

A Carta dos Direitos Fundamentais e a crise  
de refugiados: A garantia dos Direitos das Pessoas  
carecidas de Proteção Internacional posta à prova

The European Charter of Fundamental Rights and the  
“Migratory Crisis”: The Rights of Persons in need for  
International Protection put to the test

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**A CARTA DOS DIREITOS FUNDAMENTAIS E A CRISE DE  
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CARECIDAS DE PROTEÇÃO INTERNACIONAL POSTA À PROVA**

**THE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS AND THE  
“MIGRATORY CRISIS”: THE RIGHTS OF PERSONS IN NEED FOR  
INTERNATIONAL PROTECTION PUT TO THE TEST**

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## 1. The 2015-2016 Migratory Crisis

The year of 2015 witnessed the beginning of the biggest migratory crisis that Europe experienced since the World War II. According to EU official data, 1.1015.078 people are estimated to have arrived to the EU borders, only by sea, in 2015<sup>2</sup>. In March 2016 such number already amounted to 138.280 arrivals<sup>3</sup>. The major part of these people was searching for international protection, and claimed to be forced migrants. They were escaping from conflict areas, such as Syria and Iraq, and also from tyrannical political regimes such as Eritrea, or failed or fragile States, such as Libya, Afghanistan, Somalia or Sudan. There were also several people willing to abandon their countries in order to search for better conditions of living. Thus, instead of speaking of a “refugee crisis”, it would seem more accurate to speak of a “migratory crisis”, since the people who sought to live in Europe in 2015 were moved by different reasons. Nonetheless, according to Eurostat data, 75,7% of those who arrived to EU in 2015 were granted international protection.

Comparing to previous years, the influx of third country nationals in 2015 suffered an increase of 85%. 43% of the people involved consisted in Syrian citizens.

Due to this unprecedented influx of people, EU Member States were faced with the first important test to the rights recognised in the European Charter of Fundamental Rights, and also to the European Common Asylum Law and Policy. Our aim in this study is to analyse the several rights and principles that were challenged during this crisis.

## 2. The Migrants as Subjects of Rights under the European Charter

The EU Charter of Fundamental Rights is based on the principle of the universality. Except when mentioned otherwise, all rights shall be recognised to every person under the jurisdiction of the Member States<sup>4</sup>.

Although this general principle may seem quite simple, it does raise some thorny

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2. Source: EUROSTAT.

3. These numbers decreased slightly in the following years, namely due to the deal celebrated between the Member States and Turkey in March 2016 and the deal celebrated between Italy and Lybia in early 2017. According to these deals, these third States became responsible for avoiding migrants to illegally reach the Members States' coast.

4. Scholars claim that the Charter is based on a three-dimensional structure: in principle, all rights enshrined therein may be recognised to every human being, some are expressly reserved to residents, and the third category concerns those rights which are reserved to the citizens of the EU. See, for more details on this issue, ANA MARIA GUERRA MARTINS, *A Igualdade e a Não Discriminação dos Nacionais de Estados Terceiros Legalmente Residentes na União Europeia – Da Origem na Integração Económica ao Fundamento na Dignidade do Ser Humano*, Almedina, 2010, p. 549, JEAN-YVES CARLIER, “La place des ressortissants de pays tiers dans la Charte”, in AA.VV., *La Charte des Droits Fondamentaux de l' Union Européenne*, J. Y. Carlier, Olivier de Schutter (sup.), Bruylant, 2002, p. 179-200.

questions, especially in the context of migration. One of such questions is the *scope of jurisdiction*. For example, when a country is refusing the entry of asylum-seekers into its territory, must we consider that such persons are under the jurisdiction of that country, even though they are not physically present in the territory? In our opinion the answer can only be positive. Otherwise, it would be easy for Member-States to evade from their Human Rights responsibilities. That is also the European Court of Human Rights' (ECtHR) approach. According to the Court, a victim is under the State-Party's jurisdiction whenever he/she is subjected to an act of that State, exercised through its effective authority<sup>5</sup>. The Court had already the opportunity to analyse such question precisely in immigration litigation. In the case *Xhavara* it considered that Italian authorities were bound to respect the rights enshrined in the European Convention of Human Rights (ECHR) while intercepting, at 35 nautical miles from the Italian coast, a boat with Albanese refugees willing to enter into the Italian territory<sup>6</sup>.

Many of the situations that characterised the migratory crisis could engage responsibility of Member-States, even if the victims were not physically present in the State's territory. That is the case of return actions at high seas made by national authorities, or decisions taken in border areas.

### 3. Rights

Several rights were put to test during the mentioned migratory crisis. We may divide these rights into three categories: *nuclear rights*, *guarantees* and *related rights*. At the first level, stand the rights to international protection and to *non refoulement*. Secondly, we may include those guarantees that are aimed at enforcing nuclear rights. Finally, we shall mention those rights that must be guaranteed to asylum-seekers while they wait for the final decision on their application.

#### 3.1. Nuclear Rights

First and foremost, the migratory crisis represented a risk to the guarantee of the right to asylum or, more broadly, to the right to international protection.

Article 18 of the European Charter of Fundamental Rights protects the right to Asylum. The specific content of this right has been highly debated since its consecration in the Universal Declaration of Human Rights. In the Charter, such content is reliant on the achievements obtained in the development of the competences of the EU on the field of immigration and asylum, which are foreseen on European Treaties<sup>7</sup>. Currently, the Directive on standards for the

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5. See, amongst others, the following rulings: *Cyprus vs. Turkey*, dated 20/01/1979, application n. 6950/75, *Loizidou vs Turkey*, dated 23/03/1995, application n. 15318/89 and *Markovic vs. Italy*, dated 14/12/2006, application n. 1398/03. For more details, see ANA RITA GIL, *Imigração e Direitos Humanos*, Petrony, 2017, p. 191 *et seq.*

6. *Xhavara and others v.s Italy and Albania*, dated 11/01/2001, application n. 39473/98.

7. See, on the content of Article 18, CRISTINA GORTÁZAR, "Artigo 18.º - Direito de Asi-

qualification of third-country nationals as beneficiaries of international protection (“Qualification Directive”<sup>8</sup>) sets forth a right to international protection, which shall be accorded both to Refugees and to Subsidiary Protection holders. Where a person fulfills the requirements foreseen by the Directive, he or she must be recognised the right to international protection<sup>9</sup>.

The majority of the persons who fled Europe in 2015, and continued to flee during the following years, could be qualified as people in need for international protection. Most of them were escaping from a context of general violence or from dictatorial political regimes. Traditionally, international protection was dependent on a proof of risk of “individual persecution” of the interested<sup>10</sup>. However, international case-law has been developing this traditional approach. The case-law of the ECtHR was decisive in this evolution.

The ECHR does not protect, *a se*, a right to international protection. It only forbids, on the basis of Article 3 (which prohibits torture, inhuman or degrading treatments), expulsions where there is a risk of suffering degrading and inhuman treatment in the country of destination. The case-law of the ECtHR has evolved in what regards protection in case of general violence in that country. In the case *NA vs. United Kingdom*<sup>11</sup>, the Court explained which conditions should be met for triggering the protection of Article 3: where the interested could prove an *individualized or special* risk of being subjected to ill-treatment, the level of general violence required to trigger the protection is low, while where no such “individual concerns” exist, the required level of general violence is higher.

The evolution of international human rights’ case law leads to an overcome of the traditional concept of “asylum” in several aspects. First, in what regards the qualification as a refugee, where the need to prove an “individual” persecution due to belonging to a certain race, ethnicity, nationality, religion, social group or political opinions (as required by the Geneva Convention on the Status of

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lo”, in AA.VV., *Carta dos Direitos Fundamentais da União Europeia Comentada*, Alessandra Silveira, Mariana Canotilho (coord.), Almedina, 2013, p. 234 and HENRI LABAYLE, “Le Droit Européen d’Asile devant ses Juges: Précisions ou Remise en Question?”, *Revue Française de Droit Administratif*, mars-avril 2011, p. 283.

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

9. On the qualification of Refugees, see the ECJ rulings: *Abdulla*, 02/03/2010, proc. n. C-175/08, C-176/08 and C-177/08 (on persecution by non-State actors), *Y and Z*, 05/09/2012, proc. n. C-71/11 and C-99/11 (on persecution on religious grounds), *A., B., & C.*, 02/12/2014, proc. C-148/13, C-149/13 and C-150/13 (on persecution due to sexual orientation grounds), *Shepherd*, 28/02/2015, proc. n. C-472/13 (on persecution based on refusal to participate in military activities in the country of origin), *Ahmedbekova*, 04/10/2018, proc. n. C-652/16 (on persecution due to family ties).

10. UNCHR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, December 2011, and also UNCHR, *Summary Conclusions in International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence*, Cape Town, South Africa, 20 December 2012, para. 6.

11. Ruling dated 17/07/2008, *NA vs. United Kingdom*, application n. 25904/07

Refugees) became less demanding. It shall be sufficient to prove that, due to those characteristics, one is at risk in their country of origin, independently of being “individually persecuted”. Thus, people who are fleeing from armed conflicts may be considered as “Refugees”, when they are in risk of persecution due to their belonging to one of the above mentioned groups, even when not “individually” persecuted. The risk may be even caused by conflicts amongst members of different groups, as is the case of religious persecution. But even when there is not a risk of persecution specifically justified with a belonging to a certain group, victims may be protected through the status of subsidiary protection. In this context, it is sufficient to prove that they incur in the risk of being subjected to Human Rights’ violations in their country of origin.

Nowadays, most cases of internal protection take the form of “subsidiary protection”. This status is now currently overcoming the refugee status as the paramount form of international protection. The EU “Qualification Directive” sets forth several grounds for granting subsidiary protection, such as “*serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict*”<sup>12</sup>. In the case *Elgafaji*<sup>13</sup>, the European Court of Justice (ECJ) stated that such clause could be used either where the applicant suffered an individual risk, or when such risk derived from a situation of general violence. In the latter case, however, (and following the ECtHR case-law), the degree of violence would need to be more serious.

Although the concept of international protection has been developed in order to protect a broader group of people, States have been facing difficulties in responding to this new concept of protection. In 2015-2016, some of them failed to agree protection to the influx of people fleeing from countries with a severe degree of violence, such as Syria and Iraq. A report released on October 2015 by the European Parliament stated that, due to the massive numbers of people arriving to the EU borders, in some cases States treated all migrants as “illegal Immigrants”<sup>14</sup>. In such a scenario, people who actually need international protection will obviously have their right to asylum disrespected.

The same goes for the principle of *non refoulement*. This principle is expressly enshrined in Article 29, n.2 of the European Charter. This Article was inspired by the ECtHR’s case-law regarding the development of Article 3 of the ECHR. According to both the mentioned case-law and to Article 19, n.2 of the Charter, no one shall be expelled to a country where there is a risk of incurring in death penalty, torture, or inhuman and degrading treatments or punishments<sup>15</sup>.

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12. Article 15 of the Directive 2011/95/EU.

13. Ruling dated 17/02/2009, *Meki Elgafaji and Noor Elgafaji*, proc. n. C-465/07.

14. DIRECTORATE GENERAL FOR EXTERNAL POLICIES OF THE EUROPEAN PARLIAMENT, *Migrants in the Mediterranean: Protecting Human Rights*, 2015.

15. See, on Article 19 of the Charter, our analysis “Artigo 19.º - Proteção em caso de Afastamento, Expulsão ou Extradição”, AA.VV., *Carta dos Direitos Fundamentais da União Europeia Comentada*, Alessandra Silveira, Mariana Canotilho (coord.), Almedina, 2013, p. 244 e ss.

The migratory crisis represented also a threat to the right to *non refoulement*: due to the strong migratory pressure, some States adopted defensive measures whereby all “illegal migrants” would be expelled or pushed back, irrespective of the situation they could face in their countries of origin. The deal signed between Turkey and the UE Member States in March 2016<sup>16</sup> also represented a menace to such principle. According to one of the clauses, irregular migrants coming from Turkey and arriving to Greece should be returned to Turkey. This clause posed a series of problems. First of all, in what concerns the definition of “irregular migrants”, as this concept encompasses all those who had not applied for asylum and also those whose application was found unfounded or inadmissible. This latter situation includes people that were considered coming from a “first country of asylum”, or a “safe third country”<sup>17</sup>. In case of people coming from Turkey, they could be deemed as proceeding from a “safe country” and, thus, would have their application declared inadmissible. However, the qualification of Turkey as a “safe country” raised several doubts<sup>18</sup>. Firstly, at the time of the deal, Turkey did not apply the Geneva Convention to non-European citizens. Syrians were granted a temporary protection mechanism that would not afford them all the rights protected in the Geneva Convention. Due to this highly controversial clause, the deal could lead to a breach of a right to asylum for persons in need. It represented anyway a resignation from the part of the Member States in what concerns respecting and granting, themselves, a right to asylum. Besides that, despite all compromises mentioned in the agreement regarding the full observance for the principle of *non refoulement*, the Member States could hardly monitor the fate of all migrants returned to Turkey. The deal represented thus, a dismissal from EU States of their own obligations.

### 3.2. Guarantees

Guarantees are necessary for the effectiveness of the nuclear rights. They correspond mainly to procedural rights.

#### 3.2.1. Right to an individual analysis

The most important guarantee is *the right to a procedure*. In a landmark decision issued in 2018, the ECtHR confirmed that lack to access to an asylum procedure could amount to a violation of Article 3 read together with Article 13 of the European Convention<sup>19</sup>. The Court considered, very briefly, that the possibility to lodge an asylum application in practice is a prerequisite for the effective protection of those in need of international protection.

Not only a procedure must take place to allow migrants to request asylum, but

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16. EU-Turkey statement, 18 March 2016.

17. Article 33, n. 2 of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

18. See, on the qualification of Turkey as a “safe country”, STEVE PEERS & EMANUELA ROMAN, “The EU, Turkey and the Refugee Crisis: What could possibly go wrong?”, *EU Law Analysis*, <http://eulawanalysis.blogspot.com/>, 5 February 2016.

19. A.E.A. v. Greece, ruling dated 15/03/2018, application n. 39034/12.

also such procedure shall be *fair*. First and foremost, all requests must be analysed *individually*. An individual analysis of the particular situation of each applicant represents the only way to guarantee that national authorities acknowledge that a certain person needs international protection.

This guarantee was dangerously menaced during the migratory crisis. Due to the heavy influx of people arriving to EU borders, there was a strong temptation to adopt collective - and, thus, automatic - measures. In this context, it must be recalled that collective measures are not allowed by International Human Rights law. In fact, collective expulsions are expressly forbidden by the text of both the ECHR (Article 4 of the 4th Protocol) and of the European Charter of Fundamental Rights (article 19, n.1)<sup>20</sup>.

The ECtHR has developed an important case-law on the concept of collective expulsions. According to this jurisprudence, an expulsion may be deemed as “collective” where a group of foreigners is expelled from the territory, and no individual analysis of the situation of each member of the group took place. In such cases, the mere circumstance of belonging to the same group – identified by the same characteristics or simply by the same circumstances –, is enough reason to expel all individuals concerned.

In this context, ECtHR has already decided that operations carried out at seas, through which national authorities send back to their country of origin boats with groups of migrants, might amount to collective expulsions. Lately, Italy and Greece have been convicted several times for incurring in such activity. In the case *Hirsi and others vs. Italy*<sup>21</sup>, Italy was convicted for having intercepted, at 35 miles south of Lampedusa, a group of 200 migrants that was travelling by boats coming from Libya. This was, for several reasons, a landmark decision. First of all, because the Court asserted the responsibility of a State-Party in what regards actions taken by its authorities outside the territory. The Court considered that, despite being taken at high seas, the removal actions were adopted under the jurisdiction of the State Party. Secondly, the Court found a violation of the prohibition of “collective expulsion” even though, *stricto sensu*, it was not an expulsion but rather an *exclusion* or a *push back* – *i.e.* a measure aimed at preventing migrants entering into the territory of the State. Lastly, these migrants only shared the mere circumstance of being in the same boat at the same time.

Finally, in September 2015, right during the epicenter of the 2015 migratory crisis, the ECtHR issued a striking ruling in the case *Khlaifia and Others vs. Italy*<sup>22</sup>. At the origin of this decision was an application made by three Tunisian citizens, in March 2012, who claimed that Italy had disrespected, amongst other rights, the prohibition of collective expulsions. Contrarily to the case *Hirsi Jamaa*, *Khlaifia* only concerned three foreigners, and their identities were duly registered

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20. See, on collective expulsions, RICHARD PERRUCHOU, “L’Expulsion en Masse d’Étrangers”, *Annuaire Français de Droit International*, Éditions du CNRS, 1988, p. 677 e ss., and our *Imigração e Direitos Humanos*, cit., p. 617 *et. seq.*

21. Ruling dated 23/02/2012, *Hirsi Jamaa and others vs. Italy*, application n. 27765/09.

22. *Khlaifia and others vs. Italy*, application n. 16483/12, 01/09/2015.



by the authorities. Nevertheless, since the applicants proved successfully that the authorities did not take into account their individual situations, the Court found that there had been a breach of Article 4 of the 4th Protocol. It took in consideration several factors: the expulsion procedures were “summary” and the expulsion decrees consisted in standardized documents, with no references to the particular situation of each of the expelled persons, exception made to their identification. However, after a referral to the Grand Chamber, the Strasbourg Court overturned the Chamber’s conclusion. It observed that the fact that migrants are issued with similar decisions does not automatically mean that the expulsion is collective, as far as each person concerned is given the “*opportunity to put arguments against his expulsion on an individual basis*”. The second ruling considered that the applicants were given the opportunity to present arguments against their expulsion<sup>23</sup>.

We may consider that the prohibition of collective expulsions also encompasses the prohibition of collective entry refusals – or collective exclusions. This type of measure has been generally called as “push back” measures, and may take place in various forms. In the above mentioned cases, the ECtHR has already confirmed that *push back* measures at seas are as forbidden as collective expulsions. During the migratory crisis, some States have engaged in other actions that raised the doubt whether they should be considered as forbidden<sup>24</sup>. That was the case of the construction, at the borders, of walls with barbed wire defended by armed guards<sup>25</sup>. We have even witnessed close combats involving border guards and migrants trying to enter the Member-States’ territory<sup>26</sup>. These types of measures are, in our opinion, ethically equivalent to *push-backs* at seas. Therefore, they deserve the same reproach.

### 3.2.2. Right to a fair procedure

Besides the right to an individual analysis of his or her situation, the applicant must be guaranteed that he/she will have a *fair procedure*. This guarantee has been one of the paramount concerns of the European common policy on asylum, having been highlighted in the Council’s conclusions following the summit in Tampere, 1999. But first and foremost, such right derives from Human Rights Law. The ECtHR has been developing the guarantee of a fair procedure from Article 3 ECHR. While analysing whether there is a risk of submission to torture, inhuman and degrading treatments in case of expulsion, the Court assesses if the competent authorities took into account the personal situation of the foreigner in a fair procedure. Fairness is also protected by UE “constitutional” law, and has

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23. *Khlaifia and others vs. Italy*, application n. 16483/12, 15/12/2016.

24. See, on push-back actions, MARIA STAVROPOULOU, “Refugee Protection in Europe: time for a major overhaul?”, *Forced Migration Law Review*, issue 51, January 2016, p. 7.

25. That was the case of Hungary, which has responded to the heavy migratory pressure that took place mainly during September and October of 2015 with the construction of walls in the borders with Croatia and Serbia. See the analysis of BOLDIZSÁR NAGY, “Parallel realities: refugees seeking asylum in Europe and Hungary’s reaction”, in <http://eumigrationlawblog.eu/>, 04/11/2015.

26. Duncan Breen, “Abuses at Europe’s Borders”, *Forced Migration Law Review*, issue 51, January 2016, p. 21.

been early affirmed as a “general principle” recognised by the ECJ.

A fair proceeding must be characterised by several qualities - otherwise it would only consist on a merely formal obligation. Firstly, fairness requires the right and opportunity of every person to be heard during the administrative procedure and before the decision. As a consequence, it also implies the authorities’ duty to take into account the individual statements.

ECJ’s *MM* case<sup>27</sup> stood forth that the right to be heard amounted to a general principle of law, which should characterise every administrative procedure that could end with an unfavorable decision for the concerned party, even where no such guarantees were expressly foreseen.

Lastly, even after the final decision, some guarantees must still be observed. That is the case of the right to an *effective judicial remedy*, which is enshrined in Article 13 of ECHR. In order to analyse whether an appeal amounts to an “effective” judicial remedy, we must take into account two different aspects: on one hand, the scope of the appeal, and, on the other hand, its effects. In what regards the scope, the ECtHR has stressed several times that an *effective appeal* must allow the re-analysis of the facts and proof that grounded the administrative decision. A full reanalysis of the merits may not be precluded because public interests might be at stake. It is also expected that national courts take actively part in researching the situation in the countries of origin<sup>28</sup>.

Regarding the effects of the appeal, when the migrant claims that his or her expulsion puts at risk their right to life (Article 2 of ECHR) or to not be subjected to inhuman or degrading treatments (Article 3), the ECtHR has been advocating that appeals shall suspend the effects of any return measure<sup>29</sup>. However, when interpreting the Procedures Directive, the ECJ has clarified that the mere fact that an additional level of jurisdiction, provided for by national law, does not have automatic suspensory effect, does not justify a finding that the principle of effectiveness is disregarded<sup>30</sup>.

Also the right to an effective remedy was challenged during the 2015-2016 migratory crisis, due to the massive influx of people entering the EU territories. Many of them were not granted access to lawyers and could not exercise the right to an effective judicial remedy. This affected mainly migrants arriving to Greece, where there was a serious lack of available lawyers.

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27. Ruling dated 22/11/2012, *M.M.*, proc. n. C-277/11

28. Ruling dated 15/01/2015, *Eshonkulov vs Russia*, application n. 68900/13. See, however, recent ECJ ruling *Moussa Sacko*, 26/07/2017, proc. n. C-348/16, which concluded that, under certain circumstances, Courts may dismiss the appeal without hearing the applicant.

29. Ruling dated 23/07/2013, *M.A. vs. Cyprus*, application n. 41872/10 and ruling dated 05/02/2013, *Zokhidov vs. Russia*, application n. 67286/10.

30. *Y.*, 29/09/2018, proc. n. C-180/17.

### 3.3. Human Treatment of Asylum-seekers

Another important group of rights that are being currently challenged corresponds to those that must be recognised to migrants while waiting for a decision on their asylum application – that is to say, to asylum-seekers. In this context, two major issues must be addressed: firstly, cases where detention of asylum-seekers is possible, and secondly, the required reception conditions of asylum-seekers.

#### 3.3.1. Detention

International law does not forbid, *a se*, the detention of asylum-seekers. Article 31, n.2 of the Refugee Convention provides that Refugees may have their freedom of movement restricted in cases where they have entered illegally in the territory and until their status is regularised. It is accepted that detention may be used in order to identify the asylum-seeker, especially in cases where their documentation was destroyed. However, according to the most recent UNCHR guidelines, an additional reason besides illegal entry must be invoked in order to apply detention to an asylum-seeker<sup>31</sup>.

The ECtHR has been following the same approach<sup>32</sup>. It assesses the detention of asylum-seekers and of irregular migrants at the light of Article 5 of the ECHR, which sets forth the right to personal freedom. Following the path of the United Nations Human Rights Committee, it has been requiring States to prove that no other less severe alternative measure could be used instead of detention<sup>33</sup>. Thus, if a State fails to prove that the detention of an asylum-seeker is the only available means to *v.g.*, prevent his/her escape, such detention is considered to breach Article 5 ECHR. This new approach, which is based on the principle of proportionality, must be applauded, and Article 6 of the EU Charter must be read in this perspective.

Also, the EU Directive on Reception Conditions of international protection seekers<sup>34</sup> requires that detention must be “necessary” *i.e.*, it shall only be used when it is not possible to effectively apply less severe measures, and it must be always preceded by an individual assessment. Article 8, n. 3 foresees which conditions must be met in order to legitimately apply detention measures, which, nonetheless, are designed very broadly<sup>35</sup>.

The *ultima ratio* nature of the detention measures was also menaced during

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31. UNCHR's guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention, 2012.

32. See, on the case-law of detention of immigrants, our study “A Detenção de Imigrantes na Jurisprudência Nacional e Internacional”, *Revista do Ministério Público*, n.º 125, Jan.-Mar. 2011.

33. Ruling dated 20/12/2011, *Yoh-Ekale Mwanje vs. Belgium*, application n. 10486/10 and Ruling dated 19/01/2012, *Popov vs. France*, application n. 39472/07 and 39474/07.

34. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

35. The ECJ had already the opportunity to confirm that this provision was lawful and did not disrespect Articles 6 and 52(1) and (3) of the Charter. See ruling dated of 15/02/2016, *J.N.*, proc. C-601/15 PPU and ruling dated 14/09/2017, *K.*, proc. n. C-18/16.

the migratory crisis, where systematic detentions of all migrants arriving to the external borders of some Member States were reported, namely in the Greece island of Lesbos. These measures were even more serious for involving families and children.

### 3.3.2. Reception Conditions

The Directive on Reception Conditions of asylum-seekers aims at implementing the Geneva Refugee Convention, which provides for a minimum set of rights recognised to the category of persons who are physically present in a State's territory and have asked for asylum, irrespective of their legal status (v. art. 15. and *seq.*). The reception conditions must be applicable since the moment the asylum-seeker lodges his or her asylum application, and should encompass documentation, freedom of movement and residence, access to education and employment and several material conditions, such as housing, food, clothing, healthcare and protection of especially vulnerable persons. The obligation to receive asylum-seekers adequately is also a requirement demanded by Article 3 of the ECHR and by Article 4 of the UE Charter of Fundamental Rights – which both guarantee the right to not incur in torture, inhuman or degrading treatments.

The ECtHR has developed a broad case-law on migrant's reception conditions, having several times convicted State-Parties for subjecting asylum-seekers to conditions that, due to their severity, amounted to treatments contrary to Article 3<sup>36</sup>. Recently, the Court has decided the *Khlaifia* case<sup>37</sup>, considering that the level of protection afforded by Article 3 does not lower in times of migratory crisis, even when there is a mass influx of migrants in the territory of States' Parties. The judges highlighted that the several material difficulties with which Italian authorities were confronted would not relieve them from their duty to provide adequate support to asylum-seekers. For example, in the mentioned case, the Court stressed out that subjecting asylum-seekers to overcrowded rooms would, as a general rule, amount to a disrespect of Article 3 of ECHR. The Court also considered that the applicants were especially vulnerable, for having embarked in a dangerous trip through the Mediterranean Sea at the hands of smugglers. The simple fact that they stayed for only few days in a detention center was not considered relevant to dismiss the allegation of ill-treatment.

The ECJ, on its turn, had also the opportunity to address the issue of the reception conditions of asylum-seekers. In the case *NS and ME*<sup>38</sup>, the Luxembourg Court considered that Article 4 of the Charter would be violated in the case of an asylum-seeker transferred from a Member State to another where systematic deficiencies on the reception conditions existed - even when the second Member State would be the responsible, according to the Dublin regulation, to analyse the asylum request.

One of the challenges regarding the respect for Human Rights during the

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36. Ruling dated 21/01/2011, *MSS vs. Belgium and Greece*, application n. 30696/09.

37. Ruling dated 01/09/2015, *Khlaifia and others vs. Italy*, application n. 16483/12.

38. Ruling dated 21/12/2011, *N.S. and M.E.*, proc. n. C-411/10 e 493/10.

2015-2016 migratory crisis concerned, precisely, the inadequacy of reception conditions. States faced a mass influx of persons and, as a result, were not able to receive adequately every asylum-seeker staying in their territories<sup>39</sup>. The same can be said regarding the so-called “hotspots”, created by the European Union, and located in the areas encumbered with more migratory pressure. These hotspots were aimed at identifying people who needed international protection and at organising relocation to other Member States. Several NGOs’ reported that asylum-seekers were subjected to long waiting hours in inadequate conditions, without the identification of especially vulnerable persons, such as children, persons with disabilities, older persons and migrants with special health needs<sup>40</sup>.

#### 4. The need of an effective Principle of Solidarity

The 2015-2016 migratory crisis embodied several challenges to the analysed rights - in particular, to the right to asylum itself. The large number of people arriving to EU Member-States led to the application of collective or automatic measures due to the lack of resources to analyse with detail every individual situation, and to the failure of reception facilities and capacities.

Those Member-States that were most affected with the migratory pressure, such as Greece or Italy, faced serious difficulties that led to a practical impossibility to fully respect the ECHR and the Charter. On one hand, they did not have reception capacities to shelter every asylum-seeker arriving on their shores. On the other hand, they could not send them back to the countries of transit or origin, as such a solution could amount to a *refoulement*. In order to cope with the migratory pressure and, at the same time, to have real conditions to respect all Human Rights enshrined in the Charter, these States needed to count with the solidarity within the EU<sup>41</sup>. This solidarity would require other Member-States to share both resources and burdens with the most affected ones.

The principle of solidarity amongst Member-States has “constitutional dignity”, for it is foreseen in several Articles of the Treaty on the Functioning of the European Union, such as Article 67, n.2 and Article 80. From this principle we may advocate that all Member-States have a duty to support the migratory pressure that heavily affected in particular Italy and Greece. The practical implementation of this duty would be operationalized by the European Institutions.

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39. See MINOS MOUZOURAKIS, “The reception of asylum-seekers in Europe: failing common standards”, [http:// eumigrationlawblog.eu/](http://eumigrationlawblog.eu/), 20<sup>th</sup> April 2016 and, regarding the case of Greece, AIKATERINI DRAKOPOULOU, “Hotspots: the case of Greece”, in *Searching for Solidarity in EU Asylum and Border Policies*, Odysseus Network, 2016, p. 19.

40. EUROPEAN COUNCIL ON REFUGEES AND ASILES, “Hotspot opens in Lesbos but reports of conditions on the Island remain worrying”, <http://www.ecre.org/>, 29/10/2015, CATHRYN COSTELLO, “It need not be like this”, *Forced Migration Law Review*, issue 51, January 2016, p. 13.

41. On the importance of Solidarity in the context of the migratory crisis, see PHILIPPE DE BRUYCKER AND EVANGELIA TSOURDI, op. cit., p. 64 et seq., and EVANGELIA TSOURDI, “Intra-EU solidarity and the implementation of the EU asylum policy: a refugee or governance ‘crisis’?”, in *Searching for Solidarity in EU Asylum and Border Policies*, Odysseus Network, 2016, p. 5.

However, general rules on responsibility sharing with asylum-seekers stem from the Dublin Regulation<sup>42</sup>, which could not – and still cannot – be considered an adequate instrument for the enforcement of the solidarity principle. This regulation sets forth criteria for determining which Member-State is responsible for examining an asylum application. However, its functioning leads to overloading the States which have external borders. Statistics show that Poland, Italy, Greece, Hungary and Malta were those which have been considered responsible in the vast majority of asylum requests<sup>43</sup>. This being the rule that governs distribution of asylum-seekers between the Member States, the Dublin Regulation did not provide a satisfactory answer for the 2015-2016 migratory crisis, and has been receiving severe criticisms, precisely for not helping the most affected States<sup>44</sup>. Although the Commission has proposed a reform to the Dublin system, it is still unclear which will be the fate of this mechanism<sup>45</sup> and whether this new version will contain a satisfactory “solidarity clause” for scenarios of exceptional migratory pressure.

One must point out, however, that EU asylum law had already one mechanism for exceptional migratory circumstances: the *Temporary Protection Directive*, which was never put into practice<sup>46</sup>. This Directive was approved after the former Yugoslavia war and was precisely aimed at providing responses to conjunctures of migratory crisis. However, contrarily to other “ordinary” mechanisms that are constantly in force, this Directive establishes a “crisis solution” that has to be “activated” by a Council’s decision<sup>47</sup>. Although it would be, in our opinion, the adequate instrument for responding to the 2015-2016 migratory crisis, there was no political will to put the Directive in force as a response to that conjuncture. Some scholars claim, thus, that this legal mechanism will remain in History as being a “ghost Directive”<sup>48</sup>.

However, the Commission proposed another mechanism aimed at putting

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42. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

43. PIETER BOELES, MAARTEN DE HEIJER, GERRIE LODDER & KEES WOUTERS, *European Migration Law*, 2nd edition, Intersentia, p. 265.

44. See, for example, MARIA STAVROPOULOU, op. cit., p. 8, and PHILIPPE DE BRUYCKER AND EVANGELIA TSOURDI, “In search of fairness in responsibility sharing”, *Forced Migration Law Review*, issue 51, January 2016, p. 64.

45. The Commission has proposed a new Dublin Regulation (which would be the “Dublin IV”) in May 2016. See COM(2016) 270 final.

46. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. See, on the Directive, CONSTANÇA URBANO DE SOUSA, “A Proteção Temporária enquanto elemento de um sistema europeu de asilo”, *Themis*, 2001, p. 269.

47. ANDREIA SOFIA PINTO OLIVEIRA, *O Direito de Asilo na Constituição Portuguesa*, Coimbra Editora, 2009, p. 217.

48. CRISTINA GORTÁZAR, “Artigo 18.º - Direito de Asilo”, in AA.VV., *Carta dos Direitos Fundamentais da União Europeia Comentada*, Alessandra Silveira, Mariana Canotilho (coord.), Almedina, 2013, p. 242.

solidarity into practice. It was the *relocation mechanism*, by which some asylum-seekers could be distributed amongst all Member-States according to specific criteria. This decision was part of the *European Agenda on Migration*<sup>49</sup>, which contained a pack of measures aimed at coping with the large influx of migrants arriving to the EU. However, its scope was rather limited. It was only applicable to Refugees sharing nationalities with an international protection recognition rate superior to 75%. Secondly, it was only applicable to those staying in Greece and in Italy, and who would ask to be part of the relocation program. All Member-States were expected to take part of the program, receiving a certain number of persons. The national quota would be calculated according to several criteria, such as the resident population, the unemployment rate, the gross national product, amongst others. However, since its proposal, the decision faced several challenges. Firstly, there were Member States who, relying on the defense of their national sovereignty, have expressly opposed to the relocation decision. Slovakia and Hungary brought an action before the ECJ against the provisional mechanism for the mandatory relocation of asylum-seekers. In a landmark decision dated of 6<sup>th</sup> September 2017, the Court dismissed the action, considering that Article 78(3) TFEU enables the EU institutions to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow of displaced persons<sup>50</sup>.

The enforcement of the relocation mechanism was also challenged by severe practical difficulties. Until April 2016, only few more than 600 Refugees had been relocated. Some authors claim that relocation mechanism had a “design failure” since it did not require the process to take into account the intentions or preferences of asylum-seekers in what regards the Member-State in which they wished to seek protection<sup>51</sup>. Meanwhile, the number of people arriving to Greek and Italian shores did not cease to rise – and, thus, also the demands for guaranteeing Human Rights.

#### 4. Conclusions

The migratory crisis with which EU was faced in 2015-2016 represented a major proof to the Member-States’ commitment to the Fundamental Rights they agreed to respect in the European Charter. Several of these rights were severely menaced, as we have been exposing in this article. However, one must bear in mind that all violations that might have happened cannot be set at the same level. On one hand, there are those rights that have been disrespected due to the

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49. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a European Agenda on Migration (COM/2015/240 final).

50. Judgment in Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary vs Council*.

51. MADELINE GARLICK, “The road more travelled? Onward movement of asylum-seekers and refugees”, *Forced Migration Law Review*, issue 51, January 2016, p. 43 and WILL JONES AND ALEXANDER TEYTELBOYM, “Choices, preferences and priorities in a matching system for refugees”, *Forced Migration Law Review*, issue 51, January 2016, p. 80.



inherent difficulties of the States faced with extraordinary migratory pressure. That is the case of many situations in Italy or in Greece, where the high number of people arriving each day led to an almost practical impossibility of receiving them adequately. Quite differently, and on the other hand, are those rights that were actively disrespected by Member-States. *Push-back* actions, such as mass returns at seas or fighting at the borders provide some examples. These latter situations are, in our opinion, more severe than the first ones, as they encompass an active decision from the Member-State.

In the first type of cases, the responsibility for assuring that Member-States have capacities to fully respect the fundamental rights enshrined in the Charter relies in the EU institutions. The only way to ensure such respect is to call for solidarity between Member-States. The relocation mechanism might have been, in theory, a good solution for responsibilities sharing. However, in practice, it was limited in several aspects. On the other hand, it would not solve the problems that Border States were faced with concerning the heavy influx of persons. Thus, solidarity should as well have encompassed a stronger reinforcement of the local teams working in the most affected areas.

Moreover, EU should also invest more in resettlement programs. In fact, relocation is an answer which is only aimed at protecting those refugees who arrived safely to the EU borders, but who might have risked their lives and been exploited by smugglers in the process. Resettlement provides international protection to asylum-seekers at the countries of origin or of transit, thus avoiding them to desperately try to arrive to safe countries at any cost<sup>52</sup>. In September 2017, the Commission presented a resettlement scheme calling Member States to contribute to, at least the resettlement of 50,000 refugees until October 2019<sup>53</sup>.

These would be answers that should have been developed to provide solidarity and help to the most affected countries, and, thus, to provide an effective international protection to refugees. However, some policies of the EU during the 2015-2016 crisis seemed to point the other way. Some studies claimed that EU has responded to the crisis more through reinforcing security than to investing on humanitarian or personnel needs<sup>54</sup>. We have witnessed some actions by which EU seemed to try to “wash its hands” in what concerns the right to asylum enshrined in Article 18 of the Charter. That was the case of the deal with Turkey, which was analysed in some points, and demonstrates a clear intention from EU to resign to its responsibilities on welcoming Refugees. That certainly would not be the intention of the drafters of the EU Charter of Fundamental Rights when

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52. For more details on resettlement, see EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Legal entry channels to the EU for persons in need of international protection: a toolbox*, 2015, p. 7, DELPHINE PERRIN (ed.), *Refugee Resettlement in the EU - 2011-2013 Report*, European University Institute, 2013 and CATHRYN COSTELLO, op. cit., p. 13.

53. Commission Recommendation of 27.09.2017, on enhancing legal pathways for persons in need of international protection, C(2017) 6504. In September 2018, 13.200 refugees were resettled under the scheme. See the report “Enhancing safe and legal pathways to Europe”, dated of 12<sup>th</sup> September 2018.

54. DUNCAN BREEN, op. cit., p. 22.



they granted a right to asylum. A Union that fails to protect the rights of “the others” fails as an entity who respects Fundamental Rights of everyone.

However, since the migratory flows have decreased in 2017 and onwards, we hope that a least pressured Europe may at least, in the future, be more focused on planning better ways to enforce these fundamental rights.

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