the right to constitutional asylum consist of an objective circumstance in which the individual is in fact prevented in his own country from exercising the democratic freedoms provided for by the Italian Constitution; and a subjective assessment made by the applicant concerning his personal situation, which makes him consider that the restriction of his freedom is so serious for his life that he decides to leave the country in which he lives.

On the other hand, regarding the meaning of the "*actual exercise"*, which must be ascertained in order to legitimize the applicant's access to the right to asylum, a concrete assessment of the individual situation of each asylum seeker is foreseen, in order to verify the actual, and not only formal, protection of certain rights in the country of origin of the person concerned. The democratic freedoms protected by the Italian Constitution, are all those fundamental freedoms guaranteed by the Italian constitutional order, including the rights protected by international standards under Article 2 of the Constitution. [101] In this sense, fundamental

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[98] Judgement of the United Sections of the Court of cassation, n.4674, 1996, available at the following link: https://web.camera.it/cartellecomuni/leg14/RapportoAttivitaCommissioni/commissioni/allegati/01/01_all_cass_1997_4674.pdf. M. Benvenuti, *La forma dell'acqua. Il diritto di asilo costituzionale tra attuazione, applicazione e attualità*, in "Questione Giustizia*"*, 2018, n.2. M. Benvenuti, *Asilo (diritto di) – II) Diritto costituzionale*, in "Enciclopedia giuridica, Roma, 2007, Aggiornamento XVI, pp.1-10. M. Benvenuti, Andata e ritorno per il diritto di asilo costituzionale, in "Diritto, Immigrazione, Cittadinanza", 2010, n.2.

[99] M. Giovannetti, and N. Zorzella, *IUS MIGRANDI. Trent'anni di politiche e legislazione sull'immigrazione in Italia, cit.,* p. 784.

[100] Paragraph 2 Chapter 1.

[101] Article 2 of the Italian Constitution, *"The Republic recognizes and guarantees the inviolable rights of man both as an individual and in the social groups where his personality is developed and requires the fulfilment of the binding duties of political,*

human rights are attributed to persons not as citizens but as human beings, which is why the legal status of a foreigner cannot be treated in a discriminatory manner with respect to that of an Italian citizen.
Of particular relevance is also the reference to the law, contained in article 10, paragraph 2, which, in contrast to what is stated by the minority doctrine, does not have the power to limit the right to asylum, but on the contrary, has the power to specify the requirements of the applicant, the procedural modalities and conditions, the rights and obligations of the applicant and/or holder of protection. Therefore, as specified above, since the constitutional provision relating to the right of asylum is preceptive it could be effectively implemented; on the contrary, by inserting the latter, the Constituent Assembly wanted to establish that the elements and conditions surrounding or deriving from the right of asylum had to be specified by legislative norms.
Two fundamental characteristics of the constitutional right to asylum are firstly that the person is materially guaranteed to apply for asylum; and secondly that the person is allowed to enter the territory of the Republic. Regarding the first characteristic, the presupposition of the right to asylum is the effective impediment to the exercise of democratic freedoms in one's own country, however, this situation according to the Italian Constitution does not need to be ascertained before allowing the person to apply for asylum. It follows from this, that the essence and procedural prerequisite for enjoying the right of asylum is to ensure that the persons concerned can express their willingness to apply for asylum and have access to the procedure for examining that application. With reference to the second characteristic, i.e. the right to enter the territory of the Republic, the latter is substantiated by the attribution of an obligation on the part of the authorities (in particular, border authorities) not to reject the foreigner and to admit him to the national territory, in order to guarantee the respect of the right to apply for asylum. [102]

However, the concept of the constitutional right to asylum as a perfect subjective right was contradicted by a 2005 judgment[103] of the Court of Cassation, which upheld the "functional" character of the right to asylum to the recognition of refugee status. The Court held that in the absence of an organic law on asylum, Article 10(3) of the Constitution could only be implemented through refugee law. Consequently, limiting the Article to guaranteeing the right to enter the territory of the State in order to complete the procedure for examining the application for political refugee status: the only type of protection recognized in the absence of an organic law on asylum. Subsequently, with the transposition of new Community instruments to protect the right to asylum and the introduction of "humanitarian protection", the pluralistic system of international protection in the Italian legal system was formed. This has allowed the constitutional provision provided for in Article 10 (3)

economic and social solidarity. The reference to inviolable human rights makes no distinction between citizens and non-citizens, thus extending the guarantee of protection of fundamental rights to foreigners as well".

[102]*M. Benvenuti, La forma dell'acqua. Il diritto di asilo costituzionale tra attuazione, applicazione e attualità, cit.* Judgement of the Court of Cassation, n. 25028/2005, 2005, available at the following link: https://www.meltingpot.org/app/uploads/2005/11/Cass_25028_25_11_2005_su_distinzione_fra_asilato_e_rifugiato.pdf.

[103] Judgement of the Court of Cassation, n. 25028/2005, 2005, *cit.*

to be effectively implemented. A confirmation of the above also comes from the judgement n. 10686 of 2012, issued by the Court of Cassation, which states that *"the right to asylum is fully implemented and regulated through the provision of the final situations provided for in the three institutions constituted by the status of refugee, subsidiary protection and the right to the issuance of a humanitarian permit [...]"* by the implementation of the European directives on the matter, and continues: *"[...] it follows that there is no longer any margin of residual direct application of the provision of art. 10, third paragraph, of the Italian Constitution, in a procedural or instrumental way, to protect those who are entitled to have their asylum applications examined in accordance with the protection rules in force"*.

The Geneva Convention on the Status of Refugees was adopted by Italy through the "legge di autorizzazione alla ratifica" no. 722 of 24 July 1954. The way the 1951 Convention was introduced into Italian law is peculiar, since until 1989 the above-mentioned "geographical reservation"[104] remained in force in Italy. The decision to recognize refugee status exclusively to individuals of European origin was based mainly on economic reasons; in fact, Italy was the only western country bordering on two geographical areas from which exoduses of refugees came, namely Eastern Europe and the Afro-Asian area. Therefore, with certain exceptions[105], for the entire period between the ratification of the Geneva Convention of 1951 and the adoption of Decree-Law 416 of 1989 (the so-called Martelli Law), the asylum procedure was limited to recognizing two types of refugees, the *de jure* and the *de facto*. The former were European asylum seekers to whom the Geneva Convention of 1951 was applied, while the latter were non-European citizens, to whom the 51 Convention did not apply on Italian territory because of the geographical reservation, but who could not be rejected under Article 33 of the Geneva Convention (principle of *non-refoulement*). To the latter the "mandati" procedure applied[106], which was the responsibility of the United Nations High Commissioner for Refugees in Italy.

This trend was reversed by the legislator in 1989, with the introduction of Decree-Law no. 416 of 30 December 1989, which was later converted into Law no. 39 of 28 February 1990 (the so-called Martelli Law)[107]. After the law implementing the 1951 Geneva Convention, the Martelli Law is the first domestic source of specific regulation of the right to asylum. Although, from the point of view of international protection, there were no changes, as the only measure regulated remained political refuge, important changes were introduced in terms of procedure. This law was about to establish *"urgent norms on political asylum, entry and stay of non-EU citizens and stateless persons already present in the territory of the State"*. The asylum procedure described by the Martelli Law is divided into two parts. In the first one, the aspects concerning the access of the asylum seeker to the Italian territory are included. In this sense, of particular relevance was the amendment introduced

[104] Paragraph 2 Chapter 1.

[105] N. Petrović, *Rifugiati, profughi, sfollati – Breve storia del diritto d'asilo in Italia, cit.*, pp. 25-26.

[106] N. Petrović, *Rifugiati, profughi, sfollati – Breve storia del diritto d'asilo in Italia, cit.*, pp. 28-30.

[107] Law n. 39/1990 available at the following link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1990-02-28;39

through Article 1 (1) concerning the abolition of the geographical[108] reservation. This meant that refugee status in Italy could also be invoked by persons belonging to non-European States. The second part of the law, on the other hand, dealt with establishing the modalities for submitting an asylum application, whose jurisdiction was entrusted to the Central Commission, followed by the possibility of access to the administrative judge.
The main problem with this legislation was the length of the asylum[109] procedure, which could sometimes last up to 24 months, during which time the applicant was granted minimum guarantees of protection and/or assistance.

In the 1990s, the Martelli Law had to deal with the crisis represented by the increase in migration flows and the lack of a legal framework for foreigners who did not meet the requirements to obtain refugee status, but who could not be removed from the national territory due to the principle of "*non-refoulement"*, provided for by the law in question. Faced with this emergency, the Italian Government, rather than adopting an organic law on asylum, decided to resort to issuing ad hoc laws or ministerial decrees, which granted a type of temporary "humanitarian status". In fact, it was with Law no. 40 of 1998 (the so-called Turco-Napolitano) that "temporary protection" [110]was introduced in case of exceptional events. In particular, the law provided for the possibility for the President of the Council of Ministers to introduce measures of temporary protection *"for significant humanitarian needs, on the occasion of conflicts, natural disasters or other events of particular gravity in countries not belonging to the European Union".*
In the same year, the legislative decree no. 286 of 25 July 1998 – "Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero"[111] (T.U) - was approved. It included both the Turco-Napolitano and Martelli laws. The most interesting provisions of the T.U were Article 5 (6)[112], and Article 19[113], concerning respectively the conditions of entry and stay in the territory and the prohibition of expulsion. The direct reference in Article 5 (6) to the constitutional and international obligations of the State and the coordinated interpretation of the above-mentioned articles gave rise to humanitarian protection.

At the end of the 1990s, the characteristics of migratory flows changed further, with an increase in arrivals from the Middle East and Africa. In addition, following the entry into force of the Dublin system, the number

[108] Given the new international climate of border abolition, exemplified by the Dublin Convention and the Schengen Convention, it was essential for Italy to abolish the geographical limitation in order to align itself with other European countries.

[109] That is, the period between the entry of the asylum seeker into the national territory and the final decision of the Commission.

[110] Law n. 40/1998 available at the following link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1998;40

[111] Legislative Decree n. 286/1998 – Consolidated text of the provisions governing immigration and the status of foreigners (T.U.), available at the following link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1998-07-25;286

[112] Article 5 (6) of the T.U, *"the residency permit cannot be revoked or refused when there are serious reasons of a humanitarian nature or resulting from the constitutional or international obligations of the State".*

[113] Article 19(1) of the T.U. prohibits expulsion to a State where a foreigner may be persecuted for reasons of race, sex, language, nationality, religion, political opinion, personal and social conditions.

of asylum applications submitted in the country increased, resulting in the overloading of the ordinary procedure and the collapse of the welfare system in place at the time. In this context, Law no. 189 of 30 July 2002, "Modification of the legislation on immigration and asylum" (the so-called Bossi-Fini law)[114], was introduced. Although it did not outline an organic reform of Article 10 (3) of the Constitution, this law made some relevant changes to the previous regulations. In particular, Article 32 integrated Article 1 of the Martelli Law, establishing a double asylum procedure: simplified for asylum seekers detained in the so-called Identification and Temporary Stay Centres; and ordinary for all other asylum seekers not detained.

This new regulatory framework, introduced by the Bossi-Fini law, established the Territorial Commissions based in the Prefectures, which replaced the Central Commission for the recognition of refugee status. Therefore, from now on, the Territorial Commissions were responsible for processing applications, while the National Commission, which had in turn replaced the Central Commission mentioned above, was only responsible for coordination and decision-making powers on revocation and termination of status.

However, the most incisive novelty was related to the "humanitarian protection", in fact, in Article 1(4) it was established that *"the Territorial Commissions, in examining the asylum application",* should *"evaluate, even without a request from a party, the existence of the conditions for the issuance of a humanitarian permit, in light of the parameters indicated in Article 5 (6) of the Legislative Decree no. 286 of 1998"*[115]. In two pronouncements of the United Sections of the Court of cassation[116], it was specified that, following the attribution to the Territorial Commissions of the competences related to the recognition of measures of international protection, it had to be *"excluded the ownership of any discretionary power of evaluation by [...] the administrative authority"*[117], thus bringing it under the jurisdiction of the ordinary courts. The humanitarian permit was issued by the Questor after a decision by the Territorial Commission; therefore, the Public Administration was entrusted with a function of mere assessment, attributing to the ordinary judge the possibility of recognizing the humanitarian residence permit, if it was not granted. Based on what has been said, the orders issued by the United Sections of 2008 [118]and 2009 are extremely important, indeed, it was specified that the humanitarian permit represented a subjective right and, as such, had the same nature as the right of asylum, i.e. a fundamental human right guaranteed by the Constitution.

[114] Law n.189/2002, available at the following link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2002;189

[115] P. Morozzo della Rocca, *Immigrazione, asilo e cittadinanza*, Santarcangelo di Romagna, Maggioli, 2021, p. 69

[116] Judgement of the United Sections of the Court of Cassation, n. 11535, 2009, available at the following link:https://www.altalex.com/documents/news/2009/06/08/cassazione-civile-ss-uu-ordinanza-19-05-2009-n-11535. Judgement of the United Sections of the Court of Cassation, n.19393, 2009 available at the following link: https://www.meltingpot.org/2009/09/ordinanza-della-corte-di-cassazione-sezioni-unite-civile-n-19393-del-9-settembre-2009/.

[117] P. Morozzo della Rocca, *Immigrazione, asilo e cittadinanza*, *cit.*, p.69

[118] Judgement of the United Sections of the Court of Cassation, n. 7933, 2008.

As anticipated, the regulatory framework introduced with the new European instruments and transposed in Italy through Legislative Decrees 18 of 2014 and 142 of 2015, has outlined a system that has substantially changed the national asylum framework.

Legislative Decree no. 85 of 7 April 2001 2003[119]transposed Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States. This legislative decree regulates in a precise and detailed manner the conditions and criteria for granting temporary protection, as also outlined in the directive itself. In fact, according to what emerges from article 3 of the decree under examination, the President of the Council of Ministers can adopt, pursuant to article 20 of the T.U, *"temporary protection measures to cope with the massive influx of displaced persons [...] for a maximum duration of one year, which can be extended, by decision of the Council, only once for an equal period and within the limits provided by the declaration of availability to receive displaced persons issued to the Council by the Italian Government"*.

It should be noted that this directive was not only the first to be transposed into Italian law, but also the one with the least impact on the Italian situation, since it was never applied.

The novelties concerning the qualification as refugee or beneficiary of international protection were introduced in the Italian legislation by the Legislative Decree 251 of 2007, later replaced by no. 18 of 21 February 2014[120], implementing the Directive 2011/95/EU. The aim of the decree in question is to update the Italian legislation with the changes introduced by the Qualification Directive, clarifying and better outlining the definitions that had previously caused problems and critical issues.

Conceerning the definition of "persecution", as already anticipated there was no general definition, therefore, in addition to the behaviors and/or acts and/or omissions exemplified by Article 7 of the European Directive, Legislative Decree no. 18 of 2014 introduced a new category of persecutory acts, namely, *"disproportionate or discriminatory prosecution or punishment resulting in serious violations of fundamental human rights as a consequence of refusal to perform military service for moral, religious, political or ethnic or national reasons"*. [121] The term "persecution for reasons of membership of a particular social group" was also difficult to interpret, as it was susceptible to more or less extensive interpretations depending on the criterion adopted. For this reason, Legislative Decree no. 18 of 2014 specified that *"for the purposes of determining membership of a particular social group or identifying the characteristics peculiar to that group, due account shall be*

[119] Legislative Decree no. 85/2003, available at the following link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003;85#:~:text=The%20present%20decree%20of%20the%20Council%20of%20the%20Union.

[120] Legislative Decree no. 18/2014, available at the following link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2014;18#:~:text=Il%20presente%20decreto%20stabilisce%20le,sul%20contenuto%20dello%20status%20riconosciuto

[121] AA.VV, *Il diritto di asilo tra accoglienza e esclusione*, Roma, edizioni dell'asino, 2015.

taken of gender related aspects, including gender identity"[122]and sexual orientation (introduced among the causes of persecution already by Legislative Decree no. 251 of 2007).

Concerning the causes of termination or exclusion of refugee or subsidiary protection status, two important changes have been introduced with respect to the previous legislative decree. The first one, defined in Art. 9 (1), letters e) and f), establishes that if the circumstances which determined a person's refugee status cease to exist, if the latter "*provides compelling reasons arising from previous persecution such as to refuse to avail him/herself of the protection of the country"*[123], the status granted does not cease to exist. While regarding subsidiary protection, a further cause of exclusion from the recognition of the status has been introduced in Art.16, namely *"if the applicant constitutes a danger to public order and safety, having been convicted with a final sentence for the crimes provided for in Art. 407(2) of the Code of Criminal Procedure".*[124]

In Chapter V of Legislative Decree no. 18 of 2014, the rights and obligations arising from the acquisition of refugee status or beneficiary of international protection are specified. In this sense, the content of the two types of protection is almost completely equalized, with a greater emphasis on situations of vulnerability. In particular, of fundamental importance are the rules on family reunification, Article 4 (22), and on the duration of the residence permit, Article 23, in which the two statuses are completely equalized. By increasing the duration of subsidiary protection to five years, the national legislator moves in a more favorable direction compared to the European directive.

The same has also happened concerning the right of access to employment and the right to social and health care, for which the two statuses had already been provided for in Legislative Decree no. 251 of 2007. However, as far as health care is concerned, Decree no. 18 of 2014 introduces more favorable rules compared to the European discipline, equating the two statuses with each other and also with the Italian citizen. In this sense, in paragraph 1 bis of Article 27, the programming of assistance, rehabilitation and treatment interventions for mental disorders has been provided for the most vulnerable people.

On the other hand, the interventions of Legislative Decree no. 18 of 2014 on the integration and accommodation of beneficiaries of subsidiary protection are not adequate, as no precise measures and tools have been provided to better address the situation.

Legislative Decree no. 142 of 18 August 2015[125] in transposition of Directive 2013/33/EU on common procedures for granting or withdrawing refugee status and international protection, amends substantially the Legislative Decree no. 25 of 2008.

[122] AA.VV, *Il diritto di asilo tra accoglienza e esclusione, cit.*

[123] AA.VV, *Il diritto di asilo tra accoglienza e esclusione, cit.*

[124] AA.VV, *Il diritto di asilo tra accoglienza e esclusione, cit.*

[125] Legislative Decree n. 142/2015, available at the following link: https://www.gazzettaufficiale.it/eli/id/2015/09/15/15G00158/sg

The novelties introduced on the matter of the procedures to be adopted for the examination of the application for international protection concern first the functions attributed to the National Commission; in fact, art. 5 of the Legislative Decree no. 25 of 2008 has been partially amended with the introduction of paragraphs 1 bis and 1 ter[126]. The first one, in particular, provides that in addition to the functions of coordination of the Territorial Commissions and decision-making on the revocation or termination of the international protection status, the National Commission has also the possibility to periodically identify a list of countries where the conditions to grant subsidiary protection to the applicant exist, in order to accelerate the process of analysis of the application.
Article 10 of the Legislative Decree no. 25 of 2008, supplemented by Legislative Decree no. 142 of 2015, establishes the guarantees in favor of the asylum seeker, which also include the possibility to use free information services both during the examination of the application and during the withdrawal of protection. In addition, the new Article 10 bis establishes the right to receive adequate information on the asylum procedure, rights and duties of applicants, directly at border crossing points.

Articles 12 to 14 of Legislative Decree no.142 of 2015 deal with regulating the way in which personal interviews of asylum seekers are conducted. In particular, Article 12 (2) bis introduces a further ground for omitting the interview[127], namely, if the asylum seeker comes from one of the countries indicated by the National Commission, pursuant to Article 5 (1) bis of Legislative Decree no. 25 of 2008, and therefore it is considered plausible that the latter meets the requirements for obtaining subsidiary protection. However, in this case, the applicant has three days to request to be heard in order to obtain refugee status. Article 13 deals with the right to a full presentation of the elements on which the application is based, while Article 14 concerns the "verbalizzazione" of the interview, which must be confirmed and signed by the applicant.

As regards the procedures for the examination of the asylum application, besides the priority procedure provided for by Article 28 of the Legislative Decree no. 25 of 2008 and almost entirely confirmed[128] by the subsequent Legislative Decree, there is the accelerated procedure. The latter, regulated by Article 28 bis of the Legislative Decree no. 25 of 2008, provides for cases in which it is possible to analyze an asylum application in a shorter time than the ordinary procedure, while ensuring the respect of the procedural guarantees provided for. The accelerated procedure applies to requests submitted by applicants detained in Identification and Expulsion Centres (CIE); to manifestly unfounded applications; to repeated applications submitted by an

[126] AA.VV, *Il diritto di asilo tra accoglienza e esclusione, cit.* It argues that *"provides for the National Commission to adopt a code of conduct for the members of the Territorial Commissions, interpreters and support staff".*

[127] In addition to those already provided for, i.e. when the Commission already has sufficient elements to accept the application for asylum; or in cases of certified impossibility or inability of the applicant to be interviewed.

[128] With the new legislative decree, more attention is paid to minors by including them in the priority demand cases.

applicant intercepted for evading border controls and/or in a condition of residence defined as irregular; to applications presumed to be aimed at delaying or preventing the execution of an expulsion measure.
However, this Article states that, in order to ensure that the individual examination of asylum applications is respected, it is possible to exceed the time limits of the accelerated procedure.

The ordinary procedure is instead governed by Articles 26 and 27 of the Legislative Decree no.25 of 2008 and provides that the applicant expresses his/her willingness to apply for asylum, generally within eight days of arrival in Italy, however, there is no actual time limit. The application is submitted to the immigration office of the competent Questura, where the applicant's fingerprints are taken, and photo identification is carried out. During the registration phase, the Dublin procedure is also applied, through which the Police Headquarters contacts the Dublin Unit of the Ministry of the Interior to verify whether Italy is the competent country to examine the application. At the end of this procedure, the application is finalized and sent to the Territorial Commissions, which are competent for the personal interview with the applicant. Pursuant to article 27 of legislative decree no. 25 of 2008, the Commission must conduct the interview with the interested party within thirty days of receiving the application, while it is obliged to make a decision on the merits within the following 3 working days. However, the latter may be extended to six months if the Commission needs to obtain more information and documents, up to a maximum period of nine months in exceptional[129] circumstances.

Finally, concerning the judicial protection of the applicant, Article 35 of Legislative Decree no. 25 of 2008 provides for the possibility of appeal by the interested party, before the ordinary judge, both against an unfavorable decision issued by the Territorial Commission, and against the decision on revocation or termination of protection drafted by the National Commission. The modalities for challenging the decision are set out within Article 27 of Legislative Decree no. 142 of 2015. [130] The appeal must be lodged by the applicant within 30 days from the receipt of the notification of rejection of the application for asylum (in cases of accelerated procedures the deadline is set at 15 days). The examination of the appeal may last up to six months in the first instance and in the subsequent levels of judgement, however, during the entire judicial proceedings the applicant is allowed to remain on Italian territory (so-called suspensive effect of the appeal), with some exceptions. [131]

On the other hand, concerning the legislation on reception, the Legislative Decree no. 142 of 2015[132] by completely repealing Legislative Decree 140/2005, transposes Directive 2013/33/EU, laying down rules on

[129] Associazione per gli Studi Giuridici sull'Immigrazione, *AIDA-Country report: Italy*, 2021, p.24.

[130] AA.VV, *Il diritto di asilo tra accoglienza e esclusione, cit.*

[131] AA.VV, *Il diritto di asilo tra accoglienza e esclusione, cit.*

[132] Legislative Decree n. 142/2015 available at the following link: https://www.gazzettaufficiale.it/eli/id/2015/09/15/15G00158/sg

the reception of asylum seekers. The main changes introduced are related to the organization of the reception system and to the detention measures for international protection applicants.
The former is governed by Article 8 of the decree mentioned before, and establishes a reception system, divided into different types of reception centers responding to very first, first and second reception needs. By virtue of improving the *governance of* the national reception system, the article also supports *"loyal cooperation between the levels of government concerned, according to the forms of national and regional coordination"*. [133] In addition, according to Article 5 of this decree, applicants without sufficient resources to support themselves are entitled to a residence permit, which guarantees their reception[134] in the structures present on the territory. The permit can be extended up to six months and renewable until the conclusion of the asylum procedure, including a possible appeal.

On the other hand, with reference to the issue concerning the detention of asylum seekers, Article 6 of Legislative Decree no. 142 of 2015 reiterates the general principle that an applicant for international protection cannot be detained for the sole purpose of examining his/her application for asylum; however, again in the said article, exceptions[135] to this principle are provided for, through which the provision of detention of the applicant for a maximum duration of twelve months[136] is granted, after an assessment of the individual cases, and by a written notification.
It should be emphasized that the restrictive measure mentioned here can only be maintained as long as the reasons for it exist, which is why it is subject to periodic monitoring.

The perception of an increase in the flows of foreign citizens on Italian territory has led in recent years to the adoption of an approach aimed at compressing the framework of rights related to international protection. The instruments that will be analyzed below are Decree-Law no. 113 of 2018 (so-called Immigration and Public Security Decree) and Decree-Law no. 130 of 2020, in the points that mainly affected the right to asylum.

The main novelty of the Immigration and Public Security Decree was the abolition of the permit for humanitarian protection (provided for in Article 5 (6) of the T.U), which, as already explained above[137], could be issued if there were serious humanitarian reasons or resulting from constitutional or international obligations of the Italian State, and had a duration of two years, with the possibility of renewal. The main characteristic of Article 5 (6) of the T.U was that it was an open rule which left the interpreter with the

[133] N. Petrović, *Rifugiati, profughi, sfollati – Breve storia del diritto d'asilo in Italia, cit.,* p. 138-140.

[134] Reception measures may be revoked pursuant to Article 23 of the Legislative Decree n. 142/2015.

[135] AA.VV, *Il diritto di asilo tra accoglienza e esclusione, cit.*

[136] It is different for persons for whom detention was already in progress at the time the application was submitted.

[137] Paragraph 3 above Chapter 1.

possibility of including it, in all the deserving concrete cases, if the other types of protection were excluded, according to Article 32 (3) of the Legislative Decree no. 25 of 2008.
Despite, the non-negligible importance of this instrument in the Italian legal system, the Government in 2018 proceeded to eliminate it, claiming the loss of its "complementary and exceptional" nature, and replaced it with the identification of "special temporary residence permits for humanitarian needs".

Subsequently, with the adoption of Law Decree no. 130 of 2020 and the amendments implemented to the previous decree, there are eight possible positive outcomes of the ordinary asylum procedure. In addition to refugee status and subsidiary protection, the aforementioned law has "partially" reinstated the safeguard clause provided for in Article 5 (6) of the T.U. The legislator has thus extended the terms for granting "special protection" permits to all persons who, according to the constitutional or international obligations of the Italian State, cannot be expelled or rejected[138]. These permits are granted for a period of two years, with the possibility of renewal.
In addition, the following permits have been granted: residence permits for medical treatment, according to article 32 (1) of legislative decree no. 25 of 2008 as modified by legislative decree no. 130 of 2020, of a duration not exceeding one year, which may be renewed; residence permits for assistance to minors according to article 32 (2) of legislative decree no. 25 of 2008 as amended by legislative decree no. 130 of 2020; residence permits for "special cases", i.e. victims of domestic violence (regulated by Article 18 bis of the T.U); victims of violence or serious exploitation (so-called social protection regulated by Article 18 of the T.U); natural disasters (governed by Article 20 bis of the TU); victims of labour exploitation (covered by Article 22, (1, 2-quater) of the TU) and acts of particular civil value (governed by Article 42 bis of the T.U).

Relevant for this discussion was the introduction by Law Decree 113 of 2018 of the "border procedure" which is applicable in border and transit areas. The latter has not been substantially amended by the subsequent decree. The border procedure is applied when the person applies directly in transit zones or after being stopped

[138]Article 1 (1) letter (e) (1) of Decree-Law n. 130/2020 states, *"Refoulement or expulsion or extradition of a person to a State shall not be permitted where there are substantial grounds for believing that he or she would be at risk of being subjected to torture or inhuman or degrading treatment or where the obligations set out in Article 5, paragraph 6, are fulfilled. In the assessment of these grounds, the existence of systematic and gross violations of human rights in that State shall also be taken into account. Moreover, a person may not be returned or expelled to a State if there are substantial grounds for believing that removal from the national territory would result in a violation of the right to respect for his private and family life, unless it is necessary on grounds of national security, public order and safety or the protection of health in accordance with the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, made effective by Law no. 722 of 24 July 1954, and the Charter of Fundamental Rights of the European Union. For the purposes of assessing the risk of violation referred to in the preceding sentence, account shall be taken of the nature and effectiveness of the family ties of the person concerned, his effective social integration in Italy, the duration of his stay in the national territory and the existence of family, cultural or social ties with his country of origin".*

for trying to evade controls, with the peculiarity that the entire examination of the asylum application takes place at the border or transit zone. However, although the application for asylum is submitted to the border police, the latter has no power to decide on the merits of the application. Upon receipt of the application, the Questura must immediately forward the necessary documentation to the Territorial Commission, which must conduct the interview within seven days after receiving the documentation, while the decision on the asylum application must be made within the following two days. Due to the speed connected to this procedure, it has been provided that the application submitted at the border must be formalized by the Questura at the moment of identification of the person who entered illegally. Article 28 bis (6) of Legislative Decree no. 25 of 2008, as amended by Law Decree no. 130 of 2020, excludes the application of the border procedure to unaccompanied minors (MSNA) and persons with special vulnerabilities, expressly provided for by Article 17 of Legislative Decree no. 142 of 2015 (Reception Conditions Decree). It is interesting here to underline how neither in the Immigration and Public Security Decree nor in the subsequent amendment made by the Law Decree no. 130 of 2020, has been included what was provided for by the article 43 of the Asylum Procedures Directive, i.e., the obligation of access to the territory, if the decision on the asylum application is not adopted within four weeks. In relation to the above, the decree under examination provides for an extension of the border procedure up to a maximum of 18 months, within which the applicant must remain at the border and/or transit zone.
As regards the individual interview and the procedure for contesting the application, the same rules apply as for the ordinary[139] procedure.

According to Article 28 bis, which has been completely modified by Decree-Law no. 130 of 2020, two different accelerated procedures have been introduced, of five and nine days respectively, from the reception of the application.

A further novelty introduced into the Italian legal system by the Decree-Law no. 113 of 2018 relates to the concept of "safe country of origin", which is already provided for in European legislation. According to the provisions of the decree in question, a third country can be considered "safe" if, according to the requirements established in the Annex I of Directive 2011/32[140]. Following the assessment of the safety of a country[141], the Ministry of Foreign Affairs, together with the National Asylum Commission, draws up a list of safe countries. The procedural consequences on the asylum application are particularly relevant. First of all, the applicant coming from a "safe country of origin" is subject to the accelerated procedure of nine days[142], according to Article 28 bis of the Legislative Decree no. 25 of 2008 as amended by the Legislative Decree no. 130 of 2020.

[139] Paragraph 3 above Chapter 1.

[140] paragraph 2.1 Chapter 1.

[141] Associazione per gli Studi Giuridici sull'Immigrazione, *AIDA-Country report: Italy, cit.,* pp. 91-93.

[142] Associazione per gli Studi Giuridici sull'Immigrazione, *AIDA-Country report: Italy, cit.,* pp.76-77.

Secondly, the inclusion of a country in the list of "safe countries of origin" gives rise to a presumption of absolute safety, which can only be overcome by the provision of contrary evidence presented by the asylum seeker. Notwithstanding this, the possible rejection of the application can be motivated by stating that the request is "manifestly unfounded".
In this regard, the Court of Cassation, in its judgment no.19252 of 2020, stated that the fact that the applicant comes from a country included in the list of "safe countries of origin" does not prevent him from claiming that he comes from an area of the country affected by *"phenomena of violence and generalized insecurity which, even if territorially circumscribed, may be relevant for the purposes of granting international or humanitarian protection, nor does it exclude the duty of the judge, in the presence of such a complaint, to assess the danger of the area in question".*[143]

In relation to judicial protection, what affirmed above remains in force [144]. A novelty introduced by Law Decree no. 113 of 2018 relates to the non-suspensive effect of the appeal with regard to cases of persons coming from "safe countries of origin". However, the applicant has the right to ask the ordinary judge to suspend the return order, who must issue a decision within five days, before which the applicant cannot be returned. Finally, the court may dismiss the appeal or grant protection within a maximum period of four months.

Although the right to the guarantees provided for by the Reception Conditions Decree should be recognized from the first moment when the persons concerned apply for asylum, the practice in recent years shows that access to reception centers only takes place after the application has been registered, thus penalizing asylum seekers. Clearly, the Covid-19 pandemic has had an impact on this situation, which has lengthened the time of access to reception, requiring a 14-day stay in public facilities (so-called quarantine).
With reference, instead, to the situations of revocation of reception, these remain the same as those provided for in Article 23 (1) of Legislative Decree no. 142 of 2015[145], however, attributable to an attitude adopted in recent years is the increasing frequency with which Prefecture revoke reception conditions.

Finally, in order to close the picture of the innovations introduced in recent years in the field of asylum, it is appropriate to open a short parenthesis on detention measures. Although, the basic principle laid down in the Reception[146] Conditions Decree remains in force, the Law Decree no. 113 of 2018 introduced new provisions that contradict the principle expressed above, such as the detention of asylum seekers in facilities set up in *hotspots*; in first reception centres; or in centres for the permanence of return (CPR), in order to ascertain their

[143] Associazione per gli Studi Giuridici sull'Immigrazione, *AIDA-Country report: Italy, cit.*

[144] Paragraph 3 Chapter 1.

[145] Associazione per gli Studi Giuridici sull'Immigrazione, *AIDA-Country report: Italy, cit.,* pp. 109-110.

[146] Paragraph 3 Chapter 1.

identity or nationality. The subsequent Law Decree no. 130 of 2020 did not modify this provision, but merely reduced the detention time provided for. [147]

1.4.Slovenian asylum legislation.

Slovenian legislation on migration originated after the independence of the Socialist Federal Republic of Yugoslavia (SFRY) in 1991, in fact, the definition of citizen and the status of foreigner are part of the so-called "independence legislation". The latter consisted of four acts: the Citizenship of the Republic of Slovenia Act, the Aliens Act (also called the Foreigners Act), the Passport of the Citizens of the Republic of Slovenia Act and the National Border Control Act. The aim of these acts was to define and regulate the status of citizens of the Socialist Federal Republic of Slovenia and all those who, coming from other SFRY, *de facto* resided in Slovenia. In particular, they dealt respectively with: regulating the conditions for acquiring and losing citizenship; the conditions of entry and residence of foreigners in Slovenia; the types of passports and the conditions for acquiring them; the established borders of the new state. However, with the exception of the Citizenship of the Republic of Slovenia Act of 1991, which, although it has undergone several amendments, is still valid, all the other above-mentioned laws have been replaced in the process of negotiating access to the European Union in the subsequent transposition of Community legislation. In fact, the Aliens Act was replaced in 1999 and then in 2011, while the Passport of the Citizens of the Republic of Slovenia Act in 2000 and then in 2007 and the National Border Control Act first in 2002 and then in 2007.

To date, the legislation regulating the right to asylum is based on the Constitution of the Republic of Slovenia adopted in 1991, which in Chapter II contains the provisions for the protection of human rights and the right to asylum. Of vital importance is article 48, which states *"Within the limits of the law, the right of asylum shall be recognized for foreign nationals and stateless persons who are subject to persecution for their commitment to human rights and fundamental freedoms"*. In fact, here the Constitution defines a right of asylum that is narrower than that recognized by the Italian Constitution, as it is attributable to all those persons persecuted for their commitment to human rights and fundamental freedoms. Equally important are Articles 18 and 13 of the Constitution, the first of which enshrines the prohibition of torture and inhuman and degrading treatment, exemplifying the prohibition of *refoulement* within the Slovene Constitution; while the second puts foreign citizens on an equal footing with Slovenian citizens, as regards the recognition of the rights guaranteed by the Constitution and other laws in force in the country, with the exception of those rights reserved only for citizens of the Republic of Slovenia. Although the Constitution of the Republic of Slovenia provides the basis for the development of asylum legislation, as of today asylum legislation is regulated by the International Protection Act of 2016 and the Temporary Protection of Displaced Persons Act of 2005. Before analyzing the most recent legislation, it is worth mentioning some historical background on asylum.

[147] Associazione per gli Studi Giuridici sull'Immigrazione, *AIDA-Country report: Italy, cit.,* p. 140.

For more than ten years, since the country's independence, Slovenia had no comprehensive asylum legislation. The Republic of Slovenia had transposed the 1951 Geneva Convention on the Status of Refugees through the Aliens Act of 1991[148]. However, the articles concerned, i.e., Articles 34 to 40, provided a narrow definition of "refugee" and the minimum conditions for obtaining the status. Article 34 stated: *"An alien who has left the country of which he is a citizen or in which he has settled permanently as a stateless person in order to avoid persecution due to his political beliefs, cultural or scientific activities or ethnic, racial or religious affiliation may recognize refugee status"*, without providing further guidance, giving a partial definition of what was established in the 51' Convention. In this same period, following the country's independence, a new institutional system was developed alongside the new legislation. On the basis of the Aliens Act, the Transit Centre for Aliens was established in the country's capital, Ljubljana. This centre had different functions, depending on the title of the persons hosted: it carried out reception and services for asylum seekers, but it was also a detention centre for foreigners and foreign minors waiting to be removed from Slovenia and/or to be rejected to their country of origin. The common feature of all types of people detained in the centre was that they could not move freely within the territory, which made the building a detention centre.

Only in 1999, with the introduction of the Asylum Act[149], Slovenia adopted a comprehensive instrument of asylum legislation, which at that time was still limited to refugee status, regulating the conditions for acquiring refugee status, the Refugee Status Determination Procedure (RSDP), the rights and obligations of the refugee status holder and the reception conditions. In the year following the adoption of the Asylum Act, the Transit Centre for Aliens was divided into two distinct areas one called Centre for Elimination of Aliens (hereinafter Aliens Centre) located in Postojna since 2002, where most of the asylum seekers were and still are detained; while the other one called Asylum Home with primary location in Ljubljana, but then since 2004 on the order of the Slovenian Ministry of Interior, following an increase in the flow of asylum seekers, several units of the Asylum Centre were decentralized throughout the country. The role of the Asylum Centre is to provide reception services to asylum seekers.

Initially, the Asylum Act provided, in addition to the protection offered by refugee status under the Geneva Convention of 51', another type of protection, known as "humanitarian asylum", for all those who could not be granted refugee status but who, if they were returned to their country of origin, might face serious threats to their safety and physical integrity under the article 3 of the ECHR.
In 2001, the Asylum Act was supplemented by a new form of protection, called "special form of protection" and regulated in Chapter VI of the Act. According to Article 61, this type of protection could be granted to foreigners *"whose asylum application has been rejected by a final decision"*, granting them the possibility *"to*

[148] Aliens Act 1991, available at: https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/1991-01-0009?sop=1991-01-0009

[149] Asylum Act (Official Consolidated Text) amended 2006, available at the following link: https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2006-01-2179?sop=2006-01-2179

stay temporarily in the Republic of Slovenia", for a maximum duration of six months, if the removal from the country could expose the applicant to the risk of torture or inhuman and degrading treatment; or in cases where the conditions exist in the Republic of Slovenia to protect the foreigner, by virtue of other regulations or international agreements. [150]

Therefore, even before the country joined the European Union and adapted to the forms of protection provided by EU law, Slovenia had already provided three forms of protection, to which the "Temporary protection status" should be added. This type of protection arose from the need to cope with the large number of flows from the former Yugoslavia in 1992. Initially provided for by the UNHCR, it was only in 1997 that it was recognized by law, through the adoption of the "Temporary Asylum Act". On the basis of the latter, *"the Government of Slovenia provided temporary protection to persons arriving from certain foreign countries where the situation of warfare, occupation and mass human rights violation occurred"*. With the end of the war in Croatia and Bosnia and Herzegovina, most of the "temporary refugees" returned to their countries of origin, while the remaining, following an amendment to the Temporary Asylum Act in 2002, were able to obtain a permanent residence permit in the Republic of Slovenia, contrary to the provisions of Article 39 of the Aliens Act of 2007. [151] With Slovenia's entry into the European Union, the Temporary Asylum Act was replaced in 2005 by the Temporary Protection of Displaced Persons Act, as a result of the transposition of Directive 2001/55/EC, which, however, has never yet been activated.

The Republic of Slovenia became a member of the European Union on 1 May 2004 and part of the Schengen area in 2007, resulting in the abolition of the internal border with Italy and a strengthening of the border with Croatia. This step marked a turning point in the creation of an organic asylum legislation, as it was facilitated by the harmonization with the European *acquis*. During this period the Asylum Act was amended several times, in 2006 the "special form of protection" and "humanitarian asylum" were removed and replaced by "subsidiary protection", while in 2007 the International Protection Act (IPA), through the reception of European directives, respectively Directive 2004/83/EC; 2005/85/EC and 2003/9/EC, took the place of the Asylum Act. Finally, in 2016 the International Protection Act[152] was itself amended in order to transpose Directive 2013/32/EU (Recast Procedure Directive) and Directive 2013/33/EU (Recast Reception Conditions Directive).

[150] Article 62 of the Asylum Act 2001.

[151] Aliens Act 2007, available at the following link: https://www.legislationline.org/download/id/2764/file/Slovenian%20Law%20on%20Aliens,%20last%20amended%20in%202007.en.pdf

[152] International Protection Act 2016, available at the following link. http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7103

As outlined above, the International Protection Act is the document that adopted for asylum seekers and international protection applicants, regulating the conditions for obtaining protection and the procedures necessary to acquire it. It then establishes the rights and duties of the asylum seeker and the holder of protection, and finally, in the last section, regulates the conditions for revocation or termination of the status.

According to the Slovenian legislation, a person is considered an asylum seeker *"when a complete asylum application is lodged with the Ministry responsible for the Interior. This means that when a person first expresses the intention to lodge an asylum application, which usually (but not exclusively) happens in the jurisdiction of the border police, the person is not yet considered an asylum seeker. [...] Starting at the moment of lodging a complete asylum application, a person is considered to be an asylum seeker".* [153]

The types of protection recognized in Slovenia are the refugee status, subsidiary protection and temporary protection, and concerning all of them Slovenia has fully complied with the provisions of the 1951 Geneva Convention and the 1967 Additional Protocol, as well as with European directives. [154]It is important to underline that there is a further and peculiar form of protection, regulated by the Aliens Act, called "permission to remain". This instrument is guaranteed, in compliance with the principle of "*non-refoulement",* to foreigners who were unable to obtain any kind of status in Slovenia, but who could not be removed from the country if this could have led to a serious risk to their physical integrity. It should be specified here that this permit may [155]also be granted to persons who are victims of trafficking; to persons who cannot be deported due to serious health reasons; to persons whose country of origin has been affected by natural disasters that do not allow their return. The "permission to remain" is a type of toleration status, lasting six months, renewable as long as the conditions that led to its recognition are met. However, the latter does not give rise to a permit to reside in the country, since when the conditions that kept it alive cease to exist, the foreigner is obliged to leave the country on the basis of Slovenian law. The guarantees provided by the "permission to remain" are minimal; in fact, the foreigner is entitled to emergency health care and "basic care", i.e. social financial assistance.

As already mentioned, the procedures for the recognition of various types of protection under Slovenian law are regulated by the International Protection Act, which transposed the Procedures Directive. There are five different types of asylum procedures, however, the ones analyzed here will be three: the regular procedure; the accelerated procedure with manifestly unfunded applications; and the procedure at the border, airport and ports. It should be noted that there is no type of asylum procedure in Slovenia that allows the police to prevent and/or refuse the right of a person from a third country to exercise his or her right to apply for asylum, as this is not one of the powers attributed to the police by law.

[153] N. Kogovsek Salamon, *Migration Law in Slovenia*, the Netherlands, Kluwer Law International B.V, 2018, p.103.

[154] Paragraphs 2 and 2.1 Chapter 1.

[155] N. Kogovsek Salamon, *Migration Law in Slovenia, cit.,* p. 180.

Before going into the procedures listed here, it is worth mentioning some amendments to the Aliens Act in recent times. The amendments to the Aliens Act were adopted at the end of March 2021 and provide for the possibility for the border police to decide whether or not to allow a person to exercise his or her right to asylum, right after the person has expressed a willingness to ask for protection. Furthermore, if in the neighboring state there are no deficiencies in the asylum system and/or it is assessed that the person concerned could not be exposed to inhuman and degrading treatment, it is possible for the police to deport him/her to that state. In order for this type of practice to be implemented, the Ministry of the Interior has the task of regularly monitoring the situation of migration flows in Slovenia and if it considers that there is a c.d "complex crisis in the field of migration" in relation to a *"security threat level for the protection of fundamental constitutional social values, especially regarding the effective functioning of the legal and welfare state, the protection of public order and peace, the efficient functioning of the economy, the protection of health and the life of the population, and the level of security"*[156], it can submit a proposal to the National Assembly for the activation of a state of emergency under Articles 10 and 10a[157] of the Aliens Act, which provide for the closure of the border for a period of six months and the consequent limitation of access to the asylum procedure. The limitation of rights, as presented here, could be justified by the state's state of emergency under Article 92 of the Constitution[158].

In Slovenia, the procedure for submitting an asylum application follows two stages: the first stage requires the individual to express the will to apply for asylum to any state or local authority, which has the duty to notify the police, so that the latter can carry out the so-called preliminary procedure. It is important that the application for asylum is submitted in the shortest possible time, as according to Article 53(7) of the IPA, a negative assessment of this requirement could lead firstly to access to the accelerated procedure for assessing the application and secondly to a ground for rejecting the application as "manifestly unfounded".
Fundamental to the present discussion is that under Article 36(1) of the IPA, once the person concerned has expressed a wish to apply for asylum, he or she cannot be removed from the country.
The preliminary procedure marks the end of the first stage of the process of examining an asylum application. This procedure is the responsibility of the police, who must establish the identity and travel route of the asylum seeker and provide all necessary information about the asylum procedure in a language that the person concerned can understand.
The second phase of the examination of the asylum application begins once the preliminary procedure has been completed, after which the applicant is transferred to the Asylum Home in order to register the

[156] PIC, *AIDA-Country report: Slovenia*, 2021, available at the following link: https://asylumineurope.org/reports/country/slovenia/, pp.18-19.

[157] Aliens Act 2011, Articles 10 and 10 (a), available at the following link: http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5761

[158] Constitution of the Republic of Slovenia, available at the following link: https://www.varuh-rs.si/en/about-us/legal-framework/the-constitution-of-the-republic-of-slovenia/

application. The absence of a time limit on the lodging of the asylum application has led to considerable problems, since it is only after it has been formalized that the individual is recognized as an asylum seeker and therefore entitled to receive the guarantees[159] that this title entails, whereas, on the contrary, if the application is not lodged, the person concerned can be detained, waiting to be able to complete their asylum application. In addition, "potential" asylum seekers are asked to sign a document in which they accept to be recognized and treated as foreigners, in case they decide to leave the Asylum Home before the finalization of their application. This implies the possibility of detention at the Aliens Centre, and removal under the bilateral agreements signed by Slovenia or the Aliens Act, even though there is no legal basis for this practice within the IPA. Obviously, with the Covid-19 pandemic, quarantine measures were envisaged in Slovenia as well as in Italy, which had the effect of further lengthening the waiting time for the application for protection.
In this phase of the examination of the application, photo identification and fingerprinting of the person concerned is carried out, in order to assess a possible application of the Dublin Regulation. At the end of this procedure, the person concerned can finally sign the report and thus finalize his/her application, obtaining recognition as an asylum seeker in Slovenia.
According to Article 37 of the International Protection Act, before being able to take a decision on an asylum application, officers of the International Protection Procedures Division, part of the Migration Directorate of the Ministry of the Interior, are obliged to conduct a first in-merit interview with the applicant within one month.[160] This is followed by a second interview with a decision-maker before a final decision is made. During both interviews, as well as during the application and registration phase, the person concerned has the right to be assisted by an interpreter.

According to the provisions of the ordinary asylum procedure, the authority responsible for examining and deciding on the merits of asylum applications has the possibility to extend the time limit for taking a decision by six months, for no more than nine months in certain situations provided for by law[161], however, a serious deficiency of the Slovene legislation is that it does not provide for consequences for non-compliance with the time limit.

It is appropriate to mention also two other procedures that will not be analyzed here, namely: the fast-track procedure regulated by article 48 (1) of the IPA; and the Admissibility procedure regulated instead by article 51 of the IPA. Regarding the first one, it must be specified that it is applicable only in cases of vulnerable persons with special needs or persons detained in the Aliens Centre. In addition to these procedures, there are also the accelerated and border procedures.

[159] Such as, for example, freedom of movement within the territory.

[160] Article 38 of the International Protection Act 2016, for cases in which the interview may be omitted.

[161] Section 47(3) and (4) of the International Protection Act 2016.

The border procedure is a novelty in the Slovenian asylum system; in fact, it was included with the 2016 amendment to the IPA. Although it is provided for in Article 43 of the IPA, in fact it has never been implemented due to the lack of infrastructure in which to complete the application examination process. As pointed out in the International Protection Act, this procedure had been included in the draft legislation, in case of important migratory flows; in fact, the text provides that in such circumstances the competent authority can take a decision within a maximum of 14 days. However, this procedure is not used, referring directly to the ordinary procedure.

The accelerated procedure, on the other hand, is provided for under Article 49(1), if, on the basis of the grounds set out in Article 52 of the IPA, an application can be considered "manifestly unfounded", and if it is further established that the individual does not qualify for any other kind of protection. On these occasions, the application may be examined under the accelerated procedure, which implies reduced examination time compared to the ordinary procedure.
It must be underlined that among the possibilities of access to the accelerated procedure there is also the one of the applicants coming from a "safe country of origin". This concept is provided for by article 61 of the IPA and does not differ in substance from what is provided for by the Italian[162] and European legislation; the Slovenian law provides that a country can be defined as a "safe country of origin" by the Slovenian Government, following a periodical evaluation of the conditions of that State, carried out by the Ministry of Interior. This can lead to an accelerated asylum application procedure, as "manifestly unfounded", and as underlined by the Supreme Court, it is then a responsibility of the applicant to prove that his country of origin is not to be considered as safe.

In addition to this concept, the concepts of "safe third country" and "first country of asylum" should also be cited, which are considered as possible grounds for inadmissibility of the asylum application under Article 51 of the IPA. They both follow the rules of the Recast Procedures Directive 2011/32.
The "safe third country" it is governed by article 53 of the IPA, and the criteria by which the Ministry can establish the safety of such a State are provided for in Article 54 of the IPA, however, it is not specified how the "sufficient connection" can be established in order to declare that the applicant had a real opportunity to apply for asylum in that State. According to the Supreme Court, *"it is not necessary for direct or indirect contact to have taken place between the applicant and the authorities or institutions within the concerned third country; it is enough if the circumstances of the individual case reveal that the applicant had objective and subjective possibilities to establish contact with the authorities of the safe third country"*.
Interesting to mention in this discussion is that following Croatia's accession to the European Union in 2013, Slovenia declared it a "safe third country".

[162] Paragraphs 2.1 and 3 Chapter 1.

On the other hand, the "First Country of Asylum" refers to the first country in which the applicant has obtained a protection status, which is still valid and able to offer sufficient protection to the applicant.
Even in the latter two cases described, the burden of proof is on the asylum seeker, if the Country is not considered by him to be effectively safe.

In Slovenia, there is no possibility to appeal against decisions on an asylum application, however, the applicant is given the possibility to initiate an administrative dispute, i.e. a "judicial review". The latter can be initiated by filing a case against the Slovenian Ministry of Interior, either in the case of an ordinary procedure or an accelerated procedure, what changes is the timeframe to be respected. In the ordinary procedure, a judicial review of the decision must be requested within 15 days, whereas all other procedures have a time limit of eight days, except for detention decisions, where the limit is set at three days. The "judicial review" has a suspensive effect only in the cases expressly provided for in Article 70 of the IPA, in fact, on these occasions, it is possible for the person concerned to request to prevent the execution of a return or removal.

As already pointed out, the IPA also provides for the reception conditions, rights and duties of asylum seekers and holders of refugee and international protection status.
As far as asylum seekers are concerned, according to article 78 of the IPA, they have the right to stay on the Slovenian territory and reside in the Asylum Home or in private facilities, until the conclusion of the asylum procedure, just in those cases of a negative outcome. Alternatively, they will enjoy the rights granted to the holders of refugee status or international protection. During their stay in the Asylum Home, asylum seekers are guaranteed "basic care" rights, i.e. food, hygiene, clothing; if residing in private facilities, however, they are entitled to receive an amount of financial assistance. With the recent amendments to the IPA, some of the rights of asylum seekers have been reduced, such as those concerning freedom of movement, which is restricted to the municipality in which the person has temporary residence.

Under Article 84 of the IPA, asylum seekers may be detained either within the Asylum Home, or within the Aliens centre, on the grounds specified in that Article, which include "risk of absconding". However, in 2019, the Supreme Court stated that in the absence of an objective definition and criteria identifying the "risk of absconding" within the IPA, asylum seekers cannot be detained for any reason that has as its basis a finding of "risk of absconding". In this sense, as of 2019, the only legitimate possibility of detention of an asylum seeker is that provided for in Article 84 (4), namely, *"when endangering the security of the state or the constitutional order of the Republic of Slovenia is prevented or this is absolutely necessary for the protection of personal security, property security and other comparable reasons of public order [...]".*

Holders of refugee and subsidiary protection status under Slovenian law enjoy the same rights, except for a few differences. First of all, it should be noted that refugee status is recognized in Slovenia without any time

limit, whereas subsidiary protection provides for a residence permit of varying duration, from one to five years. A further difference concerns the right to residence, as a refugee is granted a permanent residence permit, while the holder of subsidiary protection has a right of temporary residence, of the same duration as the recognized protection (which, however, cannot be less than one year).

Still in relation to the right to asylum, the following chapter will examine the so-called practice of informal readmissions, in the Italian and Slovenian contexts. In particular, we will analyze two decisions issued respectively by the Court of Rome and the Supreme Court of Slovenia in 2021, in which several interesting profiles emerge, related to the criticality of compliance with substantive and procedural obligations related to the implementation of the right to asylum, in the light of national, EU and international law, during the implementation of informal transfer practices. The first paragraph will examine the context of the Balkans and in particular of the "Balkan route", in order to provide an overview of the right to asylum and the approach to migration flows in the region. The second paragraph, on the other hand, aims at outlining the European legislation on border controls, and then focuses on the practice of rejections and more specifically on the so-called "informal readmissions", both in Italian and Slovenian law. Finally, the last paragraph will be occupied by the analysis of two specific cases mentioned above.

2. The Balkan Route

The conflicts that accompanied the gradual break-up of Yugoslavia from 1990 onwards led to a humanitarian crisis involving some 4 million people throughout the Balkan region to the south-east of Europe. Following these events, the countries of the former Yugoslavia and their neighbours, including Italy, recognized the need to adopt instruments to integrate this large number of people. A first example, as seen in the previous chapter, was the introduction of "temporary protection" by both Italy and Slovenia.

The Balkan area has always been affected by important migratory phenomena, which over the years have made it one of the main channels for refugees to enter Europe. The "Balkan route" is defined as the route taken by migrants mainly from the Middle East and Asia who want to reach Europe, mainly Northern Europe, via the Balkan countries. In fact, one of the peculiarities of the Balkan area is its conformation. In its broadest definition, the Balkan area includes Greece, part of Turkey, Bulgaria, Slovenia, Croatia, Albania, Kosovo, Montenegro, Macedonia, Bosnia and Herzegovina and Serbia. It is interesting to note that of these states, only some are part of the European Union, including Slovenia and Croatia, while others remain outside the European Union, such as Bosnia and Herzegovina.

Originally, the Balkan route started from Turkey and headed towards Greece, then crossed the Western[163] Balkans, in particular Macedonia and Serbia, and arrived in Austria via Hungary. Therefore, the flows along the Balkan route are made up of people entering the European Union for the first time from Turkey, then leaving it and entering a fragmented geographical area, that of the Western Balkans, and finally re-entering the European Union further north[164]. As mentioned above, the Balkan route has been "active "for several years, but it gained more notoriety following the events that took place in 2015/2016.

During this period, the deterioration of the situation in Afghanistan and Iraq, and the war in Syria, were accompanied by significant policy changes at the European level, including the introduction by the European Commission of the European Migration Agenda. In fact, it is precisely during what has been defined as the "migration crisis" and which has affected the countries of South and South-East Europe[165] that the serious shortcomings of the Dublin system, already anticipated in the previous[166] chapter, begin to emerge. The consequent suspension of the Dublin III Regulation led to the adoption by the European Union of a mechanism for the relocation (through a system of mandatory quotas) of applicants for international[167] protection from Italy and Greece to other EU countries. This system resulted in the creation of "*hotspots*"[168], i.e., closed "reception" facilities in which to carry out identification, registration and fingerprinting procedures.

It was followed in 2016 by the European Commission's proposal to replace unilateral border patrols carried out by member states with a coordinated approach of temporary border controls. Because of this, a Border and Coast Guard Agency was set up, which in cooperation with Member States, aimed to monitor the EU's external borders in order to avoid, what has been described as, *"possible attacks on the internal security of EU states"*[169].

The above was an attempt by the European Union to tackle the migration situation which then was followed by action from the states in the region, who decided to act autonomously in two ways: on the one hand by blocking the passage, through the construction of walls, the implementation of border controls and the adoption

[163] The countries in the Western Balkans are Croatia, Serbia, Bosnia and Herzegovina, Montenegro, Kosovo, Albania, Macedonia and Slovenia. The Eastern Balkans includes Greece, Bulgaria and part of Turkey.

[164] G. Schiavone, *La rotta balcanica un sistema di violenza nel cuore dell'Europa*, in "Il Diritto d'Asilo", 2020, n.1, p.273.

[165] Italy, Greece, Slovenia, Croatia, Hungary.

[166] See Chapter 1 paragraph 2.1.

[167] Persons whose nationality has an average recognition rate of 75%.

[168] In I. Ž. Žagar, N. Kogovšek Šalamon, and M. Lukšič Hacin, *The Disaster of European Refugee Policy*. *Perspectives from the "Balkan Route",* Newcastle, Cambridge Scholars Publishing, 2018. *"The aim of the hotspot approach is the swift identification, registration and fingerprinting of all incoming migrants and more effective implementation of relocation and return. This dovetails nicely with one of EU's main aims in the recent decade - to externalize border control, further "secure external borders" and prevent people from reaching the EU territory"*; J. Sardelič, *Managing the balkan route: the 2015/16 refugee crisis*, in "European Union Institute for Security Studies", 2017; G.M. Melchionni, *Migrations' changing scenario: the new Balkan Route and the European Union*, "Rivista di Studi Politici Internazionali", 2018, n.2; and M. Vitiello, *La crisi dei rifugiati e il Sistema europeo commune di asilo: che cosa non ha funzionato?*, "Meridiana", 2016, n.86.

[169] Ž. Žagar, N. Kogovšek Šalamon, and M. Lukšič Hacin, *The Disaster of European Refugee Policy, cit.*

of stricter national asylum policies to discourage people from seeking protection in these territories; on the other hand, by facilitating the passage of asylum seekers, suspending the Dublin Regulation and the Schengen Agreement, with the shared intention of not becoming countries of final destination, but only of transit.
In relation to this, the "corridor" that crossed the Balkan route was a sort of tool for managing migration flows, giving the perception to people on the move that the countries along the route were merely places of transit. In a sense, the "corridor" allowed people to move as quickly as possible, generating a "positive" outcome for both states and people in transit. The role played by single States in the management of the 2015-2016 "crisis" was huge, indeed they acted through state prerogatives, completely outside of what is provided for in European and national legislation, by declaring a state of emergency, both *de jure* and *de facto*, which led to the suspension and replacement of national and European rules, with decrees and/or state practices that changed daily, outlining a situation of constant uncertainty to the detriment of people in transit. In fact, the "passage" described above was characterized by alternating openings and closures, dictated by a sort of "domino effect" logic according to which, in June 2015, Hungary announced the closure of its borders with Serbia, through the construction of a 175 km[170] long barbed fence, which was immediately followed by Bulgaria and Macedonia, with equally restrictive entry[171] measures. Meanwhile, in August, Germany, in contrast to the approach taken by other member states, declared its willingness to accept asylum seekers on the one hand, while on the other hand introducing more controls at the border with Austria. However, claiming to be *"at the limit of its capabilities"*[172], Germany, in 2015, triggered the "domino effect" that spread first to Austria, with the introduction of more restrictive measures on the entry of asylum seekers and then, to Hungary which declared the closure of the border with Serbia. This last event led to a change in the route, which moved along Bosnia and Herzegovina, through Croatia and Slovenia, and finally to Italy. The implementation of increasingly securitarian measures[173] by the various states culminated in the interruption of the informal "channel", described so far, following the adoption of the European Union-Turkey declaration in March 2016, known as the "agreement"[174]. As stated in the press release, this agreement provided that *"all new irregular migrants who made the crossing from Turkey to the Greek islands as of 20 March 2016 will be returned to Turkey, in full compliance with EU and international law, thus excluding any form of collective expulsion. This will be a*

[170] Project to be completed in 2017.

[171] Ž. Žagar, N. Kogovšek Šalamon, and M. Lukšič Hacin, *The Disaster of European Refugee Policy, cit.,* pp.29-33.

[172] Ž. Žagar, N. Kogovšek Šalamon, and M. Lukšič Hacin, *The Disaster of European Refugee Policy, cit.,* p.12.

[173] Ž. Žagar, N. Kogovšek Šalamon, and M. Lukšič Hacin, *The Disaster of European Refugee Policy, cit.,* pp. 35-37; E. Cocco, *Where is the European frontier? The Balkan migration crisis and its impact on relations between the EU and the Western Balkans*, in "European View", 2017, n.16, p. 297.

[174] G. Schiavone, *La rotta balcanica un sistema di violenza nel cuore dell'Europa, cit.,* p. 274. It is argued, in fact, that although the EU-Turkey Declaration was presented as an agreement between the European Union and a third State, in reality, as also pointed out by the Court of Justice of the European Union, that Declaration cannot, at least at a legal level, be understood as an agreement of the Union, since "no procedure in that direction had ever been initiated or concluded". Thus, in essence, it was an understanding between Turkey and all the Member States of the Union.

temporary and extraordinary measure that is necessary to put an end to human suffering and restore public order".[175]It also outlined a 1:1 system whereby for every Syrian readmitted from Greece to Turkey, another person of the same nationality would be resettled in an EU Member State. The press release goes on to say that *"once irregular crossings between Turkey and the EU have ended, or at least drastically and sustainably reduced, a voluntary humanitarian admission programme will be activated. EU Member States will contribute to the programme on a voluntary basis"*[176]. As a result of this agreement[177], the channel along the Balkan route was blocked, making the journey to European countries more complex and costly, and about 60,000 people were stranded inside the Balkan countries.

In Greece, the emergency *"hotspot"* approach, coupled with the policy of "geographical restriction" in the analysis of asylum applications, i.e. allowing the transfer of asylum seekers arriving by sea to the mainland only after their application for protection has been examined, has caused delays in the granting of international residence permits, stranding thousands of people in refugee camps along the islands, in degrading and inhuman conditions.
Moreover, in February 2020, Turkey announced that it would no longer prevent departures, as an exception to the EU-Turkey agreement. This change of policy, linked to the worsening geopolitical situation in the Middle East, contributed to a tightening of the migration[178] policies implemented by Greece and an increase in rejections.

Serbia was until 2017, i.e. before the fencing of the southern border with Hungary was completed, a key crossroads to Europe, as it shared borders with Hungary, Croatia and Romania. The asylum situation in Serbia is divided into two phases: one from 2015-2016; and the other from 2017 to 2020. In the first phase, the very high transit of people to Hungary was managed through a system of "quotas", which was gradually reduced from 500 people per week, to 20-10 passages per week, until it was exhausted, then during the winter of 2016-2017, government camps were built in Serbia, replacing the previous informal *"barracks"* where people in transit were temporarily housed, this contributed to slow down the people in their journey. The number of asylum applications in the country increased in 2019[179], but only 2% of them were actually formalized, as well as rejections by neighbouring states.

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[175] Council of the European Union, EU-Turkey Declaration, press release 144/16, Bruxelles, 2016, available at the following link: https://www.consilium.europa.eu/it/press/press-releases/2016/03/18/eu-turkey-statement/pdf

[176] Council of the European Union, EU-Turkey Declaration, press release 144/16, Bruxelles, 2016, *cit.*

[177] What happened in reality was a reduction in arrivals from Turkey to Greece and consequently a significant increase in the number of asylum seekers in Turkey, as no resettlement plan was put in place for Europe. F. Mat, *L'implementazione dell'accordo UE-Turchia. Gli effetti sull'accoglienza*, in "Occasional Paper Osservatorio balcani e caucaso transeuropa", 2017.

[178] RiVolti ai Balcani, *Rotta Balcanica: i migranti senza diritti nel cuore dell'Europa*, Como, New Press, 2021, pp. 12-15; G. Schiavone, *La rotta balcanica un sistema di violenza nel cuore dell'Europa*, *cit.*, pp. 277-278.

[179] G. Schiavone, *La rotta balcanica un sistema di violenza nel cuore dell'Europa*, *cit.*, p.279.

Moreover, in 2020, Serbia built a barbed wire fence on the border with Macedonia and introduced a policy of total prevention of entry into the territory by citizens from third countries during the Covid-19 pandemic. The practice of collective expulsions has never stopped in the country; in fact, as stated by the Serbian[180] Constitutional Court in 2020, illegal practices at the border have become an established practice in Serbia. This decision is the first official statement recognizing the practices of the Serbian police of banning access to the territory and collective expulsions to Bulgaria and Macedonia.

Following Hungary's closure of transit through the country, a new route was opened via the border between Bosnia and Herzegovina (BiH) and Croatia. The first stop on this route was initially the capital Sarajevo, but also the canton of Una-Sana, in particular the localities of Bihać and Velika Kladuša. Since 2018, the Bosnian Serb Republic had declared that it was not willing to operate any form of reception of asylum seekers, which is why it is in the territories of the Federation of Bosnia and Herzegovina that informal encampments and camps for migrants and asylum seekers are developed, managed by the International Organization for Migration (IOM) which coordinates the field staff belonging to the Service for Foreign Affairs (Sfa), i.e., an independent agency within the Ministry of Security of Bosnia and Herzegovina. The management of the centres is also entrusted to the Sfa with the support of IOM, while measures, decisions and action procedures in relation to migration issues are managed at national level by the Minister of Security in cooperation with the Council of Ministers. The situation in BiH is further complicated by the asylum procedure and the *"hostspot"* system in force in the country. After having applied for asylum at the border or before the Sfa, the persons concerned are given a certificate stating their intention to apply for asylum and indicating the centre for asylum seekers where they can be hosted. Following this first step, there are two interviews, at the end of which the applicant is provided with a decision on his/her status in the country. However, the length of this procedure this procedure, which can take up to 18 months, together with the country closure to the possibility of granting citizens from third countries any kind of international[181] protection status, resulted in a small number of people being granted asylum in the country. Indeed, according to UNHCR data between January 2018 and October 2021, 84,000 people were registered as having transited through Bosnia and Herzegovina, of which only 129 people in the first months of 2021 submitted an asylum request, while overall in the years highlighted above, there would have been 2,731 asylum seekers in the country. In addition to these data, the outcomes of BiE applications for protection must be considered. Assuming that there are no alternative permits to refugee status and subsidiary protection, in 2021 out of 129 applications 3 residence permits were granted for refugee status and 21 for subsidiary[182] protection.

[180] Judgement of the Serbian Constitutional Court, n. UŽ 1823/2017, 2020, available at the following link: https://www.asylumlawdatabase.eu/nl/content/serbia-constitutional-court-decision-expulsions-bulgaria

[181] G. Schiavone, *La rotta balcanica un sistema di violenza nel cuore dell'Europa, cit.*, pp. 279-280.

[182] RiVolti ai Balcani, *Lipa, il campo dove fallisce l'Europa*, in "Altreconomia", 2021, pp. 12-13.

In Croatia the Balkan route rejoins the European Union, however, the conditions regarding the treatment of asylum seekers prove to be much more inhuman and degrading. The competent authority for the implementation of asylum policy in the country is the Ministry of Interior, which is in charge of the initial and first instance procedure. According to the Croatian Law on International and Temporary Protection (LITP), as soon as a person expresses his/her willingness to apply for asylum at the border and/or local police, the officials of the Reception Centre for Applicants for International Protection of the Ministry of Interior are obliged to examine the application and complete the identification procedures of the applicant, ensuring all procedural guarantees. Once the registration phase of the application has been completed, the interested parties have a maximum of 15 days to submit a complete application, which is then followed by an interview with the "Asylum Department of the Ministry of the Interior", which will decide on the merits. However, in Croatia this procedure is not applied in practice. "The Game" [183]is the term used by people on the move to describe the informal attempt to travel to Western Europe by crossing the borders along the Balkan route. According to data provided by the Croatian Ministry of Interior, in 2020, 29,094 attempts to cross the border were recorded, while it is estimated that 16,425 were rejected towards BiE and 1,975 in a chain first towards BiE and then towards Serbia.[184] Other estimates speak of 7,100 persons who once managed to cross the border were intercepted by Croatian police in Una-Sana canton and brought back across the Bosnian border. Summary rejections denied access to individual application and exposure to inhuman and degrading treatment by the Croatian authorities appear to be the most problematic aspect of the asylum system in Croatia. This practice is carried out by the police informally and therefore it is difficult to contest them before a judicial authority, moreover, these expulsions clearly do not follow an individual analysis of the person, nor of the country of return and the potential risks to which the individual might be exposed, which amounts to a complete violation of the principle of non-refoulement, and consequently of Community and international law. The situation described here follows a logic of slowing down and intimidation of people on the move[185], and has been condemned several times by non-governmental organizations, but also by international and European institutional bodies. The latest condemnation was issued on 18 November 2021 by the European Court of Human Rights in the case M.H. and others v. Croatia[186], while on 3 December the report[187] of the European

[183] C. Minca, and J. Collins, *The Game: or, "the making of migration" along the Balkan Route*, in "Political Geography", 2021.

[184] HPC, *AIDA-Country Report: Croatia*, 2021, pp. 22-23.

[185] HPC, *AIDA-Country Report: Croatia, cit.*; G. Schiavone, *La rotta balcanica un sistema di violenza nel cuore dell'Europa, cit.*, pp. 282-284; RiVolti ai Balcani, *Rotta Balcanica: i migranti senza diritti nel cuore dell'Europa, cit.*; Amnesty International, *Pushed to the Edge-violence and abuse against refugees and migrants along the balkans route*, 2019. These are just some of the reports and organizations that are still denouncing human rights violations along the Balkan route and in this case in relation to Croatia.

[186] Judgement of the European Court of Human Rights, M.H. and others v. Croatia, n. 15670/18 and 43115/18, 2021, available at the following link: https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22001-213213%22]}

[187] Council of Europe, *Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 2020.

Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) [188]was published.

Finally, to close this brief overview of the Balkan route, it is worth mentioning Slovenia and then, also if not part of the Balkan route, Italy, more precisely Friuli-Venezia Giulia and the province of Trieste, are the only areas directly affected by entries from the Balkan route.
By giving an overview of the asylum applications, in 2020, 3.548 asylum applications were submitted, of which 274 were still pending at the end of the year, with a rejection rate of 70.7%[189]. On the other hand, like Slovenia, Italy represents for most of the people arriving there a transit area towards Northern Europe. Following the change in the route, between 2017 and 2018 the arrivals of asylum seekers also intensified, as with the opening of the BiE crossing, Italy became a compulsory passage to Western Europe, indeed, during the year 2020, were submitted 26,963 asylum application.

2.1. The right of asylum and the practice of rejection at the border

Starting from an analysis of the European legislation on border control, the aim of this paragraph is to highlight the practice of rejections at the border, through the so-called "informal readmissions", paying particular attention to the Italian and Slovenian context.

2.2. The Schengen Borders Code and border control policies

European and international law recognizes a certain level of State discretion in matters of entry and residence of foreign nationals, as seen in the previous chapter in relation to asylum procedures. In fact, each State has the right to exercise control over its territory and borders, clearly in full compliance with national and international obligations and with respect for fundamental rights.

The issue of borders gained importance in Europe during the 1980s, following the progressive abolition of internal border controls, aimed at creating a European internal market, which was accompanied by a consequent strengthening of external border controls, aimed at guaranteeing greater security for both the Member States and the Community area, especially in view of the growing migratory flows. From this moment

[188] Council of Europe, *Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, cit.*

[189] PIC, *AIDA-Country Report: Slovenia*, 2021, *cit.*, p.7.

on, the Community has been trying to develop common policies for everything concerning entry into the territory and access to the border. [190]

As mentioned in Chapter I, the first step towards this EU border management policy was the creation of the Schengen *acquis*, which today includes common rules mainly governing the free movement of persons and Schengen visas, the abolition of systematic controls at internal borders, the Schengen Information System (SIS),[191] as well as police, customs and judicial cooperation. The common measures on the crossing of borders by persons are governed today by the European Union Regulation n. 399/2016, also known as the "Schengen Borders Code" (SBC). This Code sets out the rules for the entry of persons at external borders; the conditions of entry into the Schengen area for nationals from third countries; and finally, regulates the possibilities for the temporary reintroduction of internal border controls, only in cases of serious threat to public order and internal security.

Here it is appropriate to analyze some of the provisions of the SBC, such as Article 22 which states that *"internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out",* on this point the European Commission has specified that *"crossing an internal border should not be the occasion for checks or formalities and that as a rule anybody is free to cross internal borders at any point. All routine and random checks on people crossing internal borders are incompatible with the idea of the area without frontiers and are therefore prohibited", subject* to the possibility of reintroducing border controls as an *extreme ratio*. The SBC provides that only in exceptional situations of serious threat to public order and state security is it possible, for a limited period of time, to introduce internal border controls, always respecting the principle of proportionality so as not to jeopardize the free movement of persons, as specified in Article 25 of the SBC.

The said article in paragraph 1 establishes, in fact, that if *"in the area without internal border control, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days. The scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat",* then continues in paragraph 2 by providing for the possibility to prolong these measures under Article 27 or possibly, under Article 28, the Member State may adopt a special procedure and immediately close its internal borders. In all these hypotheses, it is foreseen that the State notifies first the

[190] A. Di Pascale, *Respingimento dello straniero e controlli delle frontiere interne ed esterne nel diritto dell'UE*, in "Diritto, Immigrazione, Cittadinanza", 2020, n.2. It refers, i.e., to policies on visas, asylum, borders, immigration.

[191] A. Di Pascale, *Respingimento dello straniero e controlli delle frontiere interne ed esterne nel diritto dell'UE, cit.*, p. 4. The SIS is an information system containing alerts on certain categories of persons and objects, which can be accessed by border authorities in order to verify the existence or non-existence of causes preventing access to the external borders.

other Member States and then the European Commission of the re-establishment of internal controls, within the time limits and deadlines set by the SBC.

Notwithstanding the *extreme ratio* of border controls, the SBC authorizes certain types of controls that the Member State may adopt in order to carry out checks at the time of or in the imminence of the border crossing.[192] These include police checks governed by Article 23 of the SBC, which also specifies that they may only be carried out insofar as they do not amount to border checks, on the basis of the requirements laid down in that Article.[193] However, a wide margin of discretion has been left to the States in relation to both the modalities and the purposes and timing of these controls, for which there is not even a procedural mechanism, as is the case for border controls. In addition, unlike the latter, police checks do not provide for the protections set out in Article 7 of the SBC, i.e. *"border guards shall, in the performance of their duties, fully respect human dignity, in particular in cases involving vulnerable persons [they] shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"*, however, the provisions of Article 22 shall remain valid.

With reference to what has been said and the purpose of this thesis, it is appropriate to report what the European Commission, following the changed migration situation in 2017, stated in a Recommendation on proportionate police checks and police cooperation in the Schengen area. The Commission encouraged Member States, under Article 29, i.e. in exceptional circumstances of serious threat to public policy or internal security, to introduce police checks rather than border checks, as *"in the current circumstances of threats related to public policy or internal security from terrorism and other serious cross-border crime and risks of secondary movements of persons who have irregularly crossed the external borders, the intensification of police checks in the entire territory of Member States, including in border areas and the carrying-out of police checks along the main transport routes such as motorways and railways, may be considered necessary and justified"* and then continues *"[....] the proper application of the bilateral readmission agreements in accordance with Article 6(3) of Directive 2008/115/EC [...] can be instrumental in addressing secondary movements of illegally staying third-country nationals. The bilateral agreements may also help in achieving similar results as targeted border controls at internal borders in terms of addressing the threats to public policy or internal security, while limiting the impact on the movement of bona fide travellers".* In this way, the Commission has promoted bilateral agreements on readmission and police cooperation, which will be discussed below, as an effective method capable of achieving the same objectives as targeted border controls.

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[192] A. Di Pascale, *Respingimento dello straniero e controlli delle frontiere interne ed esterne nel diritto dell'UE, cit.,* p. 12.

[193] Article 23 of the Schengen Border Code: *"do not have border control as an objective; (ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime; (iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders; (iv) are carried out on the basis of spot-checks".*

Title II of the SBC, on the other hand, regulates controls at the external borders of the Schengen area, consequently also defining the entry conditions for third-country nationals. These checks follow different rules depending on whether the person concerned is a citizen of the Union and/or the Schengen area or a citizen of a third country and are essentially designed to check that anyone crossing the border meets the conditions for entry into the Member States. As regards the illegal crossing of a border by a person who does not have the right to stay in the territory of the Member State concerned, the Schengen Borders Code does not intervene, but rather Directive 2008/115/EC, also known as the "Return Directive", which will be discussed below.

2.3. The removal and return of persons considered "irregular".

Chapter II of the TFEU aims to establish common standards on border control and possible refoulement, covering border control, asylum and immigration policies. More specifically, Article 79 states that *"the European Union shall develop a common immigration policy aimed at ensuring [...] the prevention of and enhanced measures against illegal immigration and trafficking in human beings"*.

Despite the presence of instruments adopted by the Council and the European Parliament for the removal and return of persons considered "irregular", Article 49 TFEU does not provide a definition of these two terms. However, both refer to two very precise cases: situations of "rejection at the border"; and situations of expulsion. Only the first of these situations will be examined here.

Rejection is a measure of forced removal to a third State, carried out against a person who does not meet the requirements to remain on the territory. Such practices can sometimes, and increasingly frequently in recent years, also be referred to as *"pushbacks"*, i.e. *"coercive practices in which authorities summarily refuse entry to people seeking protection or return individuals who have already entered the country's territory back to the country from which they came"*[194]. Pushbacks frequently occur close to international borders, and often involve the threat or use of force by border police officers, with the aim of dissuading and/or preventing people from crossing the border. The so-called "informal readmissions" also fall under the category of rejections. This institution, which will be discussed in more detail below with reference to the Italian and Slovenian case, provides for the possibility to resend, through a simplified procedure, a person intercepted at the border in the neighbouring country, if he/she does not have the requirements to enter legally in the country of destination. The legal basis for these practices is to be found in the bilateral agreements between States, which are considered legitimate to the extent that they do not conflict with European, international and domestic legislation.

[194] Amnesty International, *Pushed to the Edge-violence and abuse against refugees and migrants along the balkan route*, *cit.,* p. 10.

Reference should also be made here to the practice of so-called "collective rejections". These are regulated following an extensive interpretation of the term "expulsion" as understood by Article 4 of Protocol n. 4 of the ECHR. This article, in fact, regulates the "collective expulsions", arguing that in order to guarantee the protection of each person, States must guarantee an examination of the individual situation of the individual, who must eventually be able to put forward arguments against his or her expulsion. By extending the application of Article 4 of Protocol n. 4 to the ECHR to situations of "collective rejections" wherever it occurs, whether in the course of border controls or in the case of interception of persons on the high seas, the case-law of the European Court of Human Rights has sought to avoid the exercise by States of techniques designed to circumvent the guarantees offered by that Protocol, such as, for example, the individual treatment of individual cases, which is also necessary in order to comply with the prohibition of *non-refoulement,* which has been discussed at length above[195].
The practice of "collective rejection" is therefore to be considered unlawful precisely under the minimum procedural guarantees inherent in the rule of law and the more elaborate ones provided by international provisions.

At European level, the practice of rejection is provided for, subject to certain limits and guarantees by the Return Directive and the SBC.

Directive 2008/115/EC (also known as the "Return Directive") defines, in Article 3, paragraph 3, *"return*" as *"a process of return of a third-country national, either in voluntary[196] compliance with an obligation to return or by force[197]: to his or her country of origin, or to a transit country in accordance with Community or bilateral readmission agreements or other arrangements, or to another third country, to which the third-country national in question voluntarily decides to return and in which he or she will be accepted".* That directive obliges the Member States to adopt a return decision, subject to certain minimum guarantees, such as the implementation of an administrative procedure, at the end of which the act produced must be motivated de *jure* and de *facto* and notified to the person concerned. This is to be applied in all cases covered by the Return Directive pursuant to Article 4 and also in those excluded from the scope of that directive pursuant to Article 4(4).

The Directive also provides, in Article 6(3), for the possibility for Member States not to issue a return decision against third-country nationals who have entered the territory illegally, but to readmit such persons to the neighbouring State, in accordance with existing bilateral agreements between the two countries, provided that

[195] Paragraph 2 Chapter 2.

[196] Article 7 of the Directive 2008/115/EC.

[197] Article 8 of the Directive 2008/115/EC.

they are already in force at the date of entry into force of the Return Directive. However, this practice cannot be adopted independently of the European legislation on return, in an attempt to circumvent the guarantees and limitations laid down.

As regards the modalities of removal, it should be underlined that these must be carried out with respect for the life, safety and dignity of the individual, and the prohibition of torture and inhuman and degrading treatment, pursuant to Article 3 of the ECHR. Finally, Article 5 of the Return Directive is concerned with establishing certain minimum conditions to be taken into account in respect of any measure taken under that directive, mainly relating to the principle of *non-refoulement*, respect for the best interests of the child, respect for family life and respect for the health conditions of the individual.

The Schengen Borders Code, in its Title II, regulates the entry of third-country[198] nationals. The possibilities of entry into the territory of a Member State are defined by Article 6 (1)[199] and/or 6 (5), however, if the requirements laid down therein are not met, Article 14 of the SBC provides for the possibility for border authorities to refuse entry to a third-country national. This rule provides, however, some exceptions. First of all, the aforementioned Article 6 (5) letter c) establishes that *"third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorized by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations"*, secondly, it is necessary to mention Article 3 of the Schengen Borders Code, which states that this Code applies to all those who cross the internal and/or external borders of a State *"without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement"*.
What has emerged is that, according to the SBC, the application of the rules on refusal of entry may not prejudice the application of provisions relating to the right to asylum; moreover, Article 14 (2), establishes the modalities by which a third-country national may be refused entry when attempting to enter the external borders of the Schengen area. This article states that the competent authorities may only provide for refusal of entry by means of a reasoned decision stating the precise reasons for the removal, which must then be notified to the persons concerned for countersignature.

[198] Article 2(6) of the Schengen Border Code: *"any person who is not a Union citizen within the meaning of Article 20(1) TFEU and who is not covered by point 5 of this Article"*.

[199] Article 6 (1) of the Schengen Border Code: *"For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals shall be the following: (a) they are in possession of a valid travel document[...]; (b) they are in possession of a valid visa [...]; (c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence [...] or are in a position to acquire such means lawfully; (d) they are not persons for whom an alert has been issued in the SIS for the purposes of refusing entry; (e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States [...]"*.

The SBC contains provisions referring to the respect of fundamental rights and international protection obligations. Regarding the former, as previously announced, the Code is applied in compliance with Article 3, and also with Article 4 concerning the fundamental rights established by the Charter of Fundamental Rights of the European Union and international law. Moreover, the Code states in Article 7 of Chapter II that border guards, in exercising their control and refusal functions, must always act with full respect for human dignity, and above all the actions taken must always be proportionate to the objectives to be pursued.

There are also many references to international protection obligations, which seek to oblige border authorities to refer to international law, in particular the Geneva Convention of 51' and the principle of *non-refoulement*, when carrying out control and refoulement activities.

However, the generality of these provisions and the absence of the procedural modalities to be followed, favors and widens the State discretion and does not guarantee the certainty of the respect of rights[200]. Of particular relevance for this discussion is precisely the absence of applicable procedures, under the SBC, regarding the possibility for persons arriving at the external border, and therefore not falling under the requirements of Article 6 paragraph 1, to apply for international protection.

2.4. The practice of rejections in the Italian legal system: the so-called "informal readmissions"

The Italian legislation provides for the case of rejection in Articles 10 and 10 bis of the T.U, while Article 11[201] of the T.U regulates the procedures to be adopted. Article 10 (1) regulates the rejection at the border, while Article 10 (2) provides for the so-called deferred rejection, i.e., *"[t]he rejection with accompaniment to the border is also ordered by the questore in respect of foreigners [...] who, entering the territory of the State while evading border controls, are stopped at the entrance or immediately afterwards; [...] who, in the circumstances referred to in paragraph 1, have been temporarily admitted to the territory for the need to receive assistance".*

As mentioned above, the so-called "informal readmissions", whose legal basis can be traced back to bilateral agreements between states aimed at readmitting citizens from third countries, can also be considered as cases of rejection. These agreements began to proliferate in Italy, following the need to contain the flow of migrants from the former Yugoslavia; in fact, it is in this first generation of agreements that the bilateral agreement between the Government of the Italian Republic and the Government of the Republic of Slovenia on the

[200] A. Di Pascale, *Respingimento dello straniero e controlli delle frontiere interne ed esterne nel diritto dell'UE*, *cit.*, pp. 33-47.

[201] Article 11 (6) of the T.U, "*At border crossing points, reception services are provided in order to provide information and assistance to foreigners who intend to apply for asylum or to enter Italy for a stay longer than three months. These services are made available, where possible, within the transit zone".*

readmission of persons at the border, dated 1996[202], which will be examined here, is inserted. The purpose of this agreement is to facilitate the readmission to the territory of the two contracting states of both nationals of one of the states concerned and third-country nationals, through the adoption of "simplified" or "no formalities" procedures.

The above-mentioned Agreement presents some criticalities, first of all related to its legitimacy, as it has never been ratified by the Italian Parliament. According, to the provisions of Article 80 of the Italian Constitution, which establishes the role of Parliament with respect to international treaties and indicates the cases in which these treaties require a law authorizing their ratification, among which there are the agreements considered to be of a "political nature". The bilateral cooperation agreement between Italy and Slovenia has the features of a political agreement, as it strongly affects national, but also European and international policies, dealing with the management of the complex phenomenon of migration flows and therefore also affecting the protection of the human rights of migrants. Secondly, again with reference to article 80, the lack of ratification by the Parliament, and therefore the conclusion of the agreement in a simplified form, also means that it is impossible for the agreement in question to envisage amendments or derogations to laws in force in Italy or to Community rules or those deriving from international law funds. However, as will be seen below, this Agreement has been interpreted and applied in a way which is inconsistent with the laws in force in the Italian, European and international context to protect the right to asylum.

In addition, Article 6 of the Agreement includes the term "without formalities"[203] to indicate the transfer of the irregular migrant to the State party. According to the Italian legal system, Articles 2 and 3 of law 241/90

[202] Bilateral Agreement between the Government of the Italian Republic and the Government of the Republic of Slovenia on the readmission of persons at the border, 1996.

[203] Article 6 of the Bilateral Agreement between the Government of the Italian Republic and the Government of the Republic of Slovenia on the readmission of persons at the border, *cit.*,"*[t]he border authorities of the requested State shall readmit to their territory, at the request of the border authorities of the requesting State and without formalities, third-country nationals who have irregularly crossed the common border and: are surrendered to them within 26 hours after crossing that border; or who, less than 10 kilometres from the common border after crossing that border, have been subjected to checks establishing the irregularity of their entry".* Associazione per gli Studi Giuridici sull'Immigrazione, *La riammissione informale dall'Italia alla Slovenia sulla base dell'Accordo bilaterale Italia – Slovenia e le riammissioni a catena verso la Slovenia e la Croazia*, 2020. The expression "without formalities" contained herein, should be understood in the sense that *"the procedures for reporting and coordinating readmission operations between the Italian and Slovenian authorities can take place in a simplified manner, without particular procedural burdens",* as it cannot be understood, instead, as the possibility of adopting a readmission procedure without the issuance of an administrative measure motivated in fact and in law, subsequently notified to the person concerned and possibly challenged before a judicial authority, pursuant to law 241/90 and subsequent amendments (containing the rules on administrative measures). Moreover, according to the Constitutional Court's judgment n. 105/2001, the forced accompaniment to the border represents a measure restricting the personal freedom of the individual and therefore requires a prior judicial validation under Article 13 of the Constitution (relating to personal freedom) and Article 10 (2) bis of the T.U. In the absence of the above, the

and subsequent amendments, establish that the return must be ordered by a reasoned administrative measure, notified to the person concerned and subject to appeal before a judicial authority.

Although bilateral readmission agreements are applied in Italy, pursuant to article 6 of the Return[204] Directive and article 13, paragraph 14 ter of the T.U[205], in their execution they can never violate the CEAS, the Schengen[206] Borders Code and, clearly, the fundamental human rights guaranteed by the Italian and international law. In addition to what has been said, it should be pointed out again, as also provided for by the Agreement itself, that readmission, in cases of asylum application and risk of persecution or torture, is in no way applicable according to articles 10 (4) and 19 of the T.U.

2.5. The practice of rejections in the Slovene legal system: the so-called "informal readmissions".

As far as Slovenian legislation is concerned, there are two main rejection procedures, both regulated by the Aliens Act. The first one is the so-called formal procedure and provides for the issuance of a *"decision on return [...] issued by the police to an alien residing illegally in the Republic of Slovenia [...]"*. This decision, according to art. 65 (1) and 2 of the Aliens Act, must be written and notified to the person concerned in a language he/she understands; the second procedure, on the other hand, regulated by art. 64 (1) of the Aliens Act provides for the possibility of not issuing any return decision, if the alien is apprehended *"at the illegal border crossing or in connection with the illegal border crossing"*. In these cases, an informal return procedure is adopted, based on bilateral intergovernmental agreements concluded by Slovenia.
Among these, the Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia on the Extradition and Acceptance of Persons Whose Entry or Residence is Illegal, 2006[207], will be examined here.

Article 2 (1) of the Agreement provides that *"[e]ach Contracting Party shall, at the request of the other Contracting Party, admit to its territory a third-country national or stateless person who does not fulfill or no*

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foreigner is prevented from exercising his right to an effective remedy, as underlined by Article 24 of the Italian Constitution (concerning the right to defence), Article 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union (both concerning the right to an effective remedy).

[204] Paragraph 2.1 Chapter 2

[205] Article 13 (14) letter (b) of the T.U, *"In the presence of bilateral agreements or arrangements with other Member States of the European Union which entered into force before 13 January 2009, a foreigner who finds himself in the conditions referred to in paragraph 2 may be returned to those States"*.

[206] Paragraph 2.2 Chapter 2, referring to the reintroduction of internal borders, with particular attention to Article 14.

[207] Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia on the Extradition and Acceptance of Persons Whose Entry or Residence is Illegal, 2006, available at the following link: https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2006-02-0040?sop=2006-02-0040

longer fulfils the conditions for entry into or residence in the territory of the requesting Contracting Party if it is proved or presumed that person has entered the territory of that Contracting Party immediately after residence in or transit through the territory of the requested Contracting Party". Therefore, according to this article, third-country nationals can be readmitted in this case on Croatian territory, without the issuance of a formal readmission decision (so-called "summary procedure"). The only condition to enable readmission is that the State announces the readmission of the person to the other Contracting State within 72 hours after the illegal border crossing. The Contracting State then has a maximum period of 24 hours from receipt of the notification to accept the readmission of the person concerned. If this procedure is rejected, the person may still be removed on the basis of the formal procedure.

The summary execution without formalities[208] provided for by the Agreement with the Government of the Republic of Croatia, does not allow to evaluate the respect or not of the principle of *non-refoulement* provided for by article 40 of the IPA, article 72 of the Asylum Act and article 18 of the Constitution of Slovenia. In addition to what has been said, it is necessary to specify that also in the case of Slovenia *"[a]sylum seeker's application for international protection cannot be rejected without proper procedures being conducted or without a well-founded reason[209]",* as provided for by the Slovenian Constitution and by the European and international law to which it conformed. In fact, the development of the readmission process substantially depends on the individual's intention to apply for asylum or not. According to the provisions of article 36 (1) of the IPA, the individual concerned may express his or her will to seek protection, at any time, and when this happens, the police is prohibited from readmitting the person concerned to Croatia under the Agreement here examined, for the entire duration of the asylum procedure. Furthermore, according to Articles 42 and 43 of the IPA, the police have the obligation to provide the individual with all necessary information, in a language he understands, regarding the possibility of applying for asylum.

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[208] Human Rights Ombudsman of the Republic of Slovenia, *National Report on the situation of human rights of migrants at the borders*, 2021, pp.12-16. The informality of the readmission procedure provided for by the Agreement clearly determines a reduction of the procedural rights of the individual, compared to the formal procedure, in fact, the absence of a reasoned decision, delivered to the individual, also determines the impossibility of challenging the decision. However, the Return Directive, although providing in Article 6 paragraph 3 the possibility of readmission "without formalities", in cases of bilateral agreements between two States, nevertheless specifies that the receiving State has the obligation to issue a written and reasoned decision. The Ombudsman then goes on to mention Articles 22, 23 and 25 of the Slovenian Constitution, i.e. respectively, the equal protection of rights, the right to judicial protection and the right to legal remedies, and points out that the "no formalities" procedure provided for in the Agreement may result in violation of the above-mentioned rights, as it prevents the individual from dissenting from the decision, *"[the person] cannot raise objections, such as considering systemic deficiencies in the country, due to which their transfer could be in contravention of the prohibition of torture and inhuman treatment, or raise other individual circumstances, such as that the return would violate their right to family or private life".*

[209] U. Regvar, *Report on findings and observations on the implementation of return procedures in accordance with the principle of non-refoulement*, 2018, p.6.

Moreover, according to Article 12 of the Agreement, the transit of a third-country national may be refused if in the country of destination or transit the person would be at risk of: being subjected to torture, inhuman or degrading treatment, punishment, death or persecution on the grounds of race, religion, nationality, social origin or political opinion; being threatened with the initiation of criminal proceedings or the execution of criminal sanctions, except for illegal crossing of the state border; or if the person is ordered to be expelled from the territory of the requested Contracting Party.

In addition to what has been said, it must be underlined that the lack of precise and detailed standards in relation to the implementation of the procedure provided for in Article 64(1) of the Aliens Act, raises many perplexities in relation to the identification of the persons who may be subjected to this type of "shortened procedure", in fact, the term "in connection with" is rather vague and does not define which facts and/or circumstances must be referred to, nor how they must be assessed, in order to adopt such a procedure.
However, the Agreement between Slovenia and Croatia, together with the Protocol on the Implementation of the Agreement intervene to provide a partial clarification. Article 2 (3) of the Agreement provides that *"[t]he summary procedure shall apply only if the competent authority of the requesting Contracting Party provides information which enables it to establish that such a person has illegally crossed the common state border"*, while the Protocol on the Implementation of the Agreement, again with reference to the above mentioned article, has given a potential and partial clarification of what are the "proofs" that can be used to establish whether a person has crossed the common border illegally. In fact, Article 6(1) states that *"[...] the crossing of a state border is an illegal act.] the crossing of a state border is considered to be illegal if the person crosses the common State Partie's border outside the designated border crossing point, at a designated border crossing without a valid travel document or avoids the border control at the border crossing",* and then continues in Article 5 paragraph 1 letters c), f), g), h), i), j), *"that the indirect evidence for the presumption may include, inter alia, official records of the authorities or institutions that were issued to the individuals during their stay or crossing through the State Party's territory, tickets, hotel invoice issued to the person, confirmation regarding money exchange, handwritten personal statements or oral personal statements made in the form of official minutes that can be verified, statement of witnesses, gathered by the competent authorities that can also be verified".* This information should be provided by the other Contracting Party, i.e. the Croatian Border Police.

2.6. The Case of Mr. M.Z. vs. the Italian Ministry of the Interior of 2020

The case in question [210]concerns the applicant M.Z., a 28-year-old Pakistani citizen who was forced to flee his country after being persecuted for his sexual orientation. After crossing the Balkan route, and once arrived at the border of Trieste in mid-July 2020, he, together with other Pakistani citizens, expressed their wish to apply

[210] Order of the Court of Rome, n. 56420/2020, 2021, available at the following link: https://www.asgi.it/wp-content/uploads/2021/01/Tribunale-Roma_RG-564202020.pdf

for asylum before the police authorities. The latter asked the applicant and the other persons who had arrived with him questions about their migration route. On this occasion, the persons concerned again specified their wish to apply for asylum in Italy. However, within a few hours, the above-mentioned persons were taken to a police station, where they were asked to sign documents in Italian. They were then all put into a van and taken to the border with Slovenia, where the Slovenian border police in turn turned them away in a chain to Croatia, and eventually to Bosnia and Herzegovina. In all the countries crossed, the applicant stated that he wished to apply for asylum, but he was never granted it. On the contrary, during the "chain" refoulement, Mr. M.Z. was subjected to violence by the Slovenian police and torture and inhuman treatment by the Croatian[211] authorities.

2.7. The position of the Italian Ministry of the Interior

Following the increase in readmissions of migrants at the border, which occurred around the period of May 2020, on 24 July 2020, the MP Riccardo Magi requested an urgent interpellation to the Ministry of Interior[212]. In his introduction, Mr. Magi pointed out that the readmissions were carried out not by virtue of the re-establishment of internal border controls under the SBC, but rather under a bilateral cooperation agreement with Slovenia. As evidenced by numerous reports[213], these practices lead to a chain of readmissions to Bosnia and Herzegovina, through Slovenia and then Croatia, of people who have expressed their willingness to seek asylum in Italy, and who risk being subjected to inhuman and degrading treatment in these territories. This was followed by requests addressed to the Ministry of the Interior concerning: the legal nature and operational procedures of the readmission measure adopted; the willingness of the Ministry of the Interior to introduce specific measures at the border areas of Trieste and Gorizia aimed at ensuring that people are informed about the possibility of applying for asylum; the willingness of the Ministry of the Interior to provide precise provisions regarding the impossibility of applying the above-mentioned bilateral agreement to foreigners seeking international protection, and the need to produce reasoned measures to be notified to the person concerned.

In the reply provided by the Ministry of Interior[214], it is stated that the informal readmission procedures in Slovenia *"are applied to migrants found close to the Italian-Slovenian border, when it is clear that they come from the Slovenian territory, even if the intention to apply for international protection is expressed"*[215], the only exceptions provided by the Ministry of Interior, refer to the so-called vulnerable categories, to people

[211] Order of the Court of Rome, n. 56420/2020, 2021, *cit.*

[212] Urgent Interpellation, n. 2/00861, 2020, available at the following link: https://aic.camera.it/aic/scheda.html?core=aic&numero=2/00861&ramo=CAMERA&leg=18

[213] RiVolti ai Balcani, *Rotta Balcanica: i migranti senza diritti nel cuore dell'Europa, cit.*; Amnesty International, *Slovenia: Push-backs and denial of access to asylum*, 2018; PIC, *AIDA-Country Report: Slovenia, cit*.; Infokolpa, *Chain Pushbacks and State Violence on the Balkan Route Slovenia, 2021*.

[214] Reply given by the Ministry of the Interior to MP Riccardo Magi's interpellation, 2020, available at the following link: https://www.asgi.it/wp-content/uploads/2020/08/Risposta-interpellanza-rotta-balcanica.pdf

[215] Reply given by the Ministry of the Interior to MP Riccardo Magi's interpellation, 2020, *cit.*

who have already applied for asylum in another Member State and to all those who have already been granted refugee status. Instead, with reference to the execution of the readmission procedure, the Ministry underlines that no formal measure is drawn up, by virtue of a *"consolidated practice"* provided for by the 1996 Readmission Agreement, which provides for the Italian authorities to fill in and send a form to the Slovenian police, in which the *"elements supporting the request"* are indicated, which, if accepted, does not provide for the possibility of formalizing the possible asylum request of the person concerned.

The Ministry of the Interior continues, assuring that all irregular foreigners found attempting to cross the border are provided with information on the possibility of applying for protection, and that, furthermore, the principle of the uniqueness of the asylum application and the certainty of its examination is guaranteed within the European Union to all foreigners seeking asylum, "*taking also into account that the foreigner, although in need of protection and help, cannot be allowed to "choose" the country in which he is to be eventually received"*[216], for these reasons the procedure provided for by the 1996 Agreement does not produce any violation of the right to asylum.

Finally, with reference to the issue of the so-called "chain readmissions" to the BiH, the Ministry maintains that the risk highlighted by Mr. Magi does not exist, since Slovenia and Croatia are member countries of the European Union, which is why they are intrinsically considered safe countries *"from the point of view of full respect for human rights and international conventions on the subject"*[217]. This statement, as will be discussed in the next paragraph, was denied by the Court of Rome.

2.8.The Order of the Court of Rome of 18 January 2021

By this order, the Court of Rome upheld the urgent appeal filed by the Pakistani citizen M.Z., and consequently also sustained a dissenting thesis with respect to the Ministry of the Interior[218]'s arguments on informal readmissions. With this Order, Judge Albano highlighted some critical aspects in the application of the practice of informal transfers by the Ministry of the Interior, concerning the compliance with substantive and procedural obligations related to the implementation of the right to asylum.

First of all, as previously stated, the 1996 Readmission Agreement, not having been ratified pursuant to article 80 of the Constitution, cannot provide for any amendment and/or derogation to the laws in force in Italy or to the norms of the European Union or deriving from sources of international law, indeed, according to the Court, the Agreement with Slovenia must necessarily be read in the light of European Union law and the Charter of Fundamental Rights of the European Union.

As a matter of fact, although the Directive 2008/115/EC allows to reject an individual without adopting a formal measure, but relying on bilateral Agreements between two States, it provides for guarantees to protect

[216] Reply given by the Ministry of the Interior to MP Riccardo Magi's interpellation, 2020, *cit.*

[217] Reply given by the Ministry of the Interior to MP Riccardo Magi's interpellation, 2020, *cit.*

[218] Paragraph 3.2 Chapter 2.

the person, as we have seen, with reference to the prohibition of *refoulement* set forth in article 5 and to the other supranational measures introduced in the Italian legislation, which provide for a necessary verification of the concrete situation to which the individual could be exposed once rejected in a third country, in compliance with article 3 of the ECHR. In this regard, in fact, Judge Albano then goes on to state in point 2 of the Order that informal readmissions can never be applied to asylum seekers, *"without even providing for the collection of the [...] application for asylum [...]"*[219], contrary to what the Italian Government stated in its response to the above-mentioned interpellation.

In fact, the Ordinance under examination pointed out that the readmission procedure here examinated violated the applicant's right to access the asylum procedure, also with reference to a discordant application of the provisions of the Agreement itself. The explanation of this statement is developed starting from an analysis of Article 2 of the Agreement in question, which provides for the possibility of readmission by States, if the citizen coming from a third country *"does not meet or no longer meets the conditions of entry or residence"*[220], provided by the Contracting State, *"insofar as [it is] proven that such citizens [have] entered the territory of this Party after having stayed in or transited through the territory of the Contracting Party"* to which readmission is requested. However, as pointed out by the judge, the asylum seeker, if he expresses the will to apply for protection, can no longer be considered "irregular", since, according to the provisions of Legislative Decree 25/2008 implementing Directive 2013/31/EU, Member States are obliged to ensure effective access to the procedure for examining the asylum application. In addition to the above, Article 1(2) of Legislative Decree 142/2015 implementing Directive 2013/33/EU, provides that reception measures are applied from the moment the person expresses the will to apply for asylum, and that under Article 4 thereof a residence permit for asylum application is granted. Consequently, the Court concludes, *"[the applicant] cannot be considered to be irregularly staying in the territory or [a] person who does not fulfil or no longer fulfils the conditions of entry or residence"*.[221] The judge then continues, referring to Article 10 (3) of the Constitution. This article, following the 2005 judgment of the Supreme Court of Cassation, mentioned in the previous chapter, has also been interpreted as the right to access the territory of the State, in order to apply for asylum, since according to the judgment of the United Sections of the Court of Cassation *"the right to international protection is full and perfect and the procedure does not affect at all the emergence of the right that in the forms of the procedure is only ascertained [...] the right arises when the situation of vulnerability occurs"*.[222]

[219] Order of the Court of Rome, n. 56420/2020, 2021, *cit.*

[220] Bilateral Agreement between the Government of the Italian Republic and the Government of the Republic of Slovenia on the readmission of persons at the border, 1996.

[221] Order of the Court of Rome, n. 56420/2020, 2021, *cit.*

[222] Judgement United Sections of the Court of Cassation, n. 29460/2019, 2019, available at the following link: https://www.asgi.it/wp-content/uploads/2019/11/2019_cassazione_29460.pdf.

A further criticality is then related to the Dublin III Regulation (n. 604/2013) governing the determination of the State responsible for examining the application for asylum, in order to ensure certain minimum guarantees to asylum seekers. The Dublin Regulation in Article 20 established that such a procedure must be initiated as soon as an application for international protection is lodged with a Member State, at which point under Article 3, the Regulation provides for the obligation of States to examine any application lodged by a third country national, on their territory, including borders and transit zones. According to Article 13 of the Regulation, therefore, the transfer of the asylum seeker can only be carried out by the EU Member States after appropriate checks have been carried out to ascertain the State responsible. This, however, does not lead to a direct transfer of the applicant without formalities; on the contrary, the Regulation provides that the asylum application must be *"always and in any event"* [223]registered in the country in which the applicant expresses his or her wish, that the person must then be temporarily received on the territory and that, in the meantime, the "Dublin" procedure must be activated to ascertain which State is responsible for examining the application.

Continuing on this point, Judge Albano, also states that the identification procedure of the competent country is a very complex procedure, in fact, to the rule of the "country of first entry", there are some exceptions, namely, exemplified by Articles 3, 4 and 5 of the same Regulation [224]. Article 3 provides for the impossibility of readmitting a person to a territory where he/she might be exposed to inhuman and degrading treatment, while Articles 4 and 5[225] refer respectively to the *"information and participation guarantees of the applicant aimed also at establishing whether there are other criteria that would establish the competence of another State"*[226]. Still referring to the above, the Ordinance mentioned what has been stated by the Court of Justice of the European Union. In a first judgment, the CJEU stressed that *"EU law precludes the application of an absolute presumption that the Member State designated as responsible respects the fundamental rights of the European Union, recalling in particular Article 4 of the Charter of Fundamental Rights of the European*[227] *Union which must also be interpreted to mean that even in the absence of serious reasons to consider that there are systemic deficiencies in the Member State responsible for examining the asylum application, the transfer of an asylum seeker in the context of Regulation n. 604/2013 can only be carried out under conditions in which it is excluded that such a transfer entails a real and acclaimed risk that the person concerned will be subjected to inhuman or degrading treatment"*[228], it then continues in a second judgment arguing that *"for the*

[223] Order of the Court of Rome, n. 56420/2020, 2021, *cit.*

[224] Paragraph 2.1 Chapter 1.

[225] Article 5 of the Dublin Regulation n. 604/2013, *"In order to facilitate the procedure for determining the Member State responsible, the Member State initiating the determination procedure shall conduct a personal interview with the applicant. The interview shall also allow for a proper understanding of the information provided to the applicant pursuant to Article 4".*

[226]Order of the Court of Rome, n. 56420/2020, 2021, *cit.*

[227] Article 4 of the Charter of Fundamental Rights of the European Union, *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment".*

[228] Order of the Court of Rome, n. 56420/2020, 2021, *cit.*

transfer, the individual risk must be assessed even in the absence of systemic deficiencies" [229]. In conclusion, the Court of Rome points out that, according to numerous authoritative sources on the conditions experienced by migrants in Slovenia, Croatia and BiH[230], the Italian Government had all *"the necessary instruments to know that the readmissions"*[231], *"would have exposed migrants, including asylum seekers, to inhuman and degrading treatment"*[232]. The Court maintains that the lack of issuance of an administrative readmission order, to be notified to the person concerned, is not only contrary to Italian, international and European[233] law, but is also a fundamental prerequisite for ensuring individual examination of individual positions and consequently compliance with Articles 19[234] and 4 of the EU Charter of Fundamental Rights, Article 4 of Protocol 4 to the ECHR and Article 3 of the ECHR. The latter provision, i.e. the prohibition of torture and/or inhuman and degrading treatment, does not provide for any possibility of derogation under Article 15 of the ECHR[235]. According to Justice Albano's explanation, the responsibility for violation of Article 3 also exists in cases where the State is aware of a possible chain readmission, with the risk for the individual to suffer torture and/or inhuman and degrading treatment not in the first State of destination but in a subsequent one.

In the light of the above, mentioning Article 10 (3) of the Italian Constitution, the court establishes the right of the applicant to enter Italian territory and apply for international protection.

2.9. The Case A. M. v. Republic of Slovenia of 2020

[229] Order of the Court of Rome, n. 56420/2020, 2021, *cit.*

[230] Order of the Court of Rome, n. 56420/2020, 2021, *cit.*, pp.8-12. RiVolti ai Balcani, *Rotta Balcanica: i migranti senza diritti nel cuore dell'Europa, cit.*; Amnesty International, *Slovenia: Push-Backs and denial of access to asylum, cit.*; PIC, *AIDA-Country Report: Slovenia, cit.*; Infokolpa, *Chain Pushbacks and State Violence on the Balkan Route Slovenia 2021, cit.;* Associazione per gli Studi Giuridici sull'Immigrazione, *AIDA-Country Report: Italy, cit.*; Amnesty International, *Pushed to the edge-violence and abuse against refugees and migrants along the balkas route*; CeSPI, *La rotta balcanica 5 anni dopo*, 2021.

[231] Order of the Court of Rome, n. 56420/2020, 2021, *cit.*

[232] Order of the Court of Rome, n. 56420/2020, 2021, *cit.*

[233] Order of the Court of Rome, n. 56420/2020, 2021, *cit.* The failure to produce an administrative measure violates Articles 2 and 3 of law 241/90, Article 13 of the Constitution and Articles 10(2) and 13(5) of the T.U and prevents the foreigner from being able to exercise his right to an effective remedy, as underlined by Article 24 of the Italian Constitution, Article 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union.

[234] Article 19 of the Charter of Fundamental Rights of the European Union, *"Collective expulsions are prohibited; 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".*

[235] Article 15 ECHR deals with those situations of "urgency" for which derogation from the obligations of the ECHR is possible, however, in paragraph 2 it states that *"[t]he preceding provision does not authorise any derogation from Article 2, except in the case of death resulting from lawful acts of war, and from Articles 3, 4 (1) and 7".*

Similar to the above-mentioned case is that of a person from Cameroon[236], who belongs to an English-speaking minority persecuted by the French-speaking government since 2016. Because of the political activities carried out in the country, the applicant was forced by the persecutory circumstances to flee from Cameroon. After crossing the Balkan route and entering Slovenian territory, together with a friend of Kurdish origin, the applicant stated that he had expressed his willingness to apply for asylum to the border police, however, both of them, immediately after crossing the border between Croatia and Slovenia, were arrested near the locality of Podlog. A. M. was subjected to several questions by the police, concerning the exact point at which he crossed the border; the number of persons "travelling" with him; and his personal history, reason for fleeing his country of origin. The police then made the applicant sign documents in Slovenian, in the absence of an interpreter, the police communicated in English, explaining the content of the documents, however, when the applicant was asked to enter the country of destination, the police prevented him from mentioning Slovenia. None of these documents were left with the applicant, who after a few hours was transported, together with other migrants, to the border with the Republic of Croatia and handed over to the authorities, who in turn deported him to BiE.

2.10. The position of the Government of the Republic of Slovenia

In its reply to the applicant's appeal, the Republic of Slovenia stated that the applicant had been treated lawfully by the police, in accordance with the Agreement between the Republic of Slovenia and Croatia on the readmission of persons whose entry into or residence on the territory is considered illegal. The Government then went on to argue that the applicant was not treated in violation of Article 3 of the ECHR and Article 4 of Protocol n. 4 to the ECHR, since, once intercepted by the border authorities he was taken inside the police station and processed for illegal crossing of the State border, he was also interviewed in English "a language he speaks and understands". With reference to Article 4 of Protocol n. 4 to the ECHR, concerning collective expulsions, Slovenia argued that this violation was totally unfounded, since, as it emerged from statements by the Government, the individual treatment of the applicant, appears to be in conformity with this article of the ECHR: *"[t]he applicant was not expelled collectively, since he was treated individually by the police, and this is not a case of collective expulsion [...]. Any standardized treatment does not amount to collective expulsion [...]"*.

As regards, however, the applicant's right to manifest his intention to apply for asylum, according to the Government a person *"whose life or freedom was allegedly threatened should have applied in the first safe country, which the applicant did not do. Prior to his illegal entry into Slovenia, the applicant was already in safe countries such as Montenegro, Bosnia and Herzegovina and Croatia [...]"*, however, the applicant did

[236] Judgement of the Administrative Court of the Republic of Slovenia, IU 1490/2019-92, 2020, available at the following link:https://www.sodnapraksa.si/?q=*:*&database[SOVS]=SOVS&database[IESP]=IESP&database[VDSS]=VDSS&database[UPRS]=UPRS&_submit=i%C5%A1%C4%8Di&id=20150811441579

not mention any circumstances in Cameroon, BiH or Croatia which he could detect[237] during the interview with the police as contrary to Article 3 ECHR. In support of this argument, the Government also stated that it had no information defining BiH as an unsafe country and that, on the contrary, as far as Croatia was concerned, since it was part of the European Union, it was obliged to comply with the rules laid down therein, including the Return Directive, and in particular with the provisions of Article 6(3), namely *"[...] the Member State which takes back the national in question shall apply [the return decision]"*. With reference to Cameroon, on the other hand, according to the Slovenian Government, general statements were provided and not supported by actual evidence. Moreover, once the interview with the police was concluded, the applicant was then handed over to the Croatian authorities, on the basis of the 2006 bilateral agreement, which is legitimate under Article 8 and Article 153, paragraph 2, of the Slovene Constitution, namely, respectively, that international treaties that have been ratified and published are directly applicable; and that the laws must conform to such treaties. In addition, the Slovenian government emphasized that it had also acted in accordance with European law, as provided for in Articles 2(2[238]) and 6(3) of the Return Directive. Both articles allow States to refrain from issuing any kind of reasoned decision on the return of a third-country national who has entered the territory of a Member State illegally, if the return procedure is governed by bilateral agreements between States, concluded before the entry into force of the directive under review.

2.11. The judgment of the Slovenian Supreme Court of 2021

In the first judgment, the Slovenian Administrative Court upheld the appeal of A.M., claiming the violation of Articles 18 and 19 (1) and 19 (2) of the Charter of Fundamental Rights of the European Union[239], concerning respectively the right to international protection, the prohibition of collective expulsions and the right of *non-refoulement*, understood as the prohibition of expulsion to a State where the individual could be exposed to the risk of torture, death penalty or inhuman or degrading treatment. The final judgment of the Supreme

[237] Judgement of the Administrative Court of the Republic of Slovenia, IU 1490/2019-92, 2020, *cit.* The Republic of Slovenia argues that although the applicant has made a general statement on the possibility of a violation under Article 3 ECHR in Croatia, BiE and Cameroon, according to the standards of assessment derived from the case law of the ECHR on that article, "*the extradition of an alien to another State is prohibited when convincing reasons are shown to justify the conclusion that there is a real risk that the person concerned will be subjected to torture or inhuman or degrading treatment or punishment", it* also adds that *"a State cannot claim not to be aware of the situation in one country if there are reports from NGOs, international organizations and other public sources on the situation in another country, which does not in itself mean that the principle of non-refoulement has also been violated in that country".*

[238] The Slovenian Government made use of the possibility provided for in Article 2(2) of the afore mentioned Directive by inserting it in Article 64 of the Aliens Act.

[239] Article 18 of the Charter of Fundamental Rights of the European Union, *"The right to asylum shall be guaranteed with due respect for the rules laid down in the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community"; Article 19 CDFUE: "Collective expulsions are prohibited; 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".*

Court[240], following the appeal of the decision of the Administrative Court by the Slovenian Government, will be presented below.

With reference to Article 19(2) of the Charter of Fundamental Rights of the European Union, the Court declared the conduct of Slovenia to be in violation of this article. According to the judgment, the Slovenian authorities should have ascertained, before readmitting the applicant to Croatia, whether such a transfer could have placed him in danger of being subjected to inhuman and degrading treatment. In that sense, the Court disagreed with the Government's reasoning, stating that although the 2006 Agreement does not provide for such a prior assessment, this does not relieve the Slovenian authorities of that obligation.

The Court's reasoning for this decision lies in its analysis of the case law of the CJEU and the ECtHR, according to which Article 19(2) was infringed when the defendant in the proceedings failed to remove all doubt that *"the competent police authority did not carry out a valid and objective examination and assessment of the personal (individual) circumstances of the applicant in the proceedings with him, or in that the applicant was not given the opportunity to defend himself before being extradited by presenting arguments against the measure of return or removal from the Republic of Slovenia".* [241]

In fact, in this sense, the Court contrasts with the Government's reasoning in relation to the principle of "mutual trust" between Member States, stating that the latter is questionable, in particular *"if it is not possible for them not [to] be aware [of the deficiencies relating to the treatment of aliens in the country of transfer]"*. The Court then goes on to say that *"the principle of non-refoulement must also be respected in the context of the implementation of measures between Member States. This in turn imposes an obligation on a Member State not to remove an individual from its territory if there is a risk of treatment in the receiving country (EU Member State) which would constitute a breach of Article 4 of the Charter [of Fundamental Rights of the EU], as the CJEU has expressly confirmed in relation to the surrender of an asylum seeker in the context of the implementation of the Dublin system".* In support of this assertion, the Court highlighted in its judgment the numerous reports drawn up by various European organizations and institutions with respect to the ill-treatment of migrants in Croatia and relating to the resulting practice of chain refoulement in BiE and the conditions to which the migrant person is subjected there. [242]

In fact, according to the Court, the principle of *non-refoulement* is both direct and indirect, i.e. a prohibition on refoulement where it is clear that a person could be subjected to a chain deportation to a country where there is a risk of being exposed to inhuman or degrading treatment.

[240] Judgment of the Supreme Court of the Republic of Slovenia, I UP 23/2021, 2021, available at the following link: http://www.sodnapraksa.si/?q=VSRS%20Sodba%20I%20Up%2023/2021&database%5BSOVS%5D=SOVS&database%5BUPRS%5D=UPRS&_submit=i%C5%A1%C4%8Di&rowsPerPage=50&page=0&id=2015081111448095

[241] Judgment of the Supreme Court of the Republic of Slovenia, I UP 23/2021, 2021, *cit.*, paragraph 2.

[242] Judgment of the Supreme Court of the Republic of Slovenia, I UP 23/2021, 2021, *cit.*, paragraph 17.

According to the Court's findings, the Slovenian government had all the necessary tools to carry out assessments of the current situation in the countries of transfer, and by failing to carry out an effective analysis of the possible risks incurred by the applicant. So, according to the Court, the conduct of Slovenia pursuant the Agreement, was in violation of the principle of *non-refoulement*, it does not matter whether the risk of torture after illegal return materializes or not, the state is already violating the absolute prohibition of torture by failing to make an assessment of the applicant's safety with regard to his refoulement. It was possible for the Court to affirm this thanks to Article 52 of the Charter of Fundamental Rights of the EU and the case law of the Court of Justice of the EU, which ruled that in interpreting Article 19 in this case, the decisions of the ECtHR on article 3 of the ECHR must be taken into account, thus reinforcing the principle of *non-refoulement*.

As regards the prohibition of collective expulsions, enshrined in Article 4 of Protocol n. 4 of the ECHR, the Court once again disagreed with the Slovenian Government's assertion that, in order not to infringe the prohibition of collective expulsions, it is a prerequisite to carry out an individual assessment of the specific cases of the rejected individuals. According to the Court, this requirement was not taken into account by the Slovenian Government, which, following the asylum application received from the person concerned, should have referred the applicant to the asylum procedure provided for by the IPA, and only in the event of rejection could he have been readmitted. Moreover, the Court also pointed out that the applicant had not been sufficiently informed of the decision to refuse entry to Croatia, and therefore could not raise any objections to it.

Regarding access to the right to asylum, the Court also confirmed the first judgment of the Administrative Court, stating that the readmission pursuant the Agreement, by the Republic of Slovenia, violated the article 18 of the Charter of Fundamental Rights of the EU. The Administrative Court had held that the applicant had expressed his intention to apply for asylum as a member of a persecuted community in Cameroon and had presented documentary evidence of persecution, *"[a]s regards the violation of the right of access to asylum, the Court held that the applicant had met his part of the burden of proving that he had made an intention to seek asylum […]"*[243]. The Court of First Instance also underlined the lack of official documentation regarding the applicant's treatment procedure and the fact that he was not guaranteed the right to receive correct information in a language he understood [244]. Moreover, the applicant's description of the police procedure was in line with the authoritative reports mentioned in the judgment, in which persons were returned to Croatia despite having applied for asylum.

[243] Judgment of the Supreme Court of the Republic of Slovenia, I UP 23/2021, 2021, *cit.*, paragraph 4.

[244] Article 12 and Article 8 (1) of the Asylum Procedures Directive 2013/32/EU which supports the obligation of States to inform third country nationals present at border crossing points, "including transit zones at external borders", about the possibility of applying for asylum if they wish to make an application for international protection.

In view of the above, *"given that the Government have not denied by their documentary evidence that an intention was expressed [by the applicant], the Supreme Court can only confirm the view of the judgment [of the Administrative Court, subsequently appealed by the Slovenian Government] that the applicant did not have an effective opportunity to claim the right to asylum"*[245].

In addition, the Court pointed to further criticalities emerged in the application of the readmission Agreement by the Slovenian Government. The first one is represented by Article 36 (1) of the IPA, which provides that *"until an application has been submitted, the applicant may not be removed from the Republic of Slovenia"*, furthermore, the article continues in paragraph 2, stating that this provision does not apply even to persons who for *"unjustified reasons arising on his part, does not submit an application, even though he has been enabled to do so"*, however, these possibilities, according to the Court, not having occurred, due to the rejection of the person, have consequently resulted in the execution of a conduct contrary to the right to asylum, as referred to in Article 18 of the Charter of Fundamental Rights of the EU. The judgment goes on to point out that in the case of a formalized application, the only instrument that can be used to transfer a person to another Member State is the Dublin III Regulation, only in cases where another State is responsible for examining that application. However, even in the Dublin system, the applicant has the right to object if there is a well-founded presumption that there are systemic deficiencies in the other Member State which could lead to a risk of inhuman or degrading treatment within the meaning of Article 4 of the EU Charter of Fundamental Rights.
Similarly to the Order of the Court of Rome, set out above, also in the present case it emerges that the Return Directive cannot be used as a legal basis for the transfer of the applicant to Croatia, since applicants for international protection do not fall within the scope of application of that directive, in fact, the Court continues stressing *"third country nationals who have applied for asylum in a Member State should not be treated as if they were illegally staying in the territory of a Member State until [the adoption] of a decision rejecting their application"*[246].
The judgment also continues by saying that the Agreement cannot be considered as a legal basis for the expulsion of the applicant, in this case an asylum seeker, since, according to its Article 2, the Agreement *"refers to the expulsion and reception of third country nationals or stateless persons who do not fulfil or no longer fulfil the conditions for entry into or residence on the territory of the requesting Contracting Party, but not to asylum seekers"*.
Lastly, the judgment also finds profiles of criticalities in relation to the Schengen Borders Code[247], which does not allow the refusal of entry to the territory of a Member State to persons seeking international protection.

[245] Judgment of the Supreme Court of the Republic of Slovenia, I UP 23/2021, 2021, *cit.*

[246] Judgment of the Supreme Court of the Republic of Slovenia, I UP 23/2021, 2021, *cit.*

[247] Article 14 (1) Schengen Border Code.

In light of the above, it is possible to see that the Supreme Court's judgment of 9 April 2021 definitively rejected the appeal filed by Slovenia, confirming the decisions of the Administrative Court and stating that the applicant should be allowed to enter Slovenian territory and apply for asylum.

2.12. Concluding remarks

In the analysis reported so far, two case studies have been examined which highlighted some critical elements in the application of informal procedures for the transfer of migrants, in relation to the right to asylum. It is also worth emphasizing that informal transfers of migrants at the border are part of a much wider spectrum of European countries than just Italy and Slovenia. According to the European Council on Refugees and Exiles[248], bilateral readmission agreements have begun to proliferate in other European countries, and here too there are critical aspects with regard to their implementation in compliance with the obligations and guarantees related to the right to asylum. With reference to the above, it is also necessary to mention the case law of the European Court of Human Rights, with the case Sharifi and Others v. Italy [249]and Greece, where, in its judgment of 21 October 2014, the Court condemned Italy for having carried out collective expulsions of asylum seekers to Greece, an unsafe country, due to its serious structural deficiencies in the asylum system. This case represents an important precedent, where the Italian government claimed to have implemented such readmissions under the 1999 Readmission Agreement with Greece. However, the European Court of Human Rights expressed the following opinion: *"[...] in view of the procedures laid down in the 1999 bilateral agreement [...] the Italian Government's argument that this applicant was the subject of a readmission on the basis of that agreement, which gave rise to a certain form of individual examination of this applicant's situation and his need for protection, seems irreconcilable: there are no readmission applications submitted to the Greek authorities in accordance with Article 5 of the 1999 bilateral agreement and its implementing protocol. This finding seems to corroborate the fears of the Special Rapporteur of the United Nations Human Rights Council that the practice of readmissions to Greece from Italian ports in the Adriatic Sea often contravenes the scope and procedures of the 1999 bilateral agreement"*. [250]The Court goes on to state that *"without calling into question either the right of States to determine their immigration policy sovereignly, possibly within the framework of bilateral cooperation, or the obligations arising from their membership of the European Union, [...] the difficulties which [the States] may encounter in managing migratory flows or in receiving asylum seekers cannot justify recourse to practices incompatible with the Convention or its Protocols"*, [251]so even in

[248] European Council on Refugees and Exiles, *Bilateral Agreements: Implementing or Bypassing the Dublin Regulation?*, 2018.

[249] Judgement of the European Court of Human Rights, Sharifi and Others v. Italy and Greece, n. 16643/09, 2014, available at the following link: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-155921%22]}.

[250] Judgement of the European Court of Human Rights, Sharifi and Others v. Italy and Greece, n. 16643/09, 2014, *cit.*

[251] Judgement of the European Court of Human Rights, Sharifi and Others v. Italy and Greece, n. 16643/09, 2014, *cit.*

implementing bilateral readmission agreements Member States *"cannot ignore or evade their obligations under the European Convention on Human Rights"*[252]

The above case has been taken up by both Courts in relation to the principle of "mutual trust" and the presumption of security of the EU Member States does not define a transfer as necessarily in compliance with the EU legislation, and a considerable amount of case law of both the ECHR and the CJEU[253] has been reported in support of this thesis. This principle was then also included in the Dublin III Regulation, in Article 3, but it has its origins in the violation of Article 3 ECHR by some States, for reasons of structural inadequacy of the asylum system and for the refoulement of applicants. Therefore, it has been stressed by the Courts, and confirmed also in the above-mentioned cases, that the transfer of the asylum seeker cannot take place automatically but must always be preceded by the verification and respect for fundamental rights of the country identified as "competent" to analyze the application.

As stated in the two decisions, the way in which these rejections are carried out is in contrast with the prohibition of collective expulsions, which, as established by the ECtHR, implies a right to individual examination of the asylum application, which is closely linked to the right to an effective remedy to challenge any unfavorable decision. This was first affirmed in Hirsi Jamaa v. Italy[254], where the ECtHR also stressed that the *"prohibition of refoulement is not limited to the obligation to refrain from returning the individual to his State of origin or to the State from which he comes, where there is a danger that he may suffer serious harm to his life, liberty or psychological and physical integrity, but also extends to the transfer to any third country where such a risk arises. Consequently, the deportation by the public authorities to a State deemed to be safe requires a careful verification of the effective protection guaranteed in that country, both with regard to the risk of being subjected to inhuman or degrading treatment and with regard to the risk of being sent back to countries where such treatment might be suffered"*, in this regard the "verification" required by the Court cannot be limited to referring to bilateral readmission agreements.

Finally, it is important to point out that the Articles 4 and 19 of the Charter of Fundamental Rights of the EU in conjunction with Article 3 of the ECHR, were formulated by the Union in absolute terms; therefore, they

[252] C. Bove and E. Rizzi, *Le riammissioni e i respingimenti dei cittadini extra-UE verso i Paesi dei Balcani occidentali: quale tutela legale?,* in "Euro-Balkan Law and Economic Review", 2021, n.1, p.54.

[253] Judgement of the Court of Justice of the European Union, N.S. c. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, C-411 e 493/10, 2011, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CJ0411&from=EN; Judgement of the European Court of Human Rights, Sharifi and Others v. Italy and Greece, n. 16643/09, 2014, *cit.*; Judgement of the European Court of Human Rights, M.S.S. v. Belgium and Greece, n. 30696/09, 2011, available at the following link: file:///Users/fra/Downloads/001-103050%20(1).pdf.

[254] Judgement ECtHR, Hirsi Jamaa and Others v. Italy, n. 27765/09, 2012, available at the following link: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-109231%22]}.

do not allow for derogations or justifications[255], as specified by the ECtHR and the Court of Justice of the European Union, which have expressed themselves, referring to these articles as *"closely linked to respect for human dignity".*[256] Considering, therefore, that respect for fundamental rights and human dignity are indispensable elements of the European Union and its derivative acts, under Article 67 TFEU[257], they are binding on all Member States when they adopt the instruments *"which within the EU lay down rules concerning the fight against irregular immigration, border control, as well as for the various acts constituting the [CEAS]"*[258]. In addition, although Article 3 of the ECHR applies to all foreigners, the asylum seeker enjoys a status to which specific rights are attached, as emphasized by the Courts under review. Provided for in the Asylum Procedures and Reception Directive. In this regard, again in Sharifi and Others v. Italy and Greece, it is stated, referring to M.S.S. v. Belgium and Greece, *"the obligation not to reject is also recognized as applying to refugees irrespective of their official recognition, which clearly includes asylum seekers whose status has not yet been determined. It extends to any measure attributable to a State which may have the effect of returning an asylum seeker or refugee to the frontiers of a territory where his life or freedom would be threatened and where he would risk persecution".*[259]

In conclusion, it should be noted that the examination carried out by the Court of Rome and the Supreme Court of Slovenia, with regard to the cases mentioned above, does not establish the illegitimacy of the practice of informal readmissions, however, highlights some critical issues of compliance with substantive and procedural obligations related to the implementation of the right to asylum within the EU context, according to what is reported by the Courts, it can also be assumed the need for Member States not to ignore their obligations related to the implementation of the right to asylum when carrying out informal transfers.

[255] A. Di Pascale, *Riammissioni informali e violazione del diritto di asilo*, in "Questione Giustizia", 2021, n.3, p.8.

[256] A. Di Pascale, *Riammissioni informali e violazione del diritto di asilo, cit.*

[257] Article 67 of the TFEU, *"The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States".* Within the area of freedom, security and justice lies the EU competence on international protection, as specified in Chapter 1.

[258] A. Di Pascale, *Riammissioni informali e violazione del diritto di asilo, cit.,* p.8.

[259] Judgement of the European Court of Human Rights, Sharifi and Others v. Italy and Greece, n. 16643/09, 2014, *cit.*

3. The situation after the issuing of the two judgements

In this last chapter, an attempt will be made to provide an overview of the current situation in the aftermath of the decisions mentioned in the previous Chapter. Finally, in a second section, the New European Pact on Migration and Asylum will be analyzed with the aim of providing as complete a picture as possible in relation to the right to asylum.

3.1. The situation today

Following the Order of the Court of Rome of 18 January 2021, there have been fewer and fewer cases reported of people being readmitted in Slovenia, indeed, the last episodes date back to the period between January and April 2021[260].

In order to provide a complete overview, a brief reference should be made here, to the appeal filed by the Ministry of the Interior, against the Order of 18 January 2021. On 3 May 2021, the same Court of Rome accepted the appeal of the Ministry[261], noting that the absence of the applicant's fingerprints in the police records such as Eurodac, made it impossible to prove his actual arrival in Italy in 2020 and that nothing could prove, in addition to his statements, his readmission to Slovenia "*under the Italo-Slovene agreement, the possible illegality of which, insofar as said, is not relevant for the purposes of deciding"*[262], however, it also pointed out that *"if the facts described were ascertained, they would be exceptionally serious"*[263]. In the meantime, the applicant entered the country and exercised his right to seek asylum.

Turning instead to the examination of the Republic of Slovenia, it should be noted that according to the data collected, from January to April 2021, 170 persons were readmitted from Slovenia to Croatia[264].

With the Supreme Court's judgment, which definitively confirmed the Administrative Court's decision, the Republic of Slovenia should have allowed the applicant to enter the country and apply for international protection, however, four months after the judgment[265] was issued, the applicant was still in BiE, indeed, it was only in September 2021 that the applicant managed to reach Slovenia on foot.

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[260] Protection Rights at Borders (PRAB), *Pushing Back Responsibility-Rights Violations as a "Welcome Treatement" at Europe's Border*, 2021, p. 4. Annex 1, POM1, POM2, POM3, POM4, interview released in Trieste, Italy.

[261] Order of the Court of Rome, n. 56420/2020, 2021, *cit.*

[262] Order of the Court of Rome, n. 56420/2020, 2021, *cit.*

[263] Order of the Court of Rome, n. 56420/2020, 2021, *cit.* I. Sesana, *Riammissioni in Slovenia: accolto il ricorso del Viminale. Ma la prassi resta illegittima*, in "Altreconomia", 2021, available at the following link: https://altreconomia.it/riammissioni-in-slovenia-accolto-il-ricorso-del-viminale-ma-la-prassi-resta-illegittima/. G. Schiavone, *La lega ordina alla polizia: "fate sparire i profughi"*, in Il Riformista, 2021, available at the following link: https://www.ilriformista.it/la-lega-ordina-alla-polizia-fate-sparire-i-profughi-249523/.

[264] Protection Rights at Borders (PRAB), *Pushing Back Responsibility-Rights Violations as a "Welcome Treatement" at Europe's Border*, 2021, *cit.*

[265] Infokolpa, *Open letter in support of plaintiff chain pushed back from Slovenia*, 2021, available at the following link: https://www.borderviolence.eu/open-letter-about-slovenian-chain-pushback-case/.

Another important point to state, in the aftermath of the decision issued by the Supreme Court of Slovenia, is that the Readmission Agreement with Croatia is currently being examined by the Constitutional Court, in order to judge on its legitimacy. This was possible, following the Ombudsman's action after the decision of the Slovenian Supreme Court, I Up 21/2020[266]. This is the case of a Moroccan citizen who applied for international protection in Slovenia and was rejected. After completing the asylum procedure, he was readmitted to Croatia on the basis of the bilateral readmission Agreement, and then to Bosnia and Herzegovina. The Administrative Court in a first judgment, I U 1412/2018, ruled that during the procedure, the applicant was not allowed to object to his return on the basis of the prohibition of non-refoulement and did not have an effective legal remedy, as he was not issued a written decision. The Ministry of Interior then appealed against this decision to the Supreme Court, which held that the fact that the applicant was not issued a written decision was not illegal, for these reasons the Ombudsman referred the case to the Constitutional Court, however, to date the case is still pending.

3.2. The new European pact on migration and asylum brief historical evolution.

The European Pact on Migration and Asylum is part of the process of establishing the CEAS.

This Pact is not binding but aims to outline the main framework of migration and asylum management initiatives for the next five years after its adoption. For the first time in 2008, the Heads of State and/or Government approved the European Pact on Immigration and Asylum, with the aim, set out by the European Commission, of completing the creation of a Common European Asylum System through a strategy that provides for the harmonization of protection standards on the one hand, and on the other the strengthening of internal solidarity and cooperation between Member States.

In addition to reaffirming the principle that *"any persecuted foreigner has the right to obtain assistance and protection in the territory of the Union"*[267], in application of the Geneva Convention of 1951 as amended by the Protocol of 1967, the Pact also provided for five other "fundamental commitments", such as the organization of legal immigration on the basis of the States' reception possibilities, the fight against illegal immigration, the strengthening of border controls and partnerships with the countries of origin, and finally the creation of a "Europe of asylum". With reference to this last objective, the Council wanted to take further initiatives[268], aimed at completing the establishment of the CEAS, as foreseen in the Hague Programme, as specified in the first Chapter of this thesis.

During the so-called "migration crisis" that has affected the EU since 2015, the 2008 Pact was followed by the European Agenda on Migration[269]. The latter was a "steering" instrument aimed at outlining measures to

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[266] PIC, *AIDA-Country Report: Slovenia*, 2021, *cit.*, p.21.

[267] N. Petrović, *Rifugiati, profughi, sfollati – Breve storia del diritto d'asilo in Italia, cit., pp.*123-124

[268] N. Petrović, *Rifugiati, profughi, sfollati – Breve storia del diritto d'asilo in Italia, cit., pp.*124-125.

[269] European Commission, European Agenda on Migration, COM (2015) 240, Bruxelles, 2015, final, available at the following link: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52015DC0240&from=es.

respond to the "crisis" and further initiatives to better manage the migration phenomenon over the years. The Agenda's measures mainly concerned the creation of instruments on the one hand aimed at managing the internal dimension of migration within the European Union; and on the other hand, focused on strengthening external borders and external action[270].

Regarding the internal side, as of April 2016, the Commission has launched a number of proposals to reform the CEAS, namely:

- Reform "Dublin" in such a way as to develop a sustainable and fair system for determining the Member State responsible for examining an asylum application;
- Transforming the Qualification and Procedures Directive into regulations, with the aim of facilitating greater convergence in the EU asylum system and thus ensuring harmonized processing of asylum applications, through the adoption of uniform standards;
- Creation of a more structured framework for the resettlement of refugees from third countries, through the implementation of a Regulation;
- Preventing secondary movements by imposing proportionate sanctions on asylum seekers who depart from the Member State responsible for the asylum application, through a recast of the Reception Conditions Directive. The aim was to achieve greater harmonization of reception conditions between European countries in order to increase integration prospects and reduce secondary movements;

As anticipated in the previous chapter, a first approach to reform the Dublin system had been proposed by the European[271] Commission, in which it was envisaged to maintain the criterion of "country of first entry" to define the Member State responsible for analyzing the application, however, to this the Commission wanted to add a corrective mechanism for the redistribution of asylum applications between Member States, with the aim of easing the burden on countries whose international protection systems are under greater pressure. This proposal by the Commission, was framed in a still emergency context, and indeed was deeply amended in 2017 by the European Parliament. The latter voted for a draft legislative resolution, which proposed a *"permanent and automatic relocation mechanism that would completely delete the criterion of the First*

[270] Associazione per gli Studi Giuridici sull'Immigrazione, *L'esternalizzazione delle frontiere e della gestione dei migranti: politiche migratorie dell'Unione Europea ed effetti giuridici*, 2019. *"The externalization of border control and refugee law can be defined as the set of actions [...] mainly extraterritorial, implemented by state and supra-state actors, with the indispensable support of other public and private actors, aimed at preventing or hindering migrants (and, among them, asylum seekers) from entering the territory of a state in order to benefit from the guarantees, even jurisdictional, provided in that State, or in any case aimed at rendering legally and substantially inadmissible their entry or their request for protection [...]".*

[271] European Parliament, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM (2016) 270 final, Bruxelles, 2016, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0270&from=EN.

country of irregular entry"[272]. According to this proposal, the asylum seeker[273] "*would be able to choose between the four Member States that had received the lowest number of asylum seekers in relation to their share in the European reception system, a share defined [...] on the basis of two criteria: the number of inhabitants and GDP (gross domestic product)"*[274], thus providing for the creation of a corrective mechanism applicable at all times and not only in times of crisis, as the Commission had envisaged.

The Parliament also provided for procedures/sanctions to be adopted against Member States that decided not to accept this relocation[275] mechanism.

However, the strong opposition of the Member States to the proposal outlined here prevented the launching of a dialogue. Consequently, the failure to agree on the reform of the Dublin III Regulation, *"the cornerstone of the entire EU asylum system, [led] to the collapse one after the other [of the other texts on which the Commission had presented its reform proposals]"*[276], mentioned above, and to the end of the previous European legislature, without a reform of the CEAS.

In order to close this brief overview of the European Agenda on Migration, it is necessary to mention the actions planned on the external level, which, unlike those described above, are part of an immediate plan to manage the "migration crisis". These include:

- the strengthening of Frontex's joint operations, namely Triton and Poseidon, and the implementation of a Common Security and Defence Policy (CSDP) operation in the Mediterranean, aimed at dismantling networks of traffickers and combating migrant smuggling, which was then reinforced with EUNAVFOR MED (European Union NAVal FORCE MEDiterranea) - Operation Sophia[277];
- adopt an emergency system to support Member States affected by large flows of migrants, in accordance with Article 78 TFEU[278].

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[272] G. Schiavone, *La proposta di patto europeo su immigrazione ed asilo. Una (non) riforma che gioca (pericolosamente) con le nozioni di solidarietà e di equa distribuzione delle responsabilità tra gli Stati*, in "Il Diritto d'Asilo", Todi, Editrice Tau, 2021, pp. 58-59.

[273] G. Schiavone, *La proposta di patto europeo su immigrazione ed asilo, cit.*, pp.58-59. Excluded from this relocation mechanism based on "quotas" are asylum seekers who have family members in, or links to, a particular Member State, for example where they have previously lived or studied.

[274] G. Schiavone, *La proposta di patto europeo su immigrazione ed asilo, cit.*, p. 59.

[275] G. Schiavone, *La proposta di patto europeo su immigrazione ed asilo, cit.*, p. 59.

[276] G. Schiavone, *La proposta di patto europeo su immigrazione ed asilo, cit.*, p. 59.

[277] G. Schiavone, *La proposta di patto europeo su immigrazione ed asilo, cit.*, pp. 74-74. Consiglio Italiano per i Rifugiati, *report Arrivi e Salvataggi in mare*, 2019. European Council, *Salvare vite in mare e lottare contro le reti criminali*, 2022, available at the following link: https://www.consilium.europa.eu/it/policies/eu-migration-policy/saving-lives-at-sea/.

[278] N. Petrović, *Rifugiati, profughi, sfollati – Breve storia del diritto d'asilo in Italia, cit.*, pp.133-134. *"Proposal for a Council Decision on temporary relocation measures for Italy and Greece"*, under Article 78 TFEU, *"where one or more Member States is faced with an emergency situation characterized by a sudden inflow of third-country nationals, the Council, on a proposal from the Commission, may adopt temporary measures for the benefit of the Member State(s) concerned".*

It is appropriate to take due account of what was envisaged in the 2015 Agenda on Migration, in order to be able to move on to the analysis of the new proposed European Pact on Immigration and Asylum, as the latter although envisaging significant changes, nevertheless maintains a partial continuity with the 2015 Agenda, the Pact [279]. For the interest of this thesis, the proposal of the new European Pact on Migration and Asylum will be examined here, limited to what concerns the determination of the responsible member state; border management; and "migration crisis" management mechanisms.

3.3. The new European pact on migration and asylum 2020

As anticipated in this section we will briefly analyze some aspects, in my opinion, relevant to this discussion, related to the new European Pact on Migration and Asylum[280]. The Pact was adopted through a Communication from the European Commission to notify the strategic and guiding lines identified for the implementation of a new policy on migration and asylum. The new European Pact on Migration and Asylum is a policy document still in the form of a proposal to be implemented. Its implementation is entrusted to a package of legislative proposals currently being examined by the European Parliament and the Council, but no agreement has yet been reached.

The two cornerstones of this new Pact can be identified in the "global approach" and the "new solidarity mechanism" envisaged by the Commission. Regarding the first aspect, the Commission has proposed a *"comprehensive approach that recognizes collective responsibilities, addresses the key concerns expressed in the negotiations since 2016 to date (notably in relation to solidarity) and closes the implementation gap. Such an approach will build on the progress made since 2016 but also include a common European framework and better governance of migration and asylum as well as a new solidarity mechanism. It will also make border procedures more coherent and efficient and ensure a uniform level of reception conditions",* continued by stating that *"the overall effectiveness [of the Pact] depends on progress on all fronts [mentioned above]". [281]*

With reference to the second, however, it is worth mentioning Article 80 of the TFEU, which states that *"[t]he policies of the Union set out in this chapter[282] and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications*, *between* the Member

[279] Y. Kibeida, *Le politiche europee e il nuovo Patto sulla Migrazione e l'asilo: il punto di vista dei rifugiati*, in "Il Diritto d'Asilo", Todi, Editrice Tau, 2021, p. 78. European Council on Refugees and Exiles, *Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded*, 2020.

[280] European Commission, New Pact on Migration and Asylum, COM (2020) 609 final, Bruxelles, 2020, available at the following link: https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-ff13-11ea-b44f-01aa75ed71a1.0002.02/DOC_3&format=PDF.

[281] European Commission, New Pact on Migration and Asylum, *cit.*, p. 3

[282] Title V: Area of Freedom, Security and Justice, which therefore also includes policies on migration and asylum.

States"[283]. The desire to close the Dublin chapter clashes fundamentally with the Commission's plans. In fact, the latter presented, as part of the migration and asylum package, a new proposal for a regulation on asylum and migration management, called "Regulation of the European Parliament and of the Council on asylum and migration management" (RAMM)[284]. The aim of this instrument is to provide a new alternative for asylum and migration management at EU level and to promote mutual trust between Member States, through respect for the principles of solidarity and fair sharing of responsibilities. Although these are the assumptions set out by the Commission, the proposed line, it does not deviate much from the past. In fact, as regards the rules on the allocation of asylum applications, and therefore on the determination of the Member State responsible, the provisions of the Dublin III Regulation are reconfirmed, i.e. the criterion of the first country of irregular entry of the applicant. In this way, the asylum seeker is not considered as a person entering a common European area[285], but rather as a person entering a single state, which is therefore responsible for examining the application.

Distancing itself from what both the European Parliament and the Commission had envisaged in their previous[286] proposal, the latter in fact, although it also maintained the principle of the first country of entry, recognized a binding[287] solidarity mechanism if a Member State was subject to excessive pressure in terms of flows.

The European Commission's current proposal has provided for solidarity or "correction" mechanisms in Chapter I of the RAMM. Article 45 of the new proposal identifies the ways in which a state can contribute by showing solidarity with another member state undergoing a migratory[288] pressure or crisis or as a result of

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[283] European Commission, New Pact on Migration and Asylum, *cit.*, p. 2

[284] Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/ XXX [Asylum and Migration Fund], including COM(2020) 610 Final and 2020/0279 (COD), Bruxelles, 2020, available at the following link: https://eur-lex.europa.eu/resource.html?uri=cellar:2a12bbba-ff62-11ea-b31a-01aa75ed71a1.0014.02/DOC_1&format=PDF.

[285] Paragraph 3.2 Chapter 3.

[286] Paragraph 3.2 Chapter 3. G. Schiavone, *La proposta di patto europeo su immigrazione ed asilo*, *cit.*, pp. 58-59.

[287] G. Schiavone, *La proposta di patto europeo su immigrazione ed asilo*, *cit.*, p. 62. European Parliament, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM (2016) 270 final, Bruxelles, 2016, *cit.*, p.19. *"The Commission had foreseen the possibility for a Member State to temporarily refrain from implementing the corrective mechanism in respect of that Member State, but for a maximum period of 12 months and in any case the Member State temporarily not participating in the corrective allocation must pay a solidarity contribution of EUR 250,000 per applicant to the Member State which has been designated as responsible for the examination of such applications".*

[288]Article 1 (2) letter (a) and (b) of the European Commission, Proposal for a Regulation of the European Parliament and of the Council on situations of crisis and force majeure in the areas of migration and asylum, Bruxelles, 2020, COM (2020) 613 final, available at the following link: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52020PC0613&from=EN. *"A situation of crisis is to be understood as: (a) an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a*

landings following Search and Rescue (SAR) operations. The "solidarity contribution" envisaged by the Commission in that article can take the following forms:

- Relocation of asylum seekers who are not subject to the border procedure for examining an application for international protection;
- Sponsored returns of illegally staying third-country nationals;
- Relocation of beneficiaries of international protection who were granted international protection less than three years before the adoption of an implementing act under Article 53 (1) [289];
- Capacity building measures on asylum, reception and return, operational support and measures to respond to migratory trends affecting the beneficiary Member State through cooperation with third countries.

However, the most relevant contributions appear to be relocation and sponsored returns. Regarding the former, it is the *"[...] transfer of a third-country national or a stateless person from the territory of a benefitting Member State to the territory of a contributing Member State"*[290], the use of this measure has been foreseen for the situations described above through the procedure incorporated in Article 52 of the RAMM[291].

An ordinary system of permanent relocation, able to go beyond emergency situations, would represent a first fundamental approach to apply an effective solidarity, in the fair sharing of responsibilities, moreover, it would make no longer necessary for the States to resort to bilateral agreements, such as those we have seen in this discussion, concluded outside the Community system. However, the new Pact envisaged by the Commission, does not fulfil this possibility, in fact, the application of the relocation instrument described above, is not applicable to asylum seekers subject to the border procedure *"except in the event of a crisis situation, but in*

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scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State's asylum, reception or return system non-functional and can have serious consequences for the functioning the Common European Asylum System or the Common Framework as set out in Regulation (EU) [RAMM] or; (b) an imminent risk of such a situation".

[289] Article 53 (1) of the RAMM.*"Within two weeks from the submission of the Solidarity Response Plans referred to in Article 52(3) or, where the Solidarity Forum is convened pursuant to Article 52(4), within two weeks from the end of the Solidarity Forum, the Commission shall adopt an implementing act laying down the solidarity contributions for the benefit of the Member State under migratory pressure to be taken by the other Member States and the timeframe for their implementation".*

[290] In Article 2 letter (u) of the RAMM.

[291] In Article 52 of the RAMM. *"If the report referred to in Article 51 shows that a Member State is subject to migratory pressures, the other Member States which are not beneficiary Member States shall contribute through the solidarity contributions provided for in Article 45. Within two weeks of the adoption of the report referred to in Article 51, Member States shall submit to the Commission a plan for the solidarity response indicating the type of contributions Member States intend to adopt. Where Member States propose more than one type of contribution, they shall indicate the share of each type. If the Commission considers that the solidarity contributions indicated in the Solidarity Response Plans do not correspond to the needs identified in the Migration Pressure Report, it shall convene the Solidarity Forum. In such cases, the Commission shall invite Member States to adjust the type of contributions indicated in their Solidarity Response Plans. If the responses presented by individual States are not adequate to resolve the crisis situation, it will be for the Commission to adopt an implementing act indicating the total number of citizens to be relocated and the share for each Member State".*

any case, subject to the consent of the available Member States"[292], according to article 56 of the RAMM. A further impediment is the possibility to exclude from relocation also asylum seekers not subject to the border procedure, if according to the solidarity plan of individual States only so-called logistical measures have been included under Article 45 (1) (d).

Sponsored returns, on the contrary, consist in the provision by the "sponsoring*"* State *"of all necessary support to the State under pressure to return rapidly those who do not have the right to stay, while the "sponsoring" Member State assumes full responsibility [if] the return is not effected within a specified period"*[293], Article 2 of the RAMM, identifies as "sponsoring Member State", that State which *"commits to return illegally staying third-country nationals to the benefit of another Member State, providing the return sponsorship referred to in Article 55 of this Regulation".* Article 55 of the RAMM establishes the characteristics of "sponsorship", including the measures that can[294] be adopted by the sponsoring State, also specifying that such forms of aid are in any case subject to the obligations and guarantees deriving from the Return Directive. Also in this case, the criterion *ratione personae* applies, in fact Article 55 refers to *"third-country nationals found illegally present in the beneficiary Member State",* while Article 56 of the RAMM applies to asylum seekers subject to the border procedure.

This measure, in the same way as relocations, tends to relieve the beneficiary State of certain burdens in the management of the migratory phenomenon, even if only in the specific circumstances mentioned above, and after a certain period of time. On this last point, Article 55 specifies that *"[w]here a Member State commits to provide return sponsorship and the illegally staying third-country nationals who are subject to a return decision issued by the benefitting Member State do not return or are not removed within 8 months, the Member State providing return sponsorship shall transfer the persons concerned onto its own territory",* this period of time can be reduced to 4 months if there are situations of crisis or force majeure.

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[292] M. Borraccetti, *Il nuovo Patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col passato*?, in "Diritto, Immigrazione e Cittadinanza", 2021, n.1, pp.5-6.

[293] M. Borraccetti, *Il nuovo Patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col passato*?,*cit.,* p. 5.

[294] M. Borraccetti, *Il nuovo Patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col passato*?,*cit.,* p.7.*"The measures available to the sponsoring state are of a purely logistical nature. These include: (a) advice on return and integration of illegally staying third-country nationals; (b) logistical or financial assistance and other material or non-material assistance, including reintegration, to illegally staying third-country nationals who are willing to leave voluntarily; (c) guidance or support for political dialogue and exchanges with third-country authorities in order to facilitate readmission (d) contacting the competent authorities of third countries in order to verify the identity of third-country nationals and obtain a valid travel document; (e) arranging, on behalf of the beneficiary Member State, the practical arrangements for carrying out the return, such as charter or scheduled flights or other means of transport to the third country of return".*

With reference to the above, some brief considerations are presented below [295], first of all, it is necessary to refer to the timing, in fact, the time factor of the sponsored return, for example, is to be considered in the whole procedure[296], which can last up to 12 months, during which the person concerned will have to remain on the territory of the Member State, therefore, this form of assistance can achieve the objective of reducing the pressure on the States of first entry, certainly not in the short term, to which must be added the hypothesis in which the sponsor State refuses the transfer, for reasons of danger to the internal security of the State.

Furthermore, the solidarity system envisaged by the Commission does not provide for functional provisions, criteria and specific procedures to enable and assess compliance with obligations towards beneficiary Member States and the appropriateness of the measures taken.

A final element to be highlighted, concerns the freedom left to Member States. In fact, the European Commission states in the proposal for the new Pact for Migration and Asylum that it *"intends to always leave Member States viable alternatives to relocation"*[297], sometimes favoring sponsorship or logistical support measures for relocation, rather than implementing real relocations of third-country nationals present in the "beneficiary" State. In this way, it seems possible to observe that the Commission envisaged a mechanism in which *"the main burden of the ordinary management of migration flows would remain with the States on the southern and eastern external borders of the Union"*[298]. In addition to this last point, it should be stressed again that solidarity contributions do not apply to asylum seekers subject to a border procedure, who, however, do not represent residual cases, *"but [...] a [...] significant part of the applications for protection which would therefore remain entirely the responsibility of the Member States at the external borders of the Union [...]"* [299]. Moreover, again with regard to states at the external borders, their link with asylum seekers could be further strengthened, following a further innovation proposed by the Commission in the New Pact under consideration. It concerns the fight against so-called secondary movements. On this point, the Commission stated that *"[i]n order to prevent unauthorized movements, the proposal limits the right to material reception conditions in the Member State where the applicant is required to be present, with the exception of the obligation for all Member States to ensure a standard of living in accordance with Union law, including the*

[295] M. Borraccetti, *Il nuovo Patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col passato*?,*cit.,* pp.7-9. G. Schiavone, *La proposta di patto europeo su immigrazione ed asilo, cit.,* pp. 60-73.

[296]M. Borraccetti, *Il nuovo Patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col passato*?,*cit.,* p.8. "*The calculation of the period of stay combines, with the maximum period of 8 months provided for in Article 55 (2), the time needed by the Communication to draw up and adopt its report on migratory pressure and the implementing act; by the Member States, to indicate the contributions they wish to make on receipt of the Commission's request; and by the sponsoring State, to confirm the transfer and proceed with it".*

[297] G. Schiavone, *La proposta di patto europeo su immigrazione ed asilo, cit.,* p.62

[298] M. Borraccetti, *Il nuovo Patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col passato*?,*cit.,* p. 9.

[299] G. Schiavone, *La proposta di patto europeo su immigrazione ed asilo, cit.,* p. 73.

EU Charter, and international obligations"[300]. So, the link between the applicant and the Member State deemed responsible, is further strengthened, because in *"avoiding unauthorized flight and movement between Member States [they], should in any event ensure that [...] the immediate material needs [of the person concerned] are met".*[301]

Although, as specified above the criterion for designating the State responsible for examining the asylum application, remains that of the "First State of Entry", the above proposal for reform of the Dublin Regulation incorporates some aspects contained in the proposal presented by the European Parliament in 2017. In fact, Article 17 and Article 20 of the RAMM are posed as an extension of the *"hypotheses in which it is the applicant's subjective status or significant links with a given State of the Union that determines the State responsible for examining the application for international protection"*[302]. The first article on "family members applying for international protection" provides for the possibility for the latter to examine their application for asylum in the applicant's State. The novelty here lies in the broadening of the concept of "family members", which is also extended to the brothers and sisters of the applicant. Article 20, on the other hand, recognizes the award of a qualification following the completion of training in a Member State as a sufficient link to establish the responsibility of that Member State to examine the asylum application.

A further element of influence on the management of international protection, is related to the new border management established by the 2020 Pact. The latter foresees a screening procedure, "*applicable to all third-country nationals crossing without authorization, comprising pre-entry checks, an asylum procedure and, where appropriate, a rapid return procedure, thus combining currently separate processes*"[303]. In this way, the Commission links the asylum procedure to the return procedure. The proposed system provides for a generalized border[304] screening procedure, to be carried out prior to entry into the territory of the state. This procedure targets all third-country nationals who have crossed the border illegally; those who have expressed

[300] In Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/ XXX [Asylum and Migration Fund], including COM (2020) 610 Final and 2020/0279 (COD), Bruxelles, 2020, available at the following link: https://eur-lex.europa.eu/resource.html?uri=cellar:2a12bbba-ff62-11ea-b31a-01aa75ed71a1.0014.02/DOC_1&format=PDF, p.17.

[301] In Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/ XXX [Asylum and Migration Fund], including COM (2020) 610 Final and 2020/0279 (COD), Bruxelles, 2020, *cit.,* p.17.

[302] G. Schiavone, *La proposta di patto europeo su immigrazione ed asilo, cit.*,p. 65.

[303] European Commission, New Pact on Migration and Asylum, COM (2020) 609 final, Bruxelles, 2020, *cit.*

[304] Associazione per gli Studi Giuridici sull'Immigrazione, *Proposta di regolamento sugli accertamenti nei confronti dei cittadini di paesi terzi. Osservazioni e proposte*, 2021. Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, Bruxelles, 2016, available at the following link: https://eur-lex.europa.eu/resource.html?uri=cellar:2c404d27-4a96-11e6-9c64-01aa75ed71a1.0001.02/DOC_1&format=PDF.

a wish to seek international protection but do not meet the entry requirements of the Schengen Borders Code; and finally, persons disembarked as a result of SAR operations. During screening, the authorities collect information about the identity, health and "social dangerousness" of the person, in order to direct him/her towards the asylum application assessment procedure or the return/refoulement procedures under the Return Directive. This *filtering*[305] operation, carried out at land borders or within *hotspots* as far as SAR operations are concerned, must be carried out within 5 days, extendable to 10 in case of exceptional[306] circumstances, and has a twofold objective: on the one hand, to identify the elements that may lead to the completion of border procedures, accelerated or possibly ordinary, and therefore to determine more quickly the status of the person concerned; while on the other hand, it is part of the plan to reduce secondary[307] movements.

The screening procedure should end with the notification of the necessary documents to the competent authorities in order to carry out the most appropriate procedure: under the ordinary procedure, although not explicitly provided for by the Pact, entry into the territory of the Member State should be authorized; on the contrary, as regards the border procedure, this guarantee is not provided for. In fact, according to the provisions of this procedure, the person concerned should be detained in the facilities provided at the border or in the disembarkation areas, from the beginning of the screening to the end of the border procedure, after which, if the 12-week deadline for the conclusion of the procedure has passed, the persons should be granted access to the territory.

The new border procedure foreseen by the Pact applies to all persons who arrived irregularly on the territory; to those considered a risk to national security and public order; to applicants for international protection who have provided false documents or information; and finally, to all applicants from a country where no more than 20% of asylum applications are generally successful.

Also, with regard to the new asylum procedure envisaged, some comments can be made. The first one is related to the expansion of the border procedure, which, through the proposed amendment of the Procedures[308] Directive, as anticipated above, will make the border procedure compulsory in certain established cases. Referring in particular to the third hypothesis, i.e. the one that submits to an accelerated procedure individuals coming from countries whose citizens have a 20% success rate of the asylum application, this could create complications with regard to the individual examination of the asylum application.

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[305] M. Borraccetti, *Il nuovo Patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col* passato?, *cit.*, p. 19.

[306] M. Borraccetti, *Il nuovo Patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col* passato?, *cit.*, p. 20. *"[…] due to the need to subject a "disproportionate" number of persons to checks, which makes it impossible to fulfil the obligation within the shortest period of time".*

[307] M. Borraccetti, *Il nuovo Patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col* passato?, *cit.*, p. 19. *"[…] through the identification of persons and the entry of their data in the EURODAC and SIS databases, it should contribute to the monitoring of their presence on the territory, limiting their possibilities of evading checks and registration in the State of arrival".*

[308] Regulation of the European Parliament and of the Council Establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2016/0467 final, Bruxelles, 2016, *cit.*

Moreover, *"Asylum applications with a low probability of being accepted should be processed quickly without requiring legal entry into the territory of the Member State. [...] While asylum applications made at the external borders of the EU should be assessed in the context of EU asylum procedures, they do not confer an automatic right to enter the EU. [This process] thus contributes to a better and more credible functioning of asylum and return policies"*, this allows the individual to remain in state-identified facilities but prevents the entry into the territory[309] for the duration of the procedure.

In addition to what has been said, however, an important positive[310] aspect of the new screening procedure must also be underlined, represented by the Commission's proposal to establish an independent monitoring mechanism of fundamental rights at the border. This institute has been included in Article 7 of the Regulation introducing checks on third-country nationals at the external borders and is in charge of monitoring whether or not European and international law is respected during the screening phase, and of ensuring that violations of fundamental rights resulting from non-compliance with the asylum procedure or the principle of *non-refoulement* are effectively dealt with. However, despite the magnitude of this provision, this instrument can only be activated with regard to the screening procedure, without covering either the possible subsequent border procedure or the possible activities carried out by Member States prior to screening. Another observation with respect to this mechanism is the lack of precise provisions in the Regulation regarding its independence from the Member States, which, however, is essential to establish in order to guarantee individuals a more effective access to justice.

[309] Associazione per gli Studi Giuridici sull'Immigrazione, *Illegittime le espulsioni notificate nelle aree di transito aeroportuali*, 2019, available at the following link: https://inlimine.asgi.it/asgi-illegittime-le-espulsioni-notificate-nelle-aree-di-transito-aeroportuali/. M. Mouzourakis, *More laws, less law: The European Union's Pact on Migration and Asylum and the fragmentation of "asylum seeker" status*, in "European Law Journal", 2021, n. 26. Associazione per gli Studi Giuridici sull'Immigrazione, *Proposta di regolamento sugli accertamenti nei confronti dei cittadini di paesi terzi. Osservazioni e proposte, cit.,"This impediment to entry into the territory represents the so-called "non-entry fiction", i.e. the situation in which the prohibition of entry goes beyond territorial borders as states are allowed to "apply the border procedure in other locations within the territory for reasons of capacity", creating a space of exception, where asylum seekers are treated without guarantees of their fundamental rights. "[…] the fiction of non-entry into the territory [provide] that asylum seekers shall not be authorized to enter the Member States' territory during the screening, the processing of their claim and any ensuing return proceedings. […] The non-entry fiction renders detention an unspoken automatic adjunct to examining asylum claims "at the border"".*

[310] S. Carrera and A. Geddes, *The EU pact on migration and asylum in light of the United Nations Global Compact on refugees. International experiences on containment and mobility and their impacts on trust and rights*, Firenze, European University Institute, 2021.

For the sake of completeness[311], it is necessary to briefly touch upon one last point concerning the mechanisms provided for in the Pact for the management of migration crises and force majeure. The Pact states that in cases where one of the Member States finds itself in situations of crisis and force majeure, or even fears that such situations might arise, it has greater scope for intervention. In fact, when the situations described occur, the scope of the border procedure is extended to all persons whose average European rate of recognition of international protection is less than or equal to 75%; and the institution of returns is also strengthened. In both cases, the detention period is extended to five months each, up to a maximum duration of ten months at the border. The mechanism of sponsorship of return then, as already anticipated above, provides that in crisis situations the maximum period beyond which entry into the territory of the sponsoring State must be granted, is reduced to four months and, moreover, includes wider categories of persons, including all asylum seekers and irregular migrants not seeking asylum.

Finally, the possibility for States to suspend the registration of asylum applications for a period ranging from four weeks to a maximum of three months is foreseen, thus considerably reducing the guarantees of asylum seekers. [312]

However, as stated above, this document is still in the form of a proposal to be implemented, and so far no agreement has been reached.

[311] As already stated at the beginning of this paragraph, this section will not address all the aspects of the New Pact on Migration and Asylum, for which please refer to a more in-depth analysis in C. Favilli, *Il patto europeo sulla migrazione e l'asilo: c'è qualcosa di nuovo, anzi d'antico*, in "Questione Giustizia", 2021, n.3.

[312] Associazione per gli Studi Giuridici sull'Immigrazione, *Proposta di regolamento sugli accertamenti nei confronti dei cittadini di paesi terzi. Osservazioni e proposte, cit.* Associazione per gli Studi Giuridici sull'Immigrazione, *Il nuovo Patto europeo su migrazione e asilo. Le criticità alla luce del contesto italiano,* 2021.

Conclusion

In the discussion so far, I have tried to provide an overview of the institution of asylum, a right that already existed in ancient times, as early as ancient Greece, the inviolable right of a person to benefit from protection from violence in a given place was recognized, however, over the years, this right has undergone various transformations, from being a prerogative of the Church, to being part of the powers of the State, and finally with the development of international law and human rights, it has been transformed. The right of asylum has been recognized as a perfect subjective right of the individual, i.e. a request for protection that the individual makes to a State and, more generally, to the international community. This is the starting point for this discussion, which aims to examine the right of asylum as regulated at international and European level, and then to focus on its provision within the national systems of two countries: Italy and Slovenia.

Although neither the 1951 Geneva Convention relating to the Status of Refugees nor any other international instrument provides for a subjective and perfect right to asylum, the principle of *non-refoulement* filled this gap by extending its scope. This Convention, together with the proliferation of Treaties on the protection of human rights that emerged after the Second World War, have contributed to the progressive evolution of the right to asylum in the European context. The right to asylum was also recognized at state level, even before the European Union was created and the national legal systems were adapted to Community law. In the two countries that have been compared in this discussion, i.e. Italy and Slovenia, the institution of asylum is recognized in the Constitution, respectively in Article 10(3) of the Constitution of the Italian Republic and Article 48 of the Constitution of the Republic of Slovenia.

Assumed that, some criticalities emerged in the implementation of such right, in compliance with substantive and procedural obligations related to it, in the light of national, EU and international law, by the Member states. Accordingly, I have chosen to focus in this discussion on the informal transfer procedures of third-country nationals who cross the territory illegally, through the examination of two decisions issued by the Court of Rome [313]and the Supreme Court of Slovenia[314].

The procedures mentioned are called "informal readmissions" and are regulated by bilateral readmission agreements concluded between Member states, which have proliferated in several European countries, so far. The importance of these two cases lies in the fact that following the jurisprudence[315] of the Court of Justice of the EU and the European Court of Human Rights, they recall the procedural and substantive guarantees related to the institution of asylum from the perspective of European, national and international law. This examination

[313] Order of the Court of Rome, n. 56420/2020, 2021, *cit.*

[314] Judgment of the Supreme Court of the Republic of Slovenia, I UP 23/2021, 2021, *cit.*

[315] Paragraph 2.12 Chapter 2.

takes place in the light of the practice of informal transfers, to which in the two cases in question the persons concerned claim to have been subjected. Although the two decisions under examination did not establish the illegality of these practices, what can be observed is that both highlight the critical aspects in relation to the guarantees provided by the right to asylum, in the transfer of the persons concerned, through informal means, if they were adopted outside European, international and national legislation, by questioning also the modalities of implementation of the readmission agreements, supported by the Italian and Slovenian government. This because, if acted that way the transfers could not be considered in compliance with the standards provided for in the above-mentioned legislations in matter of asylum, for these reasons, the two courts, in the previously mentioned cases, condemned the countries in question to allow the applicants access to the territory and to allow them to apply for asylum.

In support of their thesis, both the Courts have underlined some worth mentioning points. First one, the principle of "mutual trust" and presumption of security of the EU Member States, indeed, by mentioning the case law of both the ECHR and the CJEU, such as the case N.S. c. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, or Sharifi and Others v. Italy and Greece, the Courts affirmed that this principle does not define a transfer as necessarily in compliance with the EU legislation, therefore the transfer of the asylum seeker cannot take place automatically but must always be preceded by the verification and respect for fundamental rights of the country identified as "competent" to analyze the application, especially the article 3 of the ECHR. Moreover, the assessment mentioned, is closely linked to the individual examination of the person, since as established in Hirsi Jamaa v. Italy, the prohibition of *refoulement "extends to the transfer to any third country where such a risk arises. Consequently, the deportation by the public authorities to a State deemed to be safe requires a careful verification of the effective protection guaranteed in that country"*. Finally, the Courts, point out that the Articles 4 and 19 of the Charter of Fundamental Rights of the EU in conjunction with Article 3 of the ECHR, were formulated by the European Union in absolute terms, and for this reason, they do not allow for derogations or justifications, especially in relation with asylum seekers, who are entitled of some specific rights provided for the Asylum Procedure and the Reception Directive as highlighted in the first Chapter.

By considering, as affirmed in the third Chapter, since the "migration crisis" of 2015 at the European level there have been attempts to reform the Dublin system, following its failure at the time of that crisis. Attempts have been made to create an ordinary system of permanent relocation, capable of going beyond the emergency situations, which had emerged in the aftermath of 2015 and had necessitated the adoption of certain mechanisms, such as the system of relocation of migrants on the basis of "quotas", for the benefit of Italy and Greece.

Such a mechanism would represent a fundamental first approach to apply effective solidarity, in the fair sharing of responsibilities, moreover, it would no longer make it necessary for states to resort to bilateral

agreements, such as those we have seen in this discussion, concluded outside the EU system. However, as we have seen in the examination of the new proposal for a Pact on Migration and Asylum presented by the Commission in 2020, to date it does not deviate much from the past.

However, in conclusion, it is necessary to recall what has been said at the beginning. So, even in implementing bilateral readmission agreements, they should necessarily be read in the light of European law and in compliance with the ECHR.

Methodology

The methodological process used for the interviews with People on the Move was based on the daily presence in Piazza della Libertà in Trieste (Italy), in the time frame from 26th October 2021 to 26th November 2021, and on the weekly visit to the isolation centre located 30 min from Trieste. Both of these places represent first arrival centres for migrants from the Balkan route. With the support of volunteers, mediators from the Linea D'Ombra Association and ICS operators, in establishing a relationship of trust with the POMs, I was able to monitor the situation at the border through the questions specified in Annex 2 and collect the testimonies of the POMs. For the interviews, I used the methods adopted by the Border Violence Monitoring Network that combine testimony with the collection of concrete data, when it was, for me, possible (dates, geo-locations). Only the most accurate and reliable interviews were included in this thesis. The interviews with the researchers were based on the questions in Annex 2, following a study of the situation in the country (Slovenia) and the conditions at the border. The choice of organizations was dictated by their involvement in the issue of informal readmissions along the Balkan route from the Slovenian side.

Annex 1- List of interviewees

Role	Gender	Regional Area	Date
Person on the move 1 (POM1)	M	Italy first time (then Slovenia, Croatia and Bosnia)	29/10/2021
Person on the move 2 (POM2)	M	Slovenia first time (then Croatia)	26/10/2021
Person on the move 3 (POM3)	M	Croatia first time (then Slovenia)	01/11/2021
Lawyer, legal consultant – PIC (Pravni center za varstvo človekovih pravic in okolja)	F	Slovenia	10/11/2021
Scholar activist – Infokolpa	M	Slovenia	09/11/2021

Annex 2 – Interview's guide

INTERVIEW'S GUIDE for People On the Move
Would you like to tell me what happened?
Did something get stolen? Was it returned?
Did you ask for asylum? if so, what were you told?
Who apprehended you? If policemen, do you remember how many were there? Do you remember their uniforms? Do you have evidence of what the surroundings looked like? Were there mediators? Can you identify the exact place where you were intercepted?
Were you detained when they stopped you? For how long? Were you provided with basic needs (toilet, food) during detention? Did they make you sign anything? Did they explain what was written? Did they take your fingerprints and photos?
Was any kind of violence used against you?
Do you remember when this happened?

INTERVIEW'S GUIDE for Researchers
Could you describe the current situation after the adoption of some legislative changes of the International Protection Act (IPA)?
What is the current situation in Slovenia regarding rejection from the Italian border or very close to the Italian border? In the last weeks I've interviewed lots of people who arrived in the square in Trieste or who were in quarantine in a centre for isolation. Some of them were able to tell me exactly where they were intercepted by the police, which I found out to be very close to the Italian border. So, I'd like to understand from your side how is the situation along the Italian-Slovenian border and if you had any cases of people rejected by Italy.
What do you see as potential solutions to this situation? What role does the new migration Pact play in this perspective?

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Summary

The right to asylum dates back to ancient times; as early as ancient Greece, the inviolable right of a person to benefit from protection from violence in a given place was recognized. Over the years, this right has undergone various transformations, from being a prerogative of the Church, according to which no one could be excluded from asylum. This right was characterized by *ratione loci*, i.e. it was conferred by virtue of the sacredness attributable to a place. This overview began to change with the advent of nation states, and the progressive erosion of secular power, which resulted in a reversal of the situation: the State was assigned the task of assessing the existence of the requirements for which a foreigner can be granted protection within the territory under the jurisdiction of that State. This shift also entailed a change in the place of asylum, which now coincides with the territory in which States exercise their sovereignty. The end of Christian asylum also meant that those who were persecuted could not escape secular jurisdiction through the protection granted by the Church. Thus, a type of asylum, defined as "external", or international, was established, according to which those in need of protection could only look for it outside the borders of their own state, in territories under the jurisdiction of another state. Following the development of international law and human rights, there has also been an evolution of the institution of asylum, which has been recognized as a perfect subjective right of the person. As a request for protection that the individual makes to a State and, more generally, to the international community. The most important instrument at international level in relation to the right to asylum is the Universal Declaration of Human Rights, which contributes to the inclusion at international level of the right to emigrate or expatriate, pursuant to Articles 13(2) and 14(1) of that Declaration. The latter also establishes the principle that the right of asylum is closely intertwined with the protection of human rights, and this makes it the last useful instrument to which individuals can appeal in order to be rehabilitated as a legal subject. Indeed, the right to asylum acts as a guarantee of protection that ensures a foreigner, whose rights have been violated in his or her State of origin, to enjoy once again those rights in the territory of another State. The 1951 Geneva Convention relating to the Status of Refugees, together with the proliferation of human rights treaties that emerged after World War II, contributed to the progressive development of the right to asylum. However, the Convention did not explicitly mention the right to asylum, nor did it make provisions for granting it. The principle of *non-refoulement* provided for in the Convention itself, has been introduced to address this shortcoming, indeed, according to the majority doctrine imposed itself as a partial justification of the subjective right of asylum at international level, since it is the main precondition for the institution of asylum to be applied. Although the principle of *non-refoulement* circumscribes the power of states to guarantee the protection of human rights, it does not replace states' migration policies, however, it confers the applicant the right to benefit from asylum, so that he can live free from persecution and threats to his life and freedom. In the early years after the Second World War, large-scale migratory movements of millions of displaced persons and refugees began to occur throughout Europe, forced to flee their countries for political reasons or because

of territorial changes brought about by peace treaties. These geopolitical events, but above all their legal and social consequences, led to the gradual introduction of instruments aimed at protecting the fundamental rights of those forced to flee and seek asylum in other European territories, including the Geneva Convention of 1951. The latter is the first and principal document to address the refugee issue at the international level, determining the conditions necessary for granting refugee status and the rights and duties attached to it. Although it was inadequate to regulate phenomena other than persecution, and sometimes even larger, in Europe, it played a key role in enabling the development of a European asylum policy, first serving as a parameter of legitimacy for derivative acts, in the same way as the ECHR and second because of the extension of the *non-refoulement* principle. At European level, the need to provide for a mechanism for addressing the issue of asylum as part of the completion of the internal market was identified in 1986 when the Single European Act was signed, identifying internal borders as a clear physical obstacle to free movement and thus to the realization of the "internal market" project. From this point on started a process of European "harmonization" of the asylum policies, with the objective of creating a Common European Asylum System (CEAS). This "communitarization" culminated in the Treaty of Lisbon of 2009, indeed, the article 78 of the TFUE, established that "*[t]he 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",* and it was provided for the legislative instruments adopted by the Union to achieve a CEAS, which basically were and still are the Council Regulation 343/2003 ("Dublin II"), later replaced by Regulation 604/2013 ("Dublin III") on the determination of the State responsible for asylum applications; the Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons; the Directive 2003/9/EC ("Reception Conditions Directive") on minimum standards for the reception of asylum seekers in Member States, later replaced by Directive 2013/33/EU; the Directive 2004/83/EC ("Qualification Directive") on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or beneficiaries of international protection and the content of such protection, later replaced by Directive 2011/95/EU; and finally the Directive 2005/85/EC ("the Asylum Procedures Directive") on minimum standards for granting and withdrawing international protection status, later replaced by Directive 2013/32/EU. However, delays in the national transposition of the directives by individual Member States and the excessive discretion granted to them made it difficult to achieve the objective of creating common and uniform asylum conditions. This was the reason why these instruments were subject to some attempts of amendments, where the last one dates back to the current proposal of a new Pact on migration and Asylum, as will be discussed in conclusion.

The comparison of Italy and Slovenia seemed appropriate because both countries are part of the European Union and therefore have implemented EU legislation, and both are affected by the migration flows of the so-called Balkan route and are considered transit countries rather than countries of arrival by people travelling

along the Balkans. In both the Republic of Slovenia and the Italian Republic, the Constitution has a provision recognizing the right to asylum, respectively Article 48 and Article 10(3). However, the actual enforcement of this right was perfected following the adoption of European and international legislation within the states under review. In this regard, a further common point emerges, namely, both are bound at European, international and national level to respect the right to asylum.

In the light of what has been said, however, some critical issues have emerged in the implementation of this right, in compliance with the substantive and procedural obligations related to it, in the light of national, EU and international law, by Member States. Consequently, in this discussion we have chosen to examine the procedures for informal transfer of third-country nationals who illegally cross the territory, through the examination of two decisions issued by the Court of Rome and the Supreme Court of Slovenia.
The procedures mentioned are called “informal readmissions” and are regulated by bilateral readmission agreements concluded between member states, which have proliferated in several European countries, until today.
The importance of these two cases lies in the fact that, through an analysis of the jurisprudence of the Court of Justice of the EU and the European Court of Human Rights, the procedural and substantive guarantees relating to the institution of asylum are recalled in the decisions under review from the perspective of European, national and international law. This examination is done in light of the practice of informal transfers, to which in the two cases in question the persons concerned claim to have been subjected. Although the two decisions under examination have not established the illegality of such practices, what it was possible to observe is that both highlight the criticality with respect to the guarantees provided by the right of asylum, in the transfer of the persons concerned, through informal modalities, if adopted outside of European, international and national law, also questioning the way of implementation of readmission agreements, supported by the Italian and Slovenian government.

In upholding this thesis, the Courts have underlined some noteworthy points, such as the principle of “mutual trust” and the presumption of security of EU member states, which does not define a transfer as necessarily complying with EU legislation, therefore the transfer of the asylum seeker cannot take place automatically but must always be preceded by the verification and respect for fundamental rights of the country identified as “competent” to analyze the application, or, the need for individual examination of the person. Finally, the Judges, recall that articles 4 and 19 of the Charter of Fundamental Rights of the EU in conjunction with article 3 of the ECHR, have been formulated by the European Union in absolute terms, and for this reason, they do not allow derogations or justifications, especially in relation to asylum seekers, as holders of certain specific rights provided by the asylum procedure and the Reception Directive as highlighted in the first chapter.

In conclusion, in order to provide a complete overview has been analyzed also the proposal of the new European Pact on Migration and Asylum, especially regarding three points, which are the determination of the responsible member state; border management; and "migration crisis" management mechanisms. The Pact aims to outline the main framework of migration and asylum management initiatives for the next five years after its adoption, however, the objective of the 2020 proposal of a new Pact on Migration and Asylum was that of providing a new alternative instrument for asylum and migration management at EU level and to promote mutual trust between Member States, through respect for the principles of solidarity and fair sharing of responsibilities. Despite the novelties introduced by the pact, such as a new system of relocation and sponsored returns of illegally staying third-country nationals, or the border management system and screening procedure, the system of determination of the Member State responsible, the provisions of the Dublin III Regulation are reconfirmed.

Considering that, as stated in the third chapter, after the 2015 "migration crisis" at the European level there have been attempts to reform said system, there has been a move towards trying to create an ordinary permanent relocation system, capable of going beyond emergency situations.
Such a mechanism would represent a fundamental first approach to enforce effective solidarity, in the fair sharing of responsibilities, furthermore it would no longer make it necessary for states to resort to bilateral agreements, such as those we have seen in this discussion, concluded outside the EU system. However, as mentioned above, in this sense the new proposal for a Pact on Migration and Asylum presented by the Commission in 2020, as of today, does not differ much from the past.

Considering that, it is important to outline what emerged from the analysis of the cases in question carried out by the Court of Rome and the Slovenian Supreme Court, namely that in implementing readmission agreements, compliance with European law and the ECHR cannot be ignored.