TRANSIT ZONES

Human Rights and Migration Law Clinic

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Strategic Litigation: International Human Rights Legal Clinic

2020

The present report is written by the "Strategic Litigation Team" of the 2019 edition of the Human Rights and Migration Law Clinic (HRMLC) of Turin composed by Michela Boero, Pietro Dunn, Valeria Fattori, Mariella Pittari, Natalia Salça & Maurizio Schiaparelli and supervised by Elena Corcione, Emanuela Roman, Andrea Spagnolo & Ulrich Stege. Viviana Gullo, from the Strategic Litigation: International Human Rights Legal Clinic, did additional research and editing.

The HRMLC is a legal training program offered in cooperation by the Departments of Law of the Universities of Turin and Eastern Piedmont in Alessandria and the International University College of Turin (see http://www.clinichelegali.unito.it/do/home.pl or www.iuctorino.it). The Strategic Litigation: International Human Rights Legal Clinic is also a legal clinical program offered by the Law Department of the University of Turin (see https://www.clinichelegali.unito.it/do/home.pl/View?doc=/strategic_litigation/panoramica.html).

The report greatly benefits from cooperation with ASGI (Associazione Studi Giuridici sull'Immigrazione), in particular its In Limine project (see here https://inlimine.asgi.it/). Heartfelt thanks to ASGI's lawyers and staff who provided data and feedback.

Special thanks also to Lucy Quacinella, who was Fulbright research fellow at the International University College of Turin (IUC) in 2019 and who helped editing of the report.

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1. Introduction

In recent years, the debate about national borders has become more and more relevant within the context of migration. One aspect regards the definition and regulation of transit zones. This report provides a legal analysis of transit zones in Europe from a human rights and asylum law perspective, with a focus on Italy and in the context of asylum-seekers and other migrants who are passing through or held in a transit zone.

States have identified specific areas within airports and seaports as well as at their land borders in which a specific legal regime apply on entry or passage. The debate on such "transit zones" is a relatively new one, but has great significance: relying on the extra-territorial status of these areas, States often choose not to apply certain national laws while also rejecting responsibilities they may have arising from international and regional human rights treaties. This is particularly relevant in the field of migration, where States use transit zones to manage migrant flows in at least two ways. First, rather than letting an asylum-seeker "enter" and access the local reception system, States instead often require the individual to stay within a designated transit area, apply for asylum while in that location and wait there for a decision. Second, individuals who have already been identified as irregular migrant are often held in a transit zone until expelled. What happens in these areas is difficult to monitor since non-governmental organizations (NGOs), associations and entities for the protection of migrants are usually denied access. Even attorneys have faced difficulties in entering such areas on numerous occasions[1].

State policies regarding transit zones may result in the violation of migrants' fundamental rights and freedoms as prescribed by the European Convention of Human Rights (ECHR). As will be shown throughout the report, major concerns involve: (*a*) the principle of *non-refoulement* (Article 3 ECHR); (*b*) the prohibition against collective expulsions (Article 4 Protocol 4 to the ECHR); (*c*) the deprivation of personal liberty (Article 5 ECHR); (*d*) the prohibition against torture and of inhuman or degrading treatment (Article 3 ECHR); and (*e*) the right to remedy (Article 13 ECHR). Inconsistencies also emerge regarding compliance with European Union (EU) law.

The present report is structured as follows: chapters 2 ("Definitional aspects") and 3 ("The issue of territoriality and State jurisdiction in transit zones") adopt a descriptive and critical approach concerning the diverse legal frameworks defining and regulating transit zones. Chapters 4 ("Potential non-compliance with the ECHR") and 5 ("Potential non-compliance with EU law") highlight how States, and particularly Italy, risk infringing basic human rights and freedoms as protected at the international and supranational level. Lastly, the report deals with an analysis of policies implemented in selected European and non-European countries, which can be found in the Annex.

2. Defining Transit Zones

[1] ASGI, *Border procedure (border and transit zones) – Italy*, accessed 07 May 2019, available at <http://www.asylumineurope.org/reports/country/italy/asylum-procedure/procedures/border-procedure-border-and-transit-zones>.

A definition of what transit zones are is necessary to identify the scope of the present report: the notion is not, indeed, of immediate clarity and transparency on its own.

What we refer to as "transit zones" can be considered as a subcategory of the broader class of spaces that are defined by Bell as "Special International Zones" (*hereinafter*: SIZs). In the words of the author, a SIZ is «[a]n area that its host nation state places outside its territory for the purpose of some local laws, leaving other such laws and applicable international obligations in force»[2]. This definition comprises a broad and eclectic range of situations and phenomena, quite different one from another. Examples of SIZs are numerous and in many cases the result of longstanding traditions: one might, think, for example, of ancient sanctuaries where prosecution of wrongdoers was prohibited or of the privileges of special ambassadors and military personnel deployed abroad[3]. The creation of areas from which the public withdraws its own powers is thus a well-established technique[4] which can serve many different aims and functions.

Among SIZs, Special Economic Zones (*hereinafter*: SEZs) play an important role. These are «demarcated geographic areas contained within a country's national boundaries where the rules of business are different from those that prevail in the national territory»[5]: in other words, SEZs, which come in many different types, are generally areas where national law is suspended, in order to give way to international customs and praxes and to increase freedom of commerce and the free market[6]. Another relevant type of SIZs is represented by Duty-Free Retail Areas[7].

International transit zones (*hereinafter*: ITZs) can thus be said to represent a kind of SIZ in which countries essentially withdraw its own powers to facilitate the transition of passengers between a host State's territory and what lays beyond, be it the territories of other sovereign States or the international commons of sea and air[8]. This solution allows travellers to reach their flight connections without having to pass through customs and immigration controls. Passengers thus touch the ground of the host State, but their transit is made easier by the fact that they do not have to enter it formally. It should be noted that the designation of a specific area as an international transit zone is the result of a decision of the State itself. Moreover, States usually withdraw domestic jurisdiction in such areas only with respect to specific fields of local law while retaining control as to all others, thus meaning that such local laws continue to be in force but the State elects not to enforce them. For example, States may renounce the application of local law on customs, duties and immigration but not on the prohibition against drug trafficking. International transit areas thus remain subject

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[2] BELL, T. W., *Special International Zones in Practice and Theory*, Chapman Law Review 21(2), 2018, p. 277.
[3] *Id.*, p. 288.
[4] *Ibid.*, BASARAN, T., *Security, Law and Borders: At the Limits of Liberty*, London: Routledge, 2010, p. 66.
[5] BAISSAC, C., *Brief History of SEZs and Overview of Policy Debates* in: FAROLE, T. & AKINCI, G., (eds.) *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experiences*, 2011, Washington DC: The International Bank for Reconstruction and Development/The World Bank, available at <https://doi.org/10.1596/978-0-8213-8638-5>, p. 23.
[6] Cf. BELL, T. W., *supra* note 3, pp. 280-281.
[7] Cf. *Id.*, pp. 282-283; International Civil Aviation Organization (ICAO), *Convention on Civil Aviation ("Chicago Convention")*,7 December 1944, (1994) 15 U.N.T.S. 295, available at <https://www.icao.int/publications/pages/doc7300.aspx>, Article 24.
[8] BELL, T. W., *supra* note 3, p. 278.

to all domestic law and domestic authorities over which sovereignty has not been withdrawn, an approach formalized in 1944 in the Chicago Convention on Civil Aviation.

Thus framed, SIZs, and ITZs as well, may appear to be liberal institutions, useful for the promotion of freedom of travel and trade.[9]. By limiting their own jurisdiction over specific areas, many States have adopted instruments, through which they relinquish territorial sovereignty for the sole purpose of rejecting responsibility under the 1951 Geneva Convention and Protocol Relating to the Status of Refugees and other international and regional human rights treaties[10]. The underlying idea is that, since migrants are left outside the State, then the State is not in any way involved in potential violations of such treaties[11]. Yet nothing about the establishment of an ITZ inherently abrogates a State's duties under international law within such spaces.

ITZs often serve the purpose of holding migrants while they wait either for a decision on asylum or to be repatriated. The most prominent example in the asylum context is the *Amuur* case, which was brought before the European Court of Human Rights (*hereinafter*: ECtHR)[12] in 1996. Repatriation was involved in the incidents that took place at Milano Malpensa Airport in December 2018[13]. Many commentators have strongly objected to this kind of approach, through which «liberal states can deny to particular communities fundamental rights, which are the normative and legal foundation of liberal states, whilst continuing to control the very same space through policing powers»[14]. As explained above, the decision to renounce jurisdiction over a specific area is usually limited to specific subjects and matters: States can and do decide to maintain a wide range of sovereign powers over the space. With regard to ITZs created specifically for purposes of migration, policing activities by the States are not only left in place in the zone but are often actually augmented, with surrounding walls or fences and guards maintaining close observation, much like a prison. There have been several reports of physical abuse by the authorities in the French *zones d'attente* [15]. While States may characterize them as consistent with international law[16], ITZs carry the risk of degenerating into a no-man's land where basic human rights are denied.

As to the breadth of the physical area or areas they occupy, ITZs may vary depending on the State's legislation. However, few examples of clear legislation in this sense have been provided so far in domestic laws. For instance, the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* (*hereinafter*: CESEDA) provides that a *zone d'attente* consists of the space between the points of embarkation and disembarkation, be it a port or an airport, and those where customs and immigration controls are managed;

[9] *Id*., p. 293.

[10] Such as the French "zones d'attente pour personnes en instance" (zones d'attente), the Hungarian "transit zones" and the Australian "migration zones" and "excision territories" ,

[11] A distinction is thus made between "physical entry" and "legal entry" within the territory of the State. Cf. BASARAN, T., *Legal borders in Europe: The waiting zone*, in: BURGESS, J. P. & GUTWIRTH, S. (eds.), *A Threat Against Europe? – Security, Migration and Integration*, Brussels: VUBPRESS Brussels University Press, 2011, p. 64.

[12] *Amuur and others v. France*, No. 19776/92, 25 June 1996, *Reports* 1996-III, available at <http://hudoc.echr.coe.int/eng?i=001-57988>. Cf. Paragraph 1 ("Introduction").

[13] ASGI & LASCIATECIENTRARE, *supra* note 2.[IF THE EXAMPLES AT PAGE 2 ARE DELETED, NEED TO CHANGE THE REFERENCE AND ADD THE FULL CITATION HERE.]

[14] BASARAN, T., *supra* note 5, p. 1.

[15] BELL, T. W., *supra* note 3, p. 291.

[16] See *Id.*

however, when affected individuals are conducted to facilities in the vicinity of the embarkation or disembarkation points, these facilities may also be designated as ITZs. Moreover, Article L221-2 provides that it is prerogative of the competent administrative authority to exactly delimit the space of the *zone d'attente*[17]. The common trend appears to be that a transit zone is comprised of the space that starts where one exits the craft arriving from abroad and extending to the inside border of immigration and customs control[18].

Given the sensitivity of the matter at hand and the impact it might have on the guarantee of human rights of migrants, it is important that States carefully design and provide clear-cut descriptions of the exact location of their particular transit zones as well as the policies and procedures to be applied there to meet State's obligations under the international and domestic law.

In Italy, legislation provides that frontier and transition zones are to be identified by the Minister of the Interior, though this has not occurred yet[19]. The question at stake is relevant in that Article 28-*bis*, paragraph 1 *de juncto* with paragraph 1-*ter*, provides that accelerated procedures may be applied to requests for international protection submitted at the border or in transit zones[20].

In sum, there is a distinct risk that transit zones will be administered as "legal black-holes". Pending a consolidated, commonly recognized national as well as international jurisprudence on these issues, the present unstable and precarious conditions that asylum-seekers and migrants face may intensify.

3. Territoriality and State jurisdiction in transit zones

As discussed above, airport transit zones are technically defined as areas set outside countries' borders that allow travellers to avoid passport controls during their layover. Based on that, passengers who are just transiting through those zones do not officially enter the country. Under international law, the idea that airport transit zones are not part of States' territory and that they are thus not subject to their respective jurisdiction is however a misconception.

The Universal Declaration of Human Rights ensures that «everyone has the right to leave any country, including his own, and to return to his country»[21]. But on the other hand, international law, in general, does

[17] See Annex.A ("France").

[18] BELL, T. W., *supra* note 3, p. 278.

[19] Article 28-bis of Legislative Decree No. 25/2008, as amended by Article 9 of Law-Decree No. 113/2018

[20] This raises many concerns, including whether transit zones will be identified so broadly as to encompass hotspots like the one in Lampedusa. Through the In Limine project, ASGI, ActionAid, Indiewatch and CILD are monitoring the troubling situation at the Lampedusa immigration hotspot. Severe criticalities emerged from the general conditions of the hotspot and numerous violations of the current immigration legislation have been observed, many resulting from the confusion created by inconsistent provisions of Law-Decree No. 113/2018 ("Decreto Sicurezza e Immigrazione"). See. ASGI – PROGETTO INLIMINE, The theatre of Lampedusa, 19 July 2019, available at <http://inlimine.asgi.it/categoria/lampedusa/>.

[21] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at <https://www.refworld.org/docid/3ae6b3712c.html>.

not impose an obligation upon States to allow foreigners access to their territories[22]. As Pcoud and Guchteneire note, «emigration is recognized as a human right, but immigration is not».

Although States control who has the right to cross the borders, the possibility of entering a safe territory is a key dimension of the right to asylum. Since the right to asylum always implies the access to a territory where the person can be safe, placing border controls outside the State's territory controls can determine the deterioration of the treatment of refugees and asylum-seekers around the world.

The blurred concept of international transit zones in the multi-layered legislation has been used by States as means of avoiding application of both international and domestic protection of human rights and on the rights of refugees. The attempt of States to suspend rights in these areas on the grounds that they fall outside of their jurisdiction is part of a policy which has been undertaken to try to reduce the number of asylum-seekers[23]. It is possible to identify as main barriers to entry adopted by country Visa requirements; (*ii*) sanctions imposed on companies which carry out transportation; (*iii*) the internationalisation of ports and airports; (iv*)* the interception of boats and ships; (*v*) the creation of physical barriers –are means of suspending the law creating an ambiguous space of exception. [24]

However, the ECtHR's ruling in *Amuur v. France,* asserting that «despite its name, the international zone does not have extraterritorial status» challenges the need for states to comply with human rights obligations.[25] In this case, the French Government claimed that plaintiffs were not deprived of liberty, but only kept in the international zone, where they could move to any place other than France. The Court declared that international zones in airports are subject to State jurisdiction and therefore all the obligations related to the protection of refugees and migrants must be guaranteed by Member States. Accordingly, the Court decided that the Somali asylum-seekers were illegally deprived of liberty since there was no law authorising their detention [26].

Moreover, in the light of the ECHR, States cannot refuse jurisdiction by simply arguing that transit zones are extra-territorial areas. In the *Hirsi Jamaa*[27] ruling, the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities»[28], implying that the State retained jurisdiction over these refugees and asylum-seekers. As a consequence, the determining factor to affirm States' jurisdiction

[22] PCOUD, A. & DE GUCHTENEIRE, P., *International migration, border controls and human rights: Assessing the relevance of a right to mobility*, Journal of Borderlands Studies 21(1), 2006, pp. 69-86.

[23] Thus PRICE, M. E., *Rethinking Asylum: History, Purpose and Limits*, Cambridge: Cambridge University Press, 2009, p. 200: «The second trend of the last fifteen years has been increasingly draconian measures that have made it difficult for would-be asylum seekers to file their claims. These include, as we shall see, the erection of barriers designed to make it more difficult for asylum seekers to enter the territory of an asylum state; the imposition of a variety of procedural rules that make it more difficult for asylum seekers to apply for asylum if they are able to enter the territory of asylum state; and the denial of benefits and the use of detention to further discourage would-be applicants from making claims».

[24] *Id.*, p. 208-232

[25] *Amuur and others v. France*, *supra* note 12.

[26] MAILLET, P. G. J., *Exclusion From Rights Through Extra-Territoriality at Home: The Case of Paris Roissy-Charles De Gaulle Airport's Waiting Zone*, Theses and Dissertations (Comprehensive) 1908, 2017.

[27] EUROPEAN COURT OF HUMAN RIGHTS (ECHR), *Hirsi Jama and others v. Italy, No. 27765/09.* Available at <http://hudoc.echr.coe.int/eng?i=001-109231>

[28] ECHR, *supra* note 27, para. II (81)

is whether the person fell under the effective control and the authority of that State. In *Hirsi Jamaa*, the ECtHR examined the applicability of the European Convention of Human rights in areas set outside of Member States' territories[29]. *Hirsi Jamaa* is remarkable for being a leading case in which the Court has ruled that, in exceptional circumstances, acts of the Contracting States produces effects outside their territories can constitute an exercise of their jurisdiction, which renders the State subject to the ECHR[30].

In the reasoning of *Hirsi Jamaa* the Court recalled its jurisprudence on extraterritorial jurisdiction. In *Xhavara*[31], the Court affirmed that Italian jurisdiction applied when an Italian ship had collided and caused the sinking of an Albanian boat. In *Medvedyev and others v. France*, where French authorities interdicted, out of territorial waters, a Cambodian vessel suspected of drug smuggling and kept the crew confined aboard during the thirteen-days voyage into a French port, the Court held that the applicants were within the jurisdiction of France, as France had exercised effective control on the ship and crew «at least de facto, from the time of its interception, in a continuous and uninterrupted manner»[32]. Another important case highlighted by the Court is *Banković*[33], in which the Court ruled that there are clearly defined and recognised instances of extra-territorial jurisdiction in international law, such as consular activities abroad and jurisdiction over flag vessels. It is fundamental to point out that the jurisdiction is determined by a de facto control and not by other external elements.

4. Considerations for ensuring compliance with the ECHR

Before analysing in details the direct violations of Italy's conduct regarding the processing of asylum applications and conducting arrests at Malpensa airport before the European Convention on Human Rights, few clarifications in relation to the ECHR and the articles at issue are essential in order to further understand the position of the European Court of Human Rights and, later in the analysis, of the European Court of Justice.

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[29] LIGUORI, A., *La Corte europea dei diritti dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: il caso Hirsi*. Rivista di diritto internazionale 95(2), 2012, pp. 415–443.

[30] *Ibid.*

[31] ECHR, *Xhavara and Others v. Italy and Albania* (dec.), No. 39473/98, 11 January 2001.

[32] ECHR, *Medvedyev and others v. France*, No. 3394/03, 2010. Available at <http://hudoc.echr.coe.int/eng?i=001-97979>

[33] ECHR, *Banković and others v. Belgium and others*, No. 52207/99, December 2001. Available at <http://hudoc.echr.coe.int/eng?i=001-22099>

Thus MACNAMARA, F., *Externalised and Privatized Procedures of EU Migration Control and Border Management: A Study of EU Member State Control and Legal Responsibility*, EUI doctoral thesis, 2017: «The Court in Banković outlined four exceptional circumstances in which a contracting State could possibly exercise extraterritorial jurisdiction. These four exceptions themselves having already being set out in Loizidou and having been inspired by disparate case law from the Court. However, it should be added that these four exceptions to the strictly territorial understanding of jurisdiction were only set out in Loizidou as being examples of exceptions and the Court in that case didn't list them as being an exhaustive list but the Court in Banković implied they were. The four exceptions are: Cases which concern the extradition or expulsion of a person by a Contracting State; cases where the acts of the State, whether performed inside or outside national borders, produce effects outside their own national territory; cases which involve an 'effective' control of an area outside its own national territory; and finally, cases concerning consular or diplomatic actions and cases in which the actions of a vessel flying the flag of the contracting State are in question».

4.1. Non-refoulement

Article 3 of the ECHR states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Following *Soering v. the United Kingdom*[34], Article 3 has been interpreted as prohibiting the expulsion of persons who are at risk of being subjected to the condemned harms in a location outside the State's territory, thus, establishing the extraterritorial applicability of the Convention.

Therefore, although Article 3 does not explicitly mention the prohibition of *non-refoulment* – which is also recognised by other international legal tools as principle to be granted and respected - the Court clarified on many occasions the relevance of the principle[35]. In the case of *Hirsi Jamaa and others v. Italy*[36], judge Pinto de Albuquerque wrote a concurring opinion emphasizing the importance of such principle: «Under the European Convention, a refugee cannot be subjected to refoulement to his or her country of origin or any other country where he or she risks incurring serious harm caused by any identified or unidentified person or public or private entity».

Thus, the right of *non-refoulement* is recognised under the Convention as an obligation by the State Parties to take into due consideration the risks of torture or inhuman or degrading treatment or punishment (as enshrined by Article 3 ECHR) which a person may face after deportation. However, in *Ilias and Ahmed v Hungary*[37], the Court delivered a questionable reasoning, especially in relation to the principle at issue and the consequent risks deriving from its violation. The applicants, two Bangladeshi nationals, applied for asylum and waited twenty-three days in the Hungarian transit zone at the border with Serbia, Röszke, where they were escorted due to an expulsion order after their applications were rejected. Focusing on the principle at issue, the Court claimed that Hungary failed to comply with the procedural obligation under Article 3 of the Convention to assess the risks of treatment contrary to that provision before removing the applicants to Serbia, which was not recognised as a safe third country[38]; yet, the Court did not clearly underline the violation of the principle of non-refoulement perpetrated, *de facto*, by Hungary, while the only references to the principle are related to the risks in the Serbian territory[39]. A similar approach, yet with a different outcome, may be underlined in the most recent case *M.K. and others v. Poland*, where thirteen Chechen applicants were returned to Belarus after Polish authorities refused to register their asylum application at the border checkpoint, at Terespol. The Court ruled in favour of the alleged violation of Article 3 due to the exposure to a serious risk of chain-refoulement and treatment prohibited by the Article, but the violation of the principle is still related to the border State (in this case Belarus)[40].

[34] ECHR, *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989, Series A No. 161.
[35] ECHR, *M. K. and others v Poland*, Applications nos. 40503/17, 42902/17 and 43643/17, 23 July 2020, §167.
[36] *Hirsi Jamaa and others v. Italy* [GC], *supra* note 27.
[37] ECHR, *Ilias and Ahmed v. Hungary*, Application no. 47287/15, 21 November 2019.
[38] ECHR, *Ilias and Ahmed v. Hungary*, §§ 163-165.
[39] *Ibidem*, § 154.
[40] ECHR, *M.K. and others v. Poland*, §§ 185-186.

In the light of the above, the accelerated procedures provided for by Law Decree No. 113/2018 may result in a violation of Article 3, especially if combined with the unsatisfactory collection of evidence on the specific circumstances of each asylum application[41]. Under the severe time constraints of an accelerated procedure, asylum applicants may find themselves unable to obtain legal support, gather the necessary evidence, or adequately communicate the circumstances supporting their applications. This may in addition be the case as soon as the safe country practice is applied, in which asylum applications become automatically unfounded as soon as a person comes from a "per declaration" considered safe country[42]. The absence of thorough individual evaluation of the application by the authorities may therefore in practice lead to a unlawful refoulement since the compliance with Article 3 ECHR is not assessed exhaustively.

It is therefore important to highlight, that Italy needs to make sure that procedural safeguards are fully in place in Transit Zones and during accelerated border procedures in order to avoid refoulements or chain refoulements to countries, in which the third country national may face the risk of torture or inhuman or degrading treatment or punishment – covered by Article 3.

4.2. Prohibition against collective expulsions

The above-mentioned non-refoulement principle is reinforced by the legal provision prohibiting collective expulsion (Article 4 Protocol No. 4 to the ECHR).

A number of consistent rulings by the ECtHR have contributed to clarifying the boundaries of the prohibition against collective punishment. Cases such as the 2019 *Berdzenishvili and others v. Russia*[43] and the 2002 case *Čonka v. Belgium*[44] underscore that Article 4 Protocol No. 4 to the ECHR prohibit «any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group»[45].

Prohibited collective expulsions are characterised by two elements. First, aliens are expelled together with other aliens who are in a similar situation. Second, expulsion occurs without due examination of the individual's own situation. Collective expulsions has evolved into a principle of general international law. Therefore, a migrant entering the State through a transit zone enjoys the full right not to be expelled collectively in the sense of Article 4 Protocol No. 4 to the ECHR.

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[41] See RENEMAN, M. *EU asylum procedures and the right to an effective remedy*, London: Bloomsbury Publishing, 2014.

[42] COSTELLO, C., *The asylum procedures directive and the proliferation of safe country practices: deterrence, deflection and the dismantling of international protection*, European Journal of Migration and Law 7(1), 2005, pp. 35-69.

[43] ECHR, *Berdzenishvili and others v. Russia*, No. 14594/07, No. 14597/07, No. 14596/07, No. 14598/07, No. 15221/07, No. 16369/07 & No. 16706/07, 26 March 2019.

[44] ECHR, *Čonka v. Belgium*, No. 51564/99, 2002-I/2019. Available at < http://hudoc.echr.coe.int/eng?i=001-60026>

[45] Press unit European court of human rights, *Factsheet on collective expulsions*, July 2019, available at <https://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf>

Case law supporting this position is found in *D.S., S.N. and B.T. v. France*[46], in which the Grand Chamber considered a claim based on an alleged violation of Article 4 of Protocol No. 4 to be admissible notwithstanding the fact that France had argued that the applicants had specifically been refused entry and were kept in the international zone of the airport. The ECtHR «implicitly confirmed the position that a non-national has the right to enjoy protection from collective expulsion»[47].

Further looking at the case law of the ECtHR regarding the subject of the expulsion of aliens, the 2012 case *Hirsi Jamaa v. Italy* provides some significant insight. Here, the Court condemned Italy for the collective expulsion to Libya of Somali and Eritrean citizens that occurred in May 2009, emphasizing the importance of abiding by the principle of *non-refoulement* in operations carried out in international waters at sea. More specifically, Italy was condemned for intercepting the irregular immigrants on high seas and transferring them to Libya: this practice violated Article 4 Protocol No. 4 as well as Articles 3 and 13 ECHR.

The Court's thorough, detailed reasoning on the prohibition against collective expulsion of aliens conducted outside of the signatory State's national territory is particularly significant given the facts of the case. For the first time, the Court found an Article 4 Protocol No. 4 violation when a State, invoking its sovereign authority, intercepted irregular migrants on high seas — a quintessential international zone—and transferred them to Libyan authorities without any type of assessment of each person's situation or any type of information in regard to their destination. This, the Court found, constituted a severe breach of the prohibition against collective expulsion.

In *Hirsi Jamaa* the Court set limits on the principle of extraterritoriality when aliens' fundamental rights are involved, holding that «the Contracting States shall abide by the prohibition of refoulement and collective expulsions in the exercise of their jurisdiction regardless of where this exercise takes place»[48]. This is a fundamental statement in the matter of extraterritorial zones, since the decision provides, but more importantly introduces, further guarantees in zones that were lacking protection, and where certain principles and rights were often suspended or simply not respected[49].

It is important to note the 2016 Grand Chamber judgement *Khlaifia and Others v Italy*[50] since it provides a significantly different reasoning in matter of collective expulsions. Distinctively from the Hirsi Jamaa case, the applicants, three Tunisian citizens, were intercepted at sea by the Italian coastguard and consequently transferred to the early reception centre on the island of Lampedusa. After several days and after

[46] *D.S., S.N. and B.T. v. France*, No. 18560/91, Commission decision of 16 October 1992, unreported.
[47] EBOE-OSUJI & C., HESSBRUEGGE, J., *Intervener brief filed on behalf of the United Nations high commissioner for human rights on Application No 27765/09 Hirsi et al v. Italy*, 2011, available at <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4f5f11a52&page=search>, §42
[48] SCUTO, F., *Aliens' protection against expulsion and prohibition of collective expulsion by the Jurisprudence of the European Court of Human Rights*, 25 June 2018, available at <http://www.integrazionemigranti.gov.it/Documenti-e-ricerche/expulsion.pdf>.
[49] The interpretation by the ECtHR regarding extraterritoriality seems to follow the reasoning given by the Inter-American Commission on Human Rights. See *Haitian Centre for Human Rights and Others v. USA*, case 10.675 (IAComHR, 13 March 1997), §157.
[50] ECHR, *Khlaifia and other v. Italy*, [GC], No. 16483/12, 2016. Available at < http://hudoc.echr.coe.int/eng?i=001-157277>

having been identified they were deported back to Tunisia on the basis of a bilateral agreement in force between to two countries. The Gran Chambers decision, while reaffirming the importance of providing safeguards for asylum seekers and reminding States their fundamental obligations that cannot be set aside even in the context of a migration crisis, leaves space for criticism and for major doubts; the procedural guarantees applicable to expulsion as set out by Art. 4 of Protocol 4 of the ECHR seems undermined by the opinion presented in the aforementioned judgment, stating that "Article 4 Protocol 4 does not warrant an unfettered right to an individual interview, but only the effective possibility to submit arguments against deportation"[51] We must take into account that the applicants did undergo an identification procedure in which, according to the Court, the Tunisian citizens did not raise any argument against deportation although no proper examination of each individual case as the provision states was conducted.

In conclusion, the interpretation given by the court restricts the scope of application of the provision by taking away from the procedural right its shield of protection[52]. As mentioned in the dissenting opinion by Judge Serghides "by limiting the application of Article 4 of Protocol No. 4 only to persons who have a genuine and effective possibility of obtaining international or other legal protection, the majority disregard the fact that this provision, […] applies whether the aliens entered the territory of a State lawfully or unlawfully. Article 4 of Protocol No. 4 applies mainly to aliens who have unlawfully entered the territory of a State. It should be observed that the procedural guarantee of Article 4 of Protocol No. 4 applies only to cases of collective expulsion of aliens, and not to the case of an expulsion of an alien who entered the territory of a State not as a member or part of a group but alone (individual expulsion). So, in my view, the aim of Article 4 of Protocol No. 4 was to prohibit collective expulsion of aliens as such and not to guarantee, as the majority decide, that every alien who enters a State should at least be able to rely on international or other legal protection, or on the non-refoulement principle". *Khlaifia* therefore raises concerns for the future evolution and interpretation of provisions regarding collective expulsions in an era of migratory flows.

Nonetheless, moving to the land borders, in *M.K. and others v. Poland*, the Court strengthened a broad interpretation of the notion of expulsion within the meaning of Article 4 of Protocol No. 4, including its application «to all measures that may be characterised as constituting a formal act or conduct attributable to a State by which a foreigner is compelled to leave the territory of that State, even if under domestic law such measures are classified differently», and addressing «to persons who were residing within the territory of a State but also to persons who arrived at the territory of the respondent State and were stopped and returned to the originating State, irrespective of whether or not they arrived in the respondent State legally […] as well as to persons who were apprehended in an attempt to cross a national border by land and were immediately removed from a State's territory by border guards»[53]. Here, the Court recalls the decision of *Hirsi Jamaa* to underline the evidence of a violation in the case at issue, even more evident considering the facts of the case took stage at the Polish checkpoint, where the applicants were subjected to border controls under the

[51] *Ibid* para. 248
[52] *Ibid.*, Dissenting Opinion.
[53] ECHR, *M.K. and others v. Poland*, §§ 198-200.

jurisdiction of Polish authorities[54]. The pivotal point in the present case and encouraging decision of the Court compared to *Khlaifia* concerns, indeed, the acknowledged evidence of a State practice in expelling, collectively, asylum seekers[55].

4.3. Deprivation of personal liberty

Transit zones are included in national policies on irregular migration, aimed at facilitating the return of foreign citizens who do not possess entry permits into the host State[56].

Since persons are held in these places without the possibility of leaving, transit zones are likely to unlawfully restrict personal liberty in absence of the conditions provided by Article 5 ECHR, whose purpose is that of guaranteeing lawful deprivations of liberty, preventing arbitrary or unjustified deprivations[57]. In order to assess whether the measures and the conditions implemented therein lead to an illegitimate deprivation of personal liberty, the ECtHR gave guidance in the *Amuur v. France* judgment. The Court held that the first criterion to determine the presence of an infringement of Article 5 ECHR is the «concrete situation» of the person concerned, including «the type, duration, effects and manner of implementation of the measure in question»[58]. This approach also appears in *Riad and Idiab v. Belgium*[59], where the ECtHR stated that «the placing of the applicants in the transit zone constituted detention within the meaning of Article 5 of the Convention»[60]. Here, the Court stressed again the fact that, in order to assess whether Article 5 ECHR has been violated, account should be taken of the «particular conditions» of the person in question[61]. The Belgian Government argued that there was no violation of Article 5 since the applicants were free to leave the Belgian territory, but the Court did not accept this argument, observing that «the mere fact that it was possible for the applicants to leave voluntarily cannot rule out an infringement of the right to liberty» since the «applicants' confinement in the transit zone of the airport amounted to a *de facto* deprivation of liberty»[62]. Moreover, the confinement in the transit zone did not respect the standard of "lawfulness" provided by the ECHR, mainly the fact that detention must occur for a predefined period of time, and it must be based on a legal provision or on a decision of a national court[63]. The Court concluded, therefore, that an illegitimate deprivation of liberty

[54] *Ibidem*, §§ 204-205.
[55] *Ib.*, § 210.
[56] ASGI, *Il valico di frontiera aeroportuale di Malpensa: la privazione della libertà dei cittadini stranieri in attesa di respingimento immediato*, May 2019, available at <https://www.asgi.it/wp-content/uploads/2019/05/Zona-di-transito-Malpensa_rev.pdf>.
[57] Council of Europe: European Court of Human Rights (ECtHR), *Guide on Article 5 of the European Convention on Human Rights – Right to liberty and security*, p.10, last updated 30 April 2019, available at <https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf>.
[58] *Amuur and others v. France*, *supra* note 14, §42.
[59] *Riad and Idiab v. Belgium*, No. 29787/03 & No. 29810/03, 24 January 2008, available at <http://hudoc.echr.coe.int/eng?i=001-108395>.
[60] *Id.*, §98.
[61] *Ibid.*
[62] *Id.*, §68.
[63] Id., §78.

appeared from the fact that the applicants were confined in the transit zone of the national airport. In addition, the factors determined in the previous case-law in order to define an actual deprivation of liberty within the meaning of Article 5 are reinforced in the above-mentioned *Ilias and Ahmed v. Hungary*, but the reasoning of the Court is narrower and delineates a step backwards precisely regarding the rules governing the transit zones, as far as the link with the deprivation of liberty is concerned. Indeed, the Court focused on some peculiarities which need to be taken into consideration: first, precisely the transit zone located on the land board between two Member States, secondly, the voluntary choice of the applicants to enter the zone and to remain there waiting for their application to be accepted, and finally, the fact that, by virtue of the location, the applicants could have freely – and illegally - «walk to the border and cross into Serbia»[64]. Therefore, following the reasoning of the Court, Hungary indeed violated the procedural obligations within the meaning of Article 3 as far as the return of the applicants to Serbia is concerned because the border State is not considered a safe third country for asylum-seekers, however, the applicants could have easily and freely «walk» there by the mere fact that Röszke transit zone is on the land and not an airport. Hence, according to the Court, despite the transit zone «was surrounded by a fence and barbed wire and was fully guarded, which excluded free outward or inward movement», the applicants could receive visits and communicate with other asylum-seekers[65], in other words, the applicants were not deprived of their liberty, for instance in a condition similar to a prison, it was merely restricted, plus by their own decision.

Indeed, in their dissenting opinion on the case, Judge Bianku and Judge Vučinić highlight, first, the mistaken idea of a choice for asylum-seekers in crossing borders, while, it is actually a necessity, secondly, as far as the decision on the inadmissible applicability of the Article at issue, because in the time-period of their «stay» in the transit zone of twenty-three days no assessment was delivered by national court, thus, questions arise in relation to the arbitrariness of the all procedure, and finally, concerning the conditions of the transit zone itself, which leads again to the issue of an arbitrary detention. This case underlines several critical issues featuring the transit zones and the challenges related to asylum matters, together with the weakness in dealing with such issues, resulting in a perpetration of violations of human rights and lack of clear instructions by the competent Court to point out the seriousness of the situation. By contrast, in another recent case, *Z.A. and others v. Russia*[66], the Court accepted the alleged violation of both Article 5 and Article 3 of the Convention – the latter will be discussed later in the analysis. In the present case, the applicants were confined in the transit zone of Sheremetyevo Airport (Moscow) without a specific legal provision or judicial authorization in justification of the confinement, unable to enter Russian territory, to receive visits from doctors and, occasionally, their lawyers' access was denied[67]. The crucial differences with the judgment previously mentioned seem to concern the feature of the transit zone itself (here, an airport) and the willingness to accede to the zone at issue, indeed, the Court states several time that the applicants entered the Sheremetyevo airport involuntarily. However, in *Ilias and Ahmed*, as already anticipated, Judge Bianku and Judge Vučinić's

[64] ECHR, *Ilias and Ahmed v. Hungary*, §§ 217-222, 241.
[65] ECHR, *Ilias and Ahmed v. Hungary*, §§ 230-233.
[66] ECHR, *Z.A. and others v. Russia*, no. 61411/15, no. 61420/15, no. 61427/15 and no. 3028/16, 21 November 2019.
[67] *Ibidem*, §§ 107-109.

dissenting opinion underlines the necessity of such action, rather than a free choice, hence, if the distinguishing element considered remains the feature of the transit zone to define whether or not a deprivation of liberty occurs, many doubts and concerns arise as to the future development of the case-law on the matter.

Going back to the theoretical framework, the Guide provided by the Council of Europe[68] is useful in assessing in greater detail how the right to liberty and security under Article 5 ECHR should be applied, especially in relation to the detention of foreign citizens. In fact, the ECtHR has established that the starting point to determine whether there has been a concrete deprivation of personal liberty must be an analysis of the specific situation of the person in question[69]. Deprivation of personal liberty within the meaning of Article 5 ECHR occurs where both *objective* and *subjective* elements are present[70]. Objective factors include "the possibility to leave the restricted area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts,"[71] while subjective factors concern the person's consent to be confined in a restricted area[72]. The more these elements appear, the more likely it is that there has been a deprivation of personal liberty rather than merely a permissible restriction on freedom of movement.

Moreover, all the elements that must be taken into account in order to assess whether there has been a deprivation of personal liberty are cumulative[73]. For instance, a short restriction of a few hours does not rule out deprivation of personal liberty if other factors, such as coercive measures and/or negative impacts on the individual, are present[74].

Nonetheless, Article 5(1)(a-f) ECHR lay down conditions upon which restrictions of personal liberty are legitimate, provided that they are conducted "in accordance with a procedure prescribed by law" (Article 5(1)). In fact, in these circumstances detention must be conducted in a lawful manner, *i.e.* without arbitrariness[75]. The principle of non-arbitrariness requires: (*a*) conformity of the detention to the purpose of Article 5; (*b*) authorization of detention by a judicial authority, based on reasonable grounds; and (*c*) obligation to fix the duration of detention[76].

In addition, as required by international human rights law, four conditions are to be met in relation to deprivation of liberty: the practice should be (*i*) a measure of last resort; (*ii*) of limited scope and duration; (*iii*) necessary and proportionate; and (*iv*) the result of an individual assessment[77].

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[68] Council of Europe: European Court of Human Rights (ECtHR), *Guide on Article 5 of the European Convention on Human Rights – Right to liberty and security*. Supra note 54.
[69] *Id.*, p.8
[70] *Id.*, p.9
[71] *Ibid.*
[72] *Ibid.*
[73] European Union Agency for Fundamental Rights (FRA), *Handbook on European law relating to asylum, borders and immigration*, last updated 2014, available at: <https://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf>, p. 144.
[74] *Ibid*.
[75] *Id.*, p. 26.
[76] *Id.*, pp. 13-14.
[77] United Nations: United Nations Human Rights Office of the High Commissioner, *Situations of Migrants in Transit*, 2016, available at <https://www.ohchr.org/Documents/Issues/Migration/StudyMigrants/OHCHR_2016_Report-migrants-transit_EN.pdf>.

Hence, given the practices within transit zones, where detention is implemented, *inter alia*, without a reasoned order given by a judicial authority and without assessing the individual conditions of the person, such practices may amount to violations of Article 5 ECHR.

As for the procedural safeguards that must be accorded anyone who is deprived of his/her personal liberty, Article 5(2) ECHR states that «everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him». This right to information is closely linked to the right to defence, since information about the reasons of the arrest enable a person, or the lawyer representing him/her, to exercise his/her defence. In other words, the right to information is fundamental because it allows the individual to challenge the measure restricting personal liberty.

4.4. Prohibition of torture and of inhuman or degrading treatment

Article 3 ECHR expressly prohibits the infliction of torture and of inhuman or degrading treatment or punishment. For the purpose of defining what torture is, the ECtHR, in a number of cases such as *Akkoç v. Turkey*, explicitly referred to the United Nations Convention Against Torture[78], which, at Article 1, states that «the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind». Pursuant to such definition, torture is composed of three essential elements: (*a*) infliction of severe mental or physical pain or suffering; (*b*) the intentional or deliberate infliction of the pain; (*c*) the pursuit of a specific purpose (*e.g.* gaining information, punishment or intimidation). The distinction between torture and other types of ill-treatment, *i.e.* inhuman or degrading treatment or punishment, is a matter of degree as far as the intensity of the suffering inflicted and purposive element are concerned[79]. However, the Commission pointed out in the *Greek case*[80] that «the notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable» in determining whether a treatment is inhuman. The Court often investigates whether the treatment was premeditated, whether it was applied at hours at a stretch and whether it caused either actual bodily injury or intense physical and mental suffering[81]. Degrading treatment, on the other hand, «is that which is said to provoke in its victims' feelings of fear, anguish and inferiority, capable of humiliating and debasing them»[82].

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[78] *Akkoç v. Turkey*, No. 22947/93 and 22948/93, §115, ECHR 2000-X, available at <http://hudoc.echr.coe.int/eng?i=001-58905>.
[79] REIDY, A., *The prohibition of torture: a guide to the implementation of Article 3 of the European convention on human rights*, Directorate General of Human Rights, Council of Europe, 2002, p. 16.
[80] *Greek Case*, Commission Report of 5 November 1969, Yearbook 12.
[81] REIDY, A. (2002), *supra* note 79, p. 16.
[82] *Ibid.* On the notion of torture, inhuman treatment and degrading treatment see box above for the relative notions and thresholds as provided for by the CoE. Source: Council of Europe, *Prohibition of Torture*, accessed 21 July 2019, available at <https://www.coe.int/en/web/echr-toolkit/interdiction-de-la-torture?inheritRedirect=true>.

Article 3's prohibition is of an absolute nature, so that no exceptions are allowed no matter whether the person concerned is subject to deprivation of personal liberty or the rationale behind such a deprivation. Article 3 has acquired paramount importance in the assessment of the minimum living standards for detainees. Italy was condemned by the ECtHR in 2013 for despicable conditions in State prisons. The *Torreggiani*[83] decision found that Article 3 had been violated because of the shortage of space within cells granted to inmates (less than 4 square metres per person), a situation which was exacerbated by other issues, such as the lack of hot water over long periods, inadequate lighting and ventilation.

In March 2017, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (*hereinafter*: CPT) issued a factsheet expressly dedicated to immigration detention. The factsheet takes note of the developing trend of holding immigration detainees in "point of entry holding facilities", airport transit zones and police stations: all of these areas are considered not to be adequate places of accommodation, so that the CPT expressly states that people should be kept there only up to 24 hours[84]. Policy and practice appear to fail this requirement.

The factsheet also specifies a series of requirements which should be fulfilled whenever detentions are longer than 24 hours[85]. For instance, detention centres should be adequately furnished, clean and in a good state of repair, and should offer sufficient living space for the numbers involved; these centres should have adequate lighting (including daylight), ventilation and heating. All detained persons, additionally, should: (*a*) be provided with a bed or plinth, and a clean mattress and clean blankets; (*b*) have ready access to toilet facilities, including at night; (*c*) be provided, on a regular basis, with a basic sanitary kit (including adequate rations of soap, washing powder, toilet paper, shampoo, shaving utensils and toothpaste, and a toothbrush) free of charge; (*d*) have access to a shower and tot water; (*e*) be offered the possibility to wear their own clothes during their stay if those are suitable and, if necessary, to have them washed and repaired; (*f*) be provided with the necessary products and equipment to keep their accommodation clean; (*g*) be provided with lockable space in which to keep personal belongings; (*h*) be guaranteed that, as concerns food and drinking water, the access to which should always be ensured, meals take into account the religious requirements and dietary habits of foreign nationals.

As pointed out by the CPT, the peculiar nature of the detention at stake should always be taken into account, so that no excessive limitations upon human rights are to be put into place; the factsheet explicitly states that «[t]he ethos of an immigration detention centre should not be carceral, which means that staff working within immigration detention facilities should not be equipped with batons, handcuffs or pepper spray»[86]. The constant presence of armed police should thus be avoided. Under such premises, an open regime

[83] ECHR, *Torreggiani and others v. Italy*, no. 43517/09 & 46882/09 & 55400/09 & 57875/09 & 61535/09 & 35315/10 & 37818/10, 2013, available at <http://hudoc.echr.coe.int/eng?i=001-116248>.
[84] Council of Europe: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Factsheet – Immigration detention*, Doc. CPT/Inf(2017)3, available at <https://rm.coe.int/16806fbf12>, p. 3,
[85] *Id.*, p. 4.
[86] *Id.*, p. 6.

is expected to be applied: restrictions upon liberty of movement within the accommodation facilities should be limited to the minimum degree. Additionally, outdoor exercise should be permitted for at least one hour per day and, toward this aim, proper equipment should be provided; appropriate leisure opportunities, especially when detentions are prolonged over time, should be ensured, as well as access to television, radio, newspapers, magazines and means of recreation. A library and a prayer room should be at disposal[87]. The CPT also argues that, in line with the policy of open regime, people subject to immigration detention should be endowed with a number of rights and opportunities allowing them to fully maintain and tend to their own personal and family life. More specifically, the Committee requires that detainees should (*a*) have the right to notify third persons of their own choice about being detained[88]; (*b*) have every opportunity to remain in meaningful contact with the outside world, and should have regular access to a telephone or to their mobile phone; (*c*) enjoy the possibility of receiving visits from both relatives and friends, unless an individual risk assessment shows that restricting visits is necessary; and (*d*) have access to computers along with Voice over Internet Protocol or Skype facilities and basic Internet access.

Failure to comply with the CPT's suggestions is evidence of a possible breach of the prohibition of torture and inhuman or degrading treatment.

Considerations similar to those expressed by the CPT can be found in the 2008 case of *Riad and Idiab v. Belgium*[89], where the Court found that transit zones could not be considered to be adequate places of detention[90]. The Court also insisted that the absence of a purpose to humiliate and debase persons detained is not a hurdle to the recognition of a violation of Article 3 when the condition of suffering and humiliation goes beyond what is legitimate: it may suffice that the victim perceives himself/herself as humiliated[91]. Moreover, the ECtHR stated that:

> Measures depriving persons of their liberty inevitably involve an element of suffering and humiliation. Although this is an unavoidable state of affairs which, in itself as such, does not infringe Article 3, that provision nevertheless requires the State to ensure that all prisoners are detained in conditions which are compatible with respect for their human dignity, that the manner of their detention does not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in such a measure and that, given the practical demands of imprisonment, their health and well-being are adequately secured […][92].

It is important to note that, in analysing the Article 3 violation, the Court placed great value on the opinions and standards set out by the CPT[93]. The Court made clear that, as remarked by the CPT (cf. *supra*),

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[87] *Id.*, p. 5.
[88] CPT, *supra* note 84, p. 2.
[89] *Riad and Idiab v. Belgium*, supra note 64.
[90] *Id.*, §104.
[91] *Id.*, §95.
[92] *Id.*, §99.
[93] It is useful to recall, on this point, that the ECtHR has repeatedly given significant weight reports and factsheets from the CPT when dealing with similar cases concerning the living conditions of detained persons. See, *ex multis*, *Kalashnikov*

the reason behind detention must be taken into account when assessing the acceptable boundaries of the suffering imposed on detainees. Thus, it must be stressed that detention of migrants based solely on the fact that they do not possess a required title to remain within the country must not be of a punitive nature. In *M.S.S. v. Belgium and Greece*, additionally, the Court gave considerable importance to «the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection»[94]. Both asylum-seekers and irregular migrants waiting to be expelled should therefore be treated consistently with their personal condition, and their detention should be of a very different nature from that of incarceration. However, mentioning again the narrow reasoning of the Court in *Ilias and Ahmed v. Hungary*, where the applicants claimed that during the twenty-three days they spent in the transit zone, the conditions «had amounted to inhuman and degrading treatment», the Grand Chamber decided against the alleged violation of Article 3 of the Convention concerning the conditions in the transit zone, due to the «relatively short period» indicated and the findings of the CPT on the «satisfactory material conditions», which did not reach the minimum level of severity necessary to constitute a violation within the meaning of the Article at issue in relation to inhuman treatment[95]. By contrast, the European Court of Justice provided a diametrically opposed decision in its 2020 judgment – which will be discussed later in the analysis - by clearly and firmly denounce the Hungarian conducts and practices towards the asylum-seekers in the transit zone. Moreover, as already anticipated, the case taking stage in the Sheremetyevo Airport transit zone, *Z.A. and others v. Russia*, provides a very different outcome from the Grand Chamber, which, indeed, accepted the alleged violation of Article 3 of the Convention as far as the conditions of the transit zone are concerned. Following the reasoning of the Court, since the applicants were, *de facto*, deprived of their liberty, their detention conditions should have been compatible with respect for human dignity[96], which did not happen[97]. Hence, comparing once again the case with *Ilias and Ahmed*, it seems that the determining factor lies in the link with Article 5 and the conditions of the transit zone in relation to a «long-term stay», indeed, in the previously mentioned judgment, the length of «accommodation» of the applicants in the transit zone was defined as «relatively short».

As far as the Italian context is concerned, particularly in view of the situation which has developed in the Milano Malpensa airport, interviews and testimonies[98] reveal low-quality standards under many aspects: insufficient space in the common area and dormitories; the absence of natural light and the impossibility of

v. Russia, No. 47095/99, §97, ECHR 2002-VI, available at <http://hudoc.echr.coe.int/eng?i=001-60606>; *Modârcă v. Moldova*, No. 14437/05, §38, ECHR 2007, available at <http://hudoc.echr.coe.int/eng?i=001-80535>; *Torreggiani and others v. Italy*, *supra* note 76, §30; *Vasilescu v. Belgium*, No. 64682/12, §45, ECHR 2014, available at <http://hudoc.echr.coe.int/eng?i=001-148507>.

[94] *M.S.S. v. Belgium and Greece*, No. 30696/09, §251, ECHR-2011, available at <http://hudoc.echr.coe.int/eng?i=001-103050>.

[95] ECHR, *Ilias and Ahmed v. Hungary*, §§ 180-182, 194.

[96] ECHR, *Z.A. and others v. Russia*, § 189.

[97] *Ibidem*, §§ 190-191.

[98] ASGI, *Il valico di frontiera aeroportuale di Malpensa: la privazione della libertà dei cittadini stranieri in attesa di respingimento immediato*, May 2019, available at <https://www.asgi.it/wp-content/uploads/2019/05/Zona-di-transito-Malpensa_rev.pdf>.

going out into open air; no leisure or recreational activity of any kind; inadequate sleeping gear; continuous control of armed border police; lack of privacy, worsened by the fact that male and female detainees are not separated; arbitrary deprivation of personal belongings and clothing; lack of hygiene kits and unsatisfactory nourishment; issues regarding access to healthcare and medical assistance; barriers with the outside world and to the possibility of contacting family members, *etc*. These unsatisfactory living conditions, affecting both persons applying for international protection and persons waiting for their deportation to be carried out, are in many ways similar to those contested in *Riad and Idiab v. Belgium*[99] and constitute a failure to comply with the standards set forth by CPT.

These concerns are confirmed and shared by the National Ombudsman for the rights of detained people or people deprived of their personal liberty. In a 2019 report to the Parliament, the Ombudsman declared that, throughout Italy, conditions within waiting areas do not meet the minimum standard requirements set out for ordinary administrative detention: facilities are numerous and widespread, they lack windows and access to open air, personal closets and hygiene kits; the use of personal mobile phones and visits by relatives is prohibited. The Ombudsman adds that potential violations of rights cannot be justified through the unique status of transit zones which must, according to both domestic and international law and case law, be subject to the same standards prescribed for any place where Italian police forces effectively exert their control. General guarantees provided for by the law are not to be denied as far as treatment of migrants in transit zones is concerned solely because no specific legislation on affirming those guarantees in this context has been enacted[100].

Inconsistencies also emerge with respect to the right to private and family life, as set forth in the ECHR at Article 8. Constant surveillance both by armed border police and video cameras, including in lavatories, is at odds with protection of private life. Although security reasons may justify the need for surveillance, the used must be proportional as well as limited to only what is necessary, especially when taking into account the peculiar and non-carceral nature of the detention at stake. As regards protection of family life, the CPT argues that, in line with the auspicated policy of open regime, people subject to immigration detention should be endowed with a number of rights and opportunities allowing them to fully maintain and tend to their own personal and family life. Additionally, it must be pointed out that, even in case of imprisonment, the ECtHR

[99] Thus *Riad and Idiab v. Belgium*, *supra* note 64: «The applicants alleged that they had suffered inhuman and degrading treatment, contrary to Article 3 of the Convention, at the hands of the Belgian authorities. They explained, firstly, that they had been left for more than ten days in the transit zone without any legal or social assistance, without any means of subsistence, without accommodation or washing or sleeping facilities, without any place to enjoy a private life, without access to means of communication, without being able to receive visits and without any possibility of having the conditions of their detention reviewed by external independent authorities. Secondly, they had been beaten several times and insulted» (§81).

[100] GARANTE NAZIONALE DEI DIRITTI DELLE PERSONE DETENUTE O PRIVATE DELLA LIBERTÀ PERSONALE, *Relazione al Parlamento*, 2019, available at <http://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/00059ffe970d21856c9d52871fb31fe7.pdf >, p. 82.

has repeatedly held that States must allow prisoners to maintain a certain degree of contact with their loved ones[101]: these principles apply *a fortiori* when detention is not justified by reasons of criminal law.

4.5. Right to remedy

Article 13 ECHR establishes that everyone whose rights and freedoms as set forth in the ECHR are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. For the purpose of this Report, Article 13 shall be rea together with Article 5(4) ECHR, since the latter sets forth the right to take proceedings for detained persons if their detention has not been conducted in a lawful manner.

Article 13 is not an autonomous provision, but it must be applied in conjunction with other Articles of the ECHR[102]. For instance, the case law of the ECtHR establishes that, where a person claims that *refoulement* under Article 13 ECHR would expose him/her to a real risk of violation of rights protected by Article 3, the person is entitled under Article 3 to an effective remedy against the measure in question[103]. Effective remedy thus refers to the right for the persons concerned to "have the lawfulness of their deprivation of liberty decided speedily by a judicial body"[104]

Moreover, according to the ECtHR, a remedy must have a "suspensive effect", meaning that a remedy must suspend the measure claimed to be in breach of the Convention so that it is no longer enforced. This suspension must occur not only in practice, but it must also be guaranteed by the national law, through the adoption of a proper national legislation[105], as the ECtHR ruled in *Gebremedhin v. France*[106]. Furthermore, in *M. and Others v. Bulgaria*[107], the Court held that no justifications on grounds of national security interests are allowed to deny the suspensive effect of a remedy[108].

The ability of detained migrants to obtain effective remedies is intertwined with the ability to access a lawyer[109]. Moreover, when a detained migrant lacks the financial resources to hire a lawyer of his/her own, he/she has the right to legal aid[110].

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[101] Thus, *ex multis*, *Messina v. Italy (No. 2)*, No. 25498/94, §61, ECHR 2000-X: «The Court observes that any detention which is lawful for the purposes of Article 5 of the Convention entails by its nature a limitation on private and family life. However, it is an essential part of a prisoner's right to respect for family life that the prison authorities assist him in maintaining contact with his close family».

[102] UNITED NATIONS: THE UN REFUGEE AGENCY (UNHCR), *The Case Law of the European Regional Courts: the Court of Justice of the European Union and the European Court of Human Rights: Refugees, asylum-seekers and stateless persons, June 2015*, accessed June 2019, available at <https://www.refworld.org/pdfid/558803c44.pdf>.

[103] *Id*., p. 225

[104] CPT., *Supra* note 77, p. 3.

[105] *Id.*, p. 228

[106] *Gebremedhin v. France*, No. 25389/05, ECHR 2007-II.

[107] *M. and Others v. Bulgaria*, No. 41416/08, 26 July 2011.

[108] *Ibid*.

[109] CPT, *supra* note 84.

[110] *Id.*, p. 2.

The ECtHR has identified several obstacles which may put a remedy's effectiveness at risk. Many of these are likely to appear in the context of transit zones. There are five main obstacles: (*a*) short-time limits for submitting a claim; (*b*) insufficient information provided to the person; (*c*) difficulty in communicating with the responsible authority; (*d*) lack of interpretation; and (*e*) lack of legal assistance[111]. For instance, in *M.S.S. v. Belgium and Greece*, the ECtHR found that the three-day time limit to apply for asylum was too short[112]. Moreover, both in *M.S.S. v. Belgium and Greece* and in the *Hirsi Jamaa* judgment, the Court stressed that lack of information provided to the person in question puts at risk the effectiveness of the right to remedy, since, in addition to the afore-mentioned rights such as access to a lawyer, right of interpretation and translation etc…, detained migrants must be granted the right to be informed about the possibility of a legal remedy[113].

5. Considerations for ensuring compliance with EU law

5.1. EU law and transit zones

The notion of "transit zones" is not unknown to EU law. Indeed, many legislative documents employ the term, the definition of which, however, is not clearly given at a supranational level but appears to be left to the interpretation of Member States themselves. Nonetheless, as far as the present report is concerned, it appears that the general EU approach is that of requesting Member States to guarantee basic rights to migrants seeking international protection, irrespective of the designation of an area as transit zone or not. In practice, however, the absence of a specific definition and the employment of far-reaching concepts, often comprising not only transit zones but also «the border» and «territorial waters», ensures that the provisions at stake are applicable to whichever area Member States may define as "transit zone".

First of all, the recast 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, contains a number of provisions pertaining to the regulation of transit zones. The idea underlying this set of rules is that, as far as applicability of EU law on international protection is concerned, States retain their duties even when dealing with migrants who are kept within transit zones (Article 3, paragraph 1). Thus, States must guarantee within transit zones and at the border: (*a*) that third country nationals or stateless persons are allowed to submit a request for international protection and that they are informed of this option (Article 8, paragraph 1); (*b*) that organisations and people providing advice and counselling have effective access to applicants present therein (Article 8, paragraph 2); (*c*) that any legal advisor or other counsellor of applicants have access therein (Article

[111] UNITED NATIONS: THE UN REFUGEE AGENCY (UNHCR), *The Case Law of the European Regional Courts: the Court of Justice of the European Union and the European Court of Human Rights: Refugees, asylum-seekers and stateless persons, June 2015*, *supra* note 100, pp. 230-231.
[112] *Id.*, p.231
[113] *Id*., pp.231-233.

23, paragraph 2); (*d*) that the UNHCR will be allowed to access to applicants detained therein (Article 29, paragraph 1(a)); (*e*) that all basic principles and guarantees provided for within Chapter II of the Directive are applied also when accelerated procedures are put into place therein (Article 31, paragraph 8)[114]; (*f*) that applicants are endowed with the right to an effective remedy against decisions on their application the decisions is made at the border or in transit zones (Article 46, paragraph 1(a)(iii))[115].

Similarly, the recast 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, requires that its protective provisions be applied to persons detained within transit zones, «as long as they are allowed to remain on the territory as applicants» (Article 3). Thus, applicants held at the border or in transit zones should, for example, be guaranteed: (*a*) protection of their family life; (*b*) permission to communicate with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and non-governmental organisations and bodies; and (*c*) that persons and institutions mentioned *sub* (*b*) have access to persons detained in these zones in order to give assistance (Article 18, paragraph 2). In some cases, specific rights may be limited; however, limits are generally impermissible when accelerated procedures are put into practice pursuant to Article 43 of Directive 2013/32/EU[116] (Article 10, paragraph 5; Article 11, paragraph 6).

Finally, the same underlying principle emerges within the recast Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013, which establishes the criteria and mechanisms for determining which Member State is responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (*hereinafter*: Dublin III Regulation). Again, the Regulation expressly provides that migrants may submit a request for international protection when at the border or within transit zones: in these cases, the rules set forth by the Regulation apply (Article 3).

It thus appears that, pursuant to EU law, asylum-seekers (and in general all applicants for any kind of international protection) must be granted the same range of rights and freedoms both when held within transit zones or at the border and when detained outside such areas.

However, the scope of the legislation mentioned above is limited to applicants for international protection applicants only and does not extend to persons pending expulsion. Nonetheless, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, on common standards and procedures in Member States for returning illegally present third-country nationals, establish some important principles on the matter and, as will be shown below, provide for a number of fundamental guarantees as far as the mentioned procedures are concerned (Article 1). It should be specified, however, that the Directive specifically applies, pursuant to Article 2(1), to migrants already staying illegally on the territory of a Member State. Applicability is therefore excluded when it comes to third-country nationals who have been refused entry pursuant to Article 14 of Regulation (EU) 2016/339 of the European Parliament and of the Council of 9 March

[114] Border procedures are regulated by Article 43 of Directive 2013/32/EU.
[115] See also *consideranda* 26 and 38 of the Directive.
[116] See *supra* note 102.

2016, on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)[117]. Additionally, Article 2(2)(b) expressly states that Member States may decide not to apply Directive 2008/115/EC when third-country nationals are subject to return as a criminal law sanction or as a consequence of a criminal law sanction or when they are the subject of extradition procedures.

5.2. *Non-refoulement*

With respect to *non-refoulement,* the EU Charter provides, at Article 19(2), that «[n]o 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».

Additionally, Article 53 of the Charter lays down the rules for the extension of the protection of rights, prohibiting European Union legislation from limiting fundamental rights as enshrined within the ECHR. The principle of *non-refoulement* as set forth by Article 3 ECHR is thus also applicable within the system of the EU.

A related issue here is the implementation of migrants' readmission to safe third countries or countries of origin. Serious risks to human rights may arise when border control authorities investigate applicants (*e.g.* regarding personal data or visas) by requesting information from countries of origin. A report by the European Union Agency for Fundamental Rights accurately describes the risks of collecting information from third countries where human rights are routinely denied:

> Through interoperability, identity fraud will be more easily identified. However, the use of false documents should not have an undue impact on decisions to grant international protection, as many seek to hide their identity when fleeing their country of origin to protect themselves, while others may be physically unable to obtain the documents necessary for legal entry (such as a passport and visa) when escaping from a conflict zone. Moreover, information originating from third countries that may be consulted through interoperability should not be taken at face value; for instance, oppressive regimes may include information about opponents in the Interpol database SLTD (Stolen and Lost Travel Documents) to prevent them from leaving the country[118].

From a procedural point of view, it is useful to recall that the Dublin III Regulation establishes that applications for international protection made in international transit areas of an airport fall under the jurisdiction of the Member State where the zone is geographically set.

The principle of *non-refoulement,* additionally, is expressly mentioned within Directive 2008/115/EC as a key element to be taken into account when third-country nationals staying illegally on the territory of a Member State are returned (Article 5).

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[117] Article 2(2)(a) of Directive 2008/115/EC, in fact, refers to Article 13 of the old 2006 Schengen Borders Code; the new Code, however, contains the corresponding provision at Article 14.

[118] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA), *Fundamental rights and interoperability of EU information systems: borders and security*, 2017, available at <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-interoperability-eu-information-systems_en-1.pdf>.

5.3. Right to information and access to asylum procedure

As set forth in Article 8 of Directive 2013/32/EU, at border crossing points, including transit zones, or even at external borders, Member States must ensure that third-country nationals and stateless persons are provided with sufficient information and with the means necessary to apply for international protection. Furthermore, the State should also provide for an interpreter facilitating the asylum procedure. In extending safeguards to transit zones, the Directive treats all places where asylum-seekers are located the same.

Directive 2013/33/EU establishes a guarantee for asylum and subsidiary protection applicants to receive information concerning the procedures to be followed (Article 12(1)(a)). Furthermore, the State must provide information dealing with applicants' rights and obligations in the applicant's language. Also noteworthy is Article 5 of Directive 2013/32/EU, establishing that Member States can only follow standards that are more favourable, not less, than those required by the Directive itself when dealing with procedures for granting and withdrawing international protection.

Directive 2013/33/EU also imposes a time limit of 15 days from the date an individual's application has been lodged for the required information to be provided (Article 5). Pursuant to Article 4 of the Dublin III Regulation, however, the right to information must be ensured as soon as an application for international protection is submitted pursuant to Article 20(2) of the Regulation. As this is a multi-layered system, the rationale behind those provisions is to follow the most time efficient procedure possible.

5.4. Right to an appropriate assessment of the asylum application

Pursuant to Article 4(5) of Directive 2011/95/EU[119], Member States, when assessing the validity of an asylum application, should investigate and take into consideration: (*a*) the applicant's genuine effort to substantiate the application; (*b*) relevant elements at the applicant's disposal; (*c*) the plausibility and coherence of the applicant's statements; and (*d*) the timing and the general credibility of the applicant. By charging Member States with the duty to check the requirements of the application, such as relevant facts, statement and documents, the Article presumes a shared commitment between the applicant and the State (Article 4(1)). Given the circumstances in which applicants are detained, immigration authorities in transit zones may not be able to evaluate asylum applications in a satisfactory manner.

5.5. Right to legal advice and counselling

[119] EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION, *Directive 2011/95/EU*. Available at < https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF>

One of the core rights of international protection applicants is the right to legal counselling. The State must ensure the right to obtain and receive legal advice, through governmental appointment or through the contribution of non-governmental organizations. However, the most crucial feature for ensuring this right is to allow lawyers and counsellors access to transit zones and related facilities. It appears that the Italian State is not offering sufficient guarantees to the right at hand (Article 9(7)(b) of Directive 2013/33/EU).

In a similar vein, Directive 2013/32/EU provides that Member States are obliged not only to ensure that applicants are provided with legal advice by either organisations or persons, but also that they have effective access to such assistance. The mandate to provide legal advice and counselling extends to border crossing points, including transit zones and external borders (Article 8). The language of the Directive does not make exceptions based on the place in which the application is lodged.

Similarly, Directive 2008/115/EC requires that Member States endow third-country nationals subjected to return procedures with the necessary legal assistance and/or representation: if requested, legal support should be granted free of charge pursuant to domestic law on legal aid (Article 13(4)).[120] Under Article 16(2), third-country nationals shall be allowed to establish in due time contact with legal representatives in due time upon request.

5.6. Detention

Article 8 of Directive 2013/33/EU prohibits States from holding a person on grounds that he/she has applied for international protection. The same provision can be found within Article 6 of Directive 2013/32/EU.

Article 10 of Directive 2013/33/EU sets the minimum standards for living conditions of international protection applicants held in detention facilities. For example, paragraph 2 requires that applicants have access to open air while being detained. As discussed above in Section 4.4., the conditions in Malpensa airport fail to meet this guarantee. So important is Article 10 that, in paragraph 3, Member States are required to allow UNHCR to communicate with detainees and monitor compliance with the Article itself.

Pursuant to Article 15(1) of Directive 2008/115/EC, third-country nationals illegally staying in the territory of a Member State may be subjected to detention only when: (*a*) no less coercive measures can be applied effectively; and (*b*) there is a risk of absconding or the person involved avoids or hampers the preparation of return or the removal process. Detention must be ordered either by administrative or by judicial authorities and, in both cases, reasons of fact and law must be given (Article 15(2)). Detention, moreover, must end as soon as any of the conditions of which at Article 15(1) stops being fulfilled. Finally, Article 16 of the same Directive sets forth a series of principles concerning conditions of detention: pursuant to paragraph 4, relevant and competent national, international, and non-governmental organisations and bodies shall have the possibility to visit detention facilities.

[120] Art. 21 directive EU 2013/32

The recent 2020 judgement delivered by the European Court of Justice (*hereinafter*: CJEU) put an end to the automatic and unlawful detention of asylum-seekers in Hungary. The awaited preliminary ruling procedures concerned an Afghan couple and an Iranian father and son all being held in the transit zone of Röszke in Hungary. The judgment is of major importance for several reasons, it confirms that the holding of asylum applicants at the external border in the transit zone is detention, clarifies that such detention must be necessary and proportionate, be ordered in a formal decision and entail judicial review and must not go beyond the limits of the border procedure as defined by the Asylum Procedures Directive[121]. In light of previous legal provisions sustained by the Hungarian government (see: Annex), it was of paramount importance how the CJEU would assess this practice. The Court, in contrast with the reasoning from the ECtHR in the *Ilias and Ahmed* case firmly and unequivocally rejected the practices of the Hungarian government, in which nearly every asylum seeker who intended to apply for asylum and had no right to stay in Hungary was forced to pass through the fence with Serbia to approach the transit zone container and apply for international protection, in which a period of detention would start and that could extend up to several hundred days.

There is however a restrictive feature presented by the Court's position on detention when it refuses to accept that an absolute time limit to detention of asylum seekers ought to be set in contrast to the maximum 18 months under article 15 of the Return Directive. This amounts to a licence to long-lasting detention, provided the conditions set by the Court are met. The court furtherly expands the definition given in Article (2) of the Reception Conditions Directive and concludes that detention "constitutes a coercive measure which deprives the applicants of their freedom of movement and isolates them from the rest of the population, by requiring them to remain continuously within a restricted and closed area". Applying that definition to the situation in the transit zone, the Court concludes that holding the applicants there amounts to detention as the definition applies and the third country nationals "cannot leave the zone voluntarily in any direction" (§ 230).[122] The previous statement disregards the Hungarian governments' position in which applicants' had the possibility to leave the transit zone back into Serbia. This de facto possibility entailed a clear breach of Serbian law and was not a right of the applicant, therefore they could only regain their liberty at the expense of a crime.

5.7. Protection of vulnerable groups

Article 11 of Directive 2013/33/EU addresses the issue of vulnerability, stating that Member States must provide for special reception conditions depending on an applicant's personal situation. The provision specifically addresses the needs of ill people, minors (both accompanied and unaccompanied), families and women. Moreover, Article 16 of the Dublin III Regulation refers to the personal conditions of "dependent" persons, requiring that specific concerns be taken into account in such cases. Finally, Article 20(3) of Directive

[121] BOLDIZSAR, N., A – pyrrhic? – victory concerning detention in transit zones and procedural rights: FMS & FMZ and the legislation adopted by Hungary in its wake. Immigration and Asylum Law and Policy. Available at <https://eumigrationlawblog.eu/a-pyrrhic-victory-concerning-detention-in-transit-zones-and-procedural-rights-fms-fmz-and-the-legislation-adopted-by-hungary-in-its-wake/>

[122] Id.

2011/95/EU expressly states that «Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence».

As far as returning procedures for third-country nationals are concerned, Article 16(3) of Directive 2008/115/EC expressly provides that detention conditions of individuals must take into account the situation of vulnerable persons. The Article also specifically requires that emergency health care and essential treatment of illness be provided. Article 17 is dedicated to the peculiar situation of the detention of minors and families.

5.8. Right to remedy

Article 47 of the EU Charter makes no distinction between persons as far as the right to an effective remedy is concerned[123].

Panayotova and others[124] (2004) represents a landmark decision on this issue within the case law of the European Court of Justice it clarifies that the general principle of effective remedies for all EU rights also applies to a State's immigration procedures[125].

Consistent with these principles, Article 46 of Directive 2013/32/EU provides the right to an effective remedy to decisions concerning asylum claims: persons should thus be ensured that they can challenge such a decision. Moreover, Article 27 of the Dublin III Regulation protects the right to an effective remedy by granting the right to an additional appeal or review against transfer decisions: in such cases, paragraph 3(b) of Article 27 requires that the transfer be automatically suspended pending judicial review.

Directive 2008/115/EC, in its turn, mentions the right to effective remedy within Article 13(1), which states that third-country nationals shall be afforded an effective remedy to appeal or seek review of decisions related to return before a competent administrative or judicial authority or a competent body composed of impartial and independent persons. Moreover, as far as detention is concerned, Article 15(2) provides for important procedural safeguards when the order is given by administrative authorities: in such cases Member States, if they do not ensure a speedy judicial review under their laws, must at least grant third-country nationals the right to take proceedings by means of which such judicial review may be put into action.

The right to remedy against *refoulement* was a key point highlighted by the CJEU judgement C-924/19 PPU and C-925/19 PPU[126] called to verify the Hungarian governments legal provisions aimed at imposing limitations to the possibility of appealing a decision of deportation in light of Art. 13 par. 1 of Directive 2008/115/EC. Moreover, in Article 13 of the aforementioned Directive, the person subjected to a decision must

[123] LENAERTS, K., *Exploring the limits of the EU charter of fundamental rights*, European Constitutional Law Review 8(3), 2012, pp. 375-403.
[124] Judgment of 16 November 2004, *Panayotova and others*, C-327/02, ECLI:EU:C:2004:718.
[125] BALDACCINI, A., GUILD, E. & TONER, H., *Whose freedom, security and justice?: EU immigration and asylum law and policy*, London: Bloomsbury Publishing, 2007, p. 76.
[126] CJEU., 14 May 2020, Judgment in Joined Cases C-924/19 PPU and C-925/19 PPU FMS and Others v Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendeszeti Főigazgatóság

then have an effective remedy against it, which must also be consistent with the right to effective judicial protection guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. To that end, the Court observed that, although Member States may make provisions for return decisions to be challenged before authorities other than judicial authorities, the person subjected to a return decision adopted by an administrative authority must however, at a certain stage of the procedure, be able to challenge its lawfulness before a judicial body. In the presented case, the Court observed that the persons concerned could challenge the decisions taken by the aliens policing authority amending their country of return only by lodging an objection before the asylum authority and that no subsequent judicial review was guaranteed. The asylum authority, which operates in this case under the authority of the Hungarian minister for policing, is part of the executive, so that it does not satisfy the condition of independence required of a court for the purpose of Article 47 of the Charter.[127]

6. Final remarks

The present report raises a wide range of issues concerning the guarantee of migrants' human rights within the context of transit zones. As summarized in the opening sections, the concept itself of transit zones is not at all well-defined and calls for clarity.

Nonetheless, such lack of clarity should not be understood by States as exempting them from human rights responsibilities. This is confirmed by several landmark ECtHR decisions which are referenced throughout the entire work, including *Amuur v. France* and *Riad and Idiab v. Belgium*.

As our analysis demonstrates, there may very well be inconsistencies between the treatment of migrants once they arrive in transit zones and the requirements of the immigration legal frameworks of both the Council of Europe and the EU. Among these, the report provides an overview of concerns regarding both asylum-seekers' rights as well as fundamental guarantees that protect all migrants. As our research here shows, State policies and procedures with respect to migrants in transit zones may expose them to judicial findings of severe infringements of the ECHR, notably of Articles 3, 5 and 13 and of Article 4 Protocol No. 4. To avoid such risks, uniform measures that fully comply with international standards should be adopted and implemented as soon as possible.

The report has given particular attention to the Italian context. It is important to note that Italy's obligations to protect and guarantee access to due process for asylum flows not only from EU law and ECtHR case-law but also follows the national legal framework. The right to asylum is enshrined in Article 10 of the Italian Constitution, which prohibits *refoulement* in the case of political asylum, recognition of refugee status

[127] The placing of asylum seekers or third-country nationals who are the subject of a return decision in the Röszke transit zone at the Serbian-Hungarian border must be classified as 'detention'. Court of Justice of the European Union., Press release No 60/20 Luxembourg, 14 May 2020. Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200060en.pdf>

and the adoption of temporary protection measures[128]. The Italian State, therefore, cannot ignore nor undermine any aliens' rights on grounds of pursuing a policy of efficiency.

The report's remarks and conclusions may also be relevant to other countries, both within and outside the European context (see Annex).

[128] DEL GUERCIO, A., "La seconda fase di realizzazione del sistema europeo comune d'asilo", *Osservatorio Costituzionale*, Associazione italiana dei Costituzionalisti, 2013, available at <http://www.osservatorioaic.it/download/9gMB9uDyYZ_PdqcvqmhdSheiXvAB89Jh0JCJF7AQPGI/osservatorio-del-guercio-finale-1.pdf>.

ANNEX: Practices of selected EU and extra-EU countries

The following section has the objective to provide a more specific and detailed vision of the common praxis and approach towards transit zones, adopted by a series of countries, *i.e.*, three EU countries and one extra-EU country. Therefore, the focus of the paragraph is the legal framework and procedures each of them applies to transit zones. The decision of selecting specific countries, namely France, Hungary, Germany and Australia, is motivated by the peculiar nature of their procedures which raises severe concerns on the treatment of asylum seekers and irregular migrants.

A. France

The French situation concerning international transit zones revolves around the landmark decision of *Amuur v. France*. This ECtHR judgment stated that, even though applicants were outside the French territory throughout their detention in the international transit zone of the Paris-Orly airport, they were in fact subject to French jurisdiction as far as ECHR obligations were concerned. More importantly, the Court ruled that the international airport zone does not have by any means the status of an extraterritorial zone.

France's administrative detention procedures towards immigration have also been subjected to controversy throughout the last decades. The country's frequent "extra-territorialisation" of border controls has been implemented many times with the creation of oversea detention centres such as the ones in Guadaloupe and Mayotte (archipelagos respectively in the southern Caribbean Sea and in the Indian Ocean).

A report by the French NGO *Terre d'Asile*, dealing with the rights of asylum-seekers, has found inhumane conditions throughout these detention centres: *e.g.* scarce hygienic conditions; insufficient legal assistance; *de facto* deprivation of personal liberty. However, most importantly, it highlights the "differentiated" rules governing these territories. The director of *Terre d'Asile* Pierre Henry calls this vastly implemented system an «infringement of regular French law which is a disgrace to the Republic»[129].

As one can assume from the previous statement, the main purpose and "effectiveness" of such overseas facilities are the fact that certain legal responsibilities of the State can easily be avoided. The processing of asylum cases and the deportation of asylum seekers from these transit zones (also known as waiting zones) are simpler and quicker than their counterparts applied in French mainland territory.

[129] The Observers, *Mayotte detention centre: "this infringement of regular French law is a disgrace to the Republic"*, 18 December 2008, available at <https://observers.france24.com/en/20081218-mayotte-detention-centre-infringement-french-law-disgrace-republic-immigration-asylum>.

In fact, in mainland France, there is a specific border procedure for asylum requests which is provided by CESEDA for persons arriving through airports, train stations or harbours[130]. Asylum-seekers can file their application even after being refused entry into the territory: in these cases, they are directed to a so-called transit or waiting zone. Article L.221-4 provides that:

> Foreign nationals held in waiting zones are informed, as soon as possible, that they may request the assistance of an interpreter and/or a doctor, talk to a counsel or any other person of their choice, and leave the waiting zone at any point for any destination outside of France. They are also informed of their rights pertaining to their asylum claim. This information is communicated in a language the person understands.

This common procedure, similar to the ones applied in other central European countries, is apparently respectful and in accordance with human rights conventions and refugee law. Unfortunately, it has become of not so rare practice to deny and derogate these accustomed procedures when dealing with extraterritorial transit zones located overseas.

In the French overseas territory of Mayotte, not only the French Constitution, but a series of immigration laws such as the CESEDA authorise important derogations to the applicability of immigration law. Local authorities expelled around 60 people a day from Mayotte during 2016 and most of them were denied access to a lawyer or judge. Their expulsion was in defiance of the French Ombudsman's recommendations as well as the European Court of Human Rights case law on the right to access an effective remedy[131].

B. Hungary

The Hungarian legal framework concerning asylum and transit zones includes Act LXXX of 2007 on Asylum[132] and related 2015 amendments and Act LXXXIX of 2007 on the State borders, as

[130] FORUM RÉFUGIÉS - COSI, *Border Procedure (border and transit zones)*, available at <https://www.asylumineurope.org/reports/country/france/asylum-procedure/procedures/border-procedure-border-and-transit-zones#footnote2_xtps6ys>. Article R.213-2 of the CESEDA reads: «When a foreign national who has arrived at the border applies for asylum, they are immediately informed, in a language they can reasonably be considered to understand, of the asylum application procedure, their rights and obligations over the course of this procedure, the potential consequences of any failure to meet these obligations or any refusal to cooperate with the authorities, and the measures available to help them present their request».

[131] GLOBAL DETENTION PROJECT, *France Immigration Detention*, October 2018, available at «https://www.globaldetentionproject.org/countries/europe/france»

[132] *Hungary: Act LXXX of 2007 on Asylum (2016) [Hungary]*, 1 January 2008. English version available at: <https://www.refworld.org/docid/4979cc072.html>, accessed 3 June 2019.

well as several Government decrees[133], among which Government Decree 301/2007(XI.9.) lastly amended in 2016 on the implementation of the Act on Asylum[134].

After the declaration of a «crisis situation caused by mass migration» in 2015[135], a sort of state of exception applies to Hungary. The situation of crisis was first declared by the Hungarian Government in September 2015 for six months and has since been periodically prolonged by Government Decrees up until 2019[136].

Previous Hungarian legislative acts were abundantly amended in favour of stricter criteria on entrance, stay and other related issues. A fence was built in July 2015[137] and four transit zones were established: two at the Serbian border (one at Röszke, the other at Tompa), and two at the Croatian border (one at Beremend, the other at Letenye)[138]. As reported by the UNHCR, according to the Act on State borders, «transit zones shall be established at any of Hungary's land borders that is an external Schengen border – namely Hungary's borders with Croatia, Romania, Serbia and Ukraine – and 'shall function to temporarily accommodate individuals seeking refugee status or subsidiary protection…, to conduct asylum and immigration procedures, and to accommodate the facilities required for this'»[139].

Article 80/J of the Asylum Act, inserted by Law No. T/13976 in 2017, states that during a crisis situation caused by mass immigration, asylum applications can only be made within transit zones set up at the Hungarian-Serbian border. Since March 2017, the praxis sees an automatic detention of asylum-seekers in the transit zones of Hungary since they stay there for the whole duration of the asylum procedure[140]. Such applications, which are assessed by the Immigration and Asylum Office (*hereinafter*: IAO), may be refused. Actually, the IAO sets entry quotas for the transit zones[141]. As reported by the Hungarian Helsinki Committee (HHC) «The IAO decides exactly who can enter the transit zone on a particular day. Beginning in March 2016, an ever-growing number of migrants continued to gather in

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[133] An exhaustive list is available at <https://www.asylumineurope.org/reports/country/hungary/overview-legal-framework>

[134] NATIONAL LEGISLATIVE BODIES / NATIONAL AUTHORITIES, *Hungary: Government Decree No. 301/2007 (XI.9.) On the implementation of the Act on Asylum*, 1 January 2008, available at <https://www.refworld.org/docid/524544c44.html>, accessed 22 July 2019.

[135] WEAVER, M. & SIDDIQUE, H., "Refugee crisis: Hungary rejects all asylum requests made at border -as it happened", *The Guardian*, updated 14 April 2018, available at <https://www.theguardian.com/world/live/2015/sep/15/refugee-crisis-hungary-launches-border-crackdown-live-updates>.

[136] HUNGARIAN HELSINKI COMITTEE (HHC), *Country Report: Hungary*, 2018 update.

[137] THORPE, N., "Hungary builds border fence to control migrant numbers", *BBC News*, available at <https://www.bbc.com/news/av/world-europe-33799208/hungary-builds-border-fence-to-control-migrant-numbers>.

[138] UN HIGH COMMISSIONER FOR REFUGEES (UNHCR), *Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016*, May 2016, available at: <https://www.refworld.org/docid/57319d514.html>, accessed 22 July 2019.

[139] *Ibid.*

[140] *HHC*, Crossing a Red Line: How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry, *2019, p. 8, available at < https://www.helsinki.hu/wp-content/uploads/crossing_a_red_line.pdf*>.

[141] *Ibid*., p. 18.

the 'pre-transit zones', which are areas partly on Hungarian territory that are sealed off from the actual transit zones by fences in the direction of Serbia. Here, migrants waited in the hope of entering the territory and the asylum procedure of Hungary in a lawful manner. […] Although parts of the pre-transit zones are physically located on Hungarian soil, they are considered to be in 'no man's land' by Hungarian authorities, who provided little to nothing to meet basic human needs or human rights. »

Within the issue of transit zones' legal status, the concept of extraterritoriality intertwines with that of jurisdiction. It is easy to note that Hungary has full jurisdiction over transit zones at such point that it claims for itself the possibility of detaining asylum-seekers. Yet, the Hungarian Government claims they are «no man's land» and refuses to admit that transit zones are a form of *de facto* detention. HHC claims that «*De facto* detention occurs when individuals are deprived of their liberty in the absence of a detention order, even if their confinement is not classified as detention under domestic law, and their only possibility of release is by leaving to another country»[142]. As a matter of fact, the Hungarian Government claims that migrants are always free to leave. However, the only alternative is going back to Serbia.

On 14 March 2017, the ECtHR issued a long-awaited judgment in *Ilias and Ahmed v. Hungary*. The Court confirmed its established case law that confinement in the transit zones in Hungary amounts to unlawful detention and established violation of Article 5(1) and (4) and of Article 13 in conjunction with Article 3 due to the lack of effective remedy to complain about the conditions of detention in the transit zone. However, in 2019, the Grand Chamber delivered a different reasoning, highlighting that the material detention conditions in the transit zone as well as the length of detention did not reach the threshold of severity to find a violation under Article 3. The applicants' complaints under Art. 5 § 1 and 5 § 4 were declared inadmissible, adding that the applicants were not prevented from leaving of their own free will to another country other than Serbia and would not face a direct threat to their life. Art. 5 therefore would not be seen as applicable in their situation in the transit zone where the applicants awaited the examination of their asylum claims.[143]

In July 2019, The European Commission decided to refer Hungary to the European Court of Justice concerning several non-compliances with EU law, particularly measures that criminalize NGOs supporting asylum applicants, those that introduce new grounds for declaring an asylum application inadmissible, «restricting the right to asylum only to people arriving in Hungary directly from a place where their life or freedom are at risk» but not those «from a country (…) which does not fulfil the criteria of a safe-third-country.»[144] Furthermore, from a different perspective and to a certain extent

[142] *Id*., p. 7.
[143] European Legal Network on Asylum, Ilias and Ahmed v Hungary: Violation of Article 3 due to failure to assess risks upon return but no violation of Article 3 with regard to the conditions in the Röszke border transit zone, 2019
[144] EUROPEAN COMMISSION, *Commission takes Hungary to Court for criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones*, Press Database, July 2019. Available at <https://europa.eu/rapid/press-release_IP-19-4260_en.htm>

contradictory to the 2019 GC judgement Ilias v. Ahmed, in May, 2020, the CJEU pronounced on the preliminary ruling raised by a Hungarian judge, in relation to the case of two couples of asylum seekers who were detained in the Röszke transit zone, located on the Serbian-Hungarian border. The main issues raised by the court mainly concerned the nature of the appeal, the concept of «safe third country», the obligations to review asylum applications rejected on the basis of illegitimate grounds and the definition of the concept of «detention». In the context of the return directive, the Court analysed the principle of effective remedy and of non-refoulement. In addition, particular attention is placed on the interpretation given by the judges to the right to personal freedom, which led the CJEU to qualify the confinement of third-country nationals in transit zones as an illegal form of detention, presenting a divergent interpretation from the one of the European Court of Human Rights case *Ilias and Ahmed v. Hungary*.

The Hungarian authority's response to the CJEU decision resulted in the release of approximately 300 people, including families with minor children, held in the transit zones on the Hungarian Serbian border and transferred them to open or semi-open facilities. It is although to be noticed that more hurdles are now placed for asylum seekers, in which the government is implementing a "system" which is even less tenable than the one criticised in the judgment and thereby sews the seeds of even more confrontation with the EU, UNHCR, the NGO sector The CJEU judgment does retain its importance, as it serves as clear guidance to the rest of the EU. Demanding that detention be necessary and proportional (and not only non-arbitrary), enforcing that no member States may invent additional inadmissibility grounds, openly taking issue with the European Court of Human Rights as to the nature of the transit zone regime are steps in the direction of preserving the values enshrined in Article 2 TEU.

C. Germany

In 2015, the then Bavarian Prime Minister Seehofer strongly asked for action *vis-à-vis* the open-door refugee policy by Prime Minister Merkel. In order to manage a feared massive influx of asylum-seekers, Seehofer presented a plan establishing transit zones aiming at accelerating deportation[145]. 2018 saw the agreement between CDU and Bavarian Christian Social Union, in which transit zones are identified[146]. In the same year, several bilateral agreements were concluded among Germany and Spain, Greece (the so-called «Seehofer deal») and Portugal. The aim was to facilitate and speed the return of asylum seekers to the country of first entry, where they have applied for asylum[147]. It has been claimed

[145] CONNOLLY, K., "Merkel's conservative alliance plan refugee transit zones on border", *The Guardian*, 13 October 2015, available at <https://www.theguardian.com/world/2015/oct/13/merkels-conservative-alliance-in-talks-refugee-transit-zones-along-german-border>.
[146] KARNITSCHNIG, M., "Merkel and Seehofer make fragile peace", *Politico*, 7 February 2018, available at <https://www.politico.eu/article/merkel-and-seehofer-strike-refugee-deal/>.
[147] REUTERS, (August 2018), *Germany reaches deal on sending back migrants to Greece.* Available at <https://www.reuters.com/article/us-europe-migrants-germany-greece/germany-reaches-deal-on-sending-back-migrants-to-greece-idUSKBN1L21GV>; DEUTSCHE WELLE, *Chancellor Merkel confirms bilateral migrant*

that the agreements «bypass the rules set out in the Dublin system with the aim of quickly carrying out transfers. The effect of the latter arrangements is the neutralisation of crucial safeguards contained in the Dublin Regulation such as the right to a personal interview, the right to appeal, and the prevention of transfers when human rights risks arise»[148]. Such legal measures have been strongly criticised also because they include the deprivation of rights, expansion of the use of detention, and withdrawal of social benefits[149]. In August 2019, the Administrative Court of Munich questioned the legality of the bilateral agreement with Greece, after an Afghan asylum seeker was refused entry to the German territory, since Greece was responsible for the asylum application, and was returned to Greece without any examination of the applicant's case or provide for a hearing, by the Federal Police. The German authorities did not respect the applicant's rights under the Dublin Regulation, particularly the legal safeguards. As the applicant was unable to re-launch his asylum application in Greece, he was also likely to face return to Afghanistan without assessment of his claim[150]. Therefore, the Court ordered the return of the applicant from Greece and to grant him provisional entry to Germany[151].

Transit zones raised not only questions concerning their legal status, but also their implementation and the risk of reproducing «vast encampments in no man's land»[152] where people are deprived of their liberty. In fact, the Federal Supreme Court (*Bundesgerichtshof, hereinafter*: BGH) expressed itself on the risk of detention in airport transit zones, but found that the people were not deprived of their liberty. This holding was perhaps strengthened by a judgment of the Federal Constitutional Court (*Bundesverfassungsgericht, hereinafter*: BVerfG) which ruled that the placement of foreigners at airport transit zone premises does not constitute detention, because the people concerned can always leave by plane and go back to their countries[153]. Thus, the BGH decision appears to be in contrast with the ECtHR judgment of *Amuur v. France*.

Among others, transit zones lay in the airports of Berlin, Frankfurt, Munich, Düsseldorf and Hamburg, where the so-called "*Flughafenverfahren*", the airport procedure, shall be conducted prior to

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agreements with Spain and Greece, 29 June 2018. Available at < https://www.dw.com/en/chancellor-merkel-confirms-bilateral-migrant-agreements-with-spain-and-greece/a-44463424>

[148] ECRE, *ECRE Policy Paper: Bilateral Agreements: Implementing or Bypassing the Dublin Regulation?*, December 2018. Available at <https://www.ecre.org/ecre-policy-paper-bilateral-agreements-implementing-or-bypassing-the-dublin-regulation/>

[149] ECRE, *Germany: Court Finds German-Greek Bilateral Agreement Violates European Law*, August 2019. Available at <https://www.ecre.org/germany-court-finds-german-greek-bilateral-agreement-violates-european-law/>

[150] EDAL, *Germany: Administrative Court of Munich finds German-Greek Administrative Agreement violates European law and orders return of applicant from Greece.* Available at <https://www.asylumlawdatabase.eu/en/content/germany-administrative-court-munich-finds-german-greek-administrative-agreement-violates>

[151] Decision available in German at < https://www.proasyl.de/wp-content/uploads/Eilbeschluss-VG-M%C3%BCnchen_8.8.2019-2.pdf>

[152] CONNOLLY, K., *supra* note 145.

[153] BVerfG, *Decision 2 BvR 1516/93*, 14 May 1996; BGH, *Decision V ZB 170/16*, 16 March 2017, in Global Detention Project (GDP), *Germany Immigration Detention Profile*, October 2017, p. 5. Available at https://www.globaldetentionproject.org/countries/europe/germany

the decision on entry to the German soil. It applies to «foreigners from a safe country of origin and foreigners who request asylum from the border authorities at an airport and who are unable to prove their identity with a valid passport or other means of identification»[154]. It can only be carried out if the asylum-seekers can be accommodated in the airport premises during the procedure, and if a branch of the Federal Office for Migration and Refugees (*hereinafter*: BAMF) is assigned to the border checkpoint[155]. Facilities are provided in each of the airports mentioned above.

The fiction of non-entry is at the core of the airport procedure. Authorities explain that the asylum procedure is carried out «before the Federal Police decide[s] whether an individual may enter the country, that is while they are still in the transit area […]»[156]. It is of great importance to highlight that, in implementing the procedure, «the fiction of non-entry into German territory is maintained for the duration of the airport procedure, *including where the person is transferred from the facility at the airport to a hospital or court*» (emphasis added)[157]. The applicant is allowed entry into the territory if the BAMF has not rejected the application as "manifestly unfounded" within two days, or where it informs the Federal Police that it will be unable to do so within that timeframe[158]. The airport procedure can last for a maximum of one month: consequently, asylum-seekers may be detained up to that period.

This apparent accelerated procedure, where BAMF has to comply with a two-day deadline, raises questions on superficial decisions, which might easily take place. Moreover, concerns on the possibility to grant effective rights to defence (one among others, whether NGOs and lawyers can easily enter transit zones), are reported[159].

D. Australia

Even though geographically distant, Australia's policies for the detention of immigrants constitute an important but equally dramatic example of the applicability of jurisdiction in extra-territorial zones. The policies implemented by the Australian government are aimed not at governing migration but rather at curtailing it at any cost, thus creating serious risks to migrants, forming such zones of lawlessness and impunity with hardly any regard to internationally recognised human rights.

Australia has received harsh worldwide criticism for the establishment of arrangements to intercept and transfer asylum-seekers to Australian funded detention centres in third-country sovereign

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[154] *Asylum Act* (Asylgesetzt), Article 18A. English version available at <https://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.html#p0468>.
[155] Informationverbund Asyl und Migration for AIDA, *Country Report: Germany*, update 2018, p. 43.
[156] Federal Office for Migration and Refugees, *The stages of the German asylum procedure*, accessed 22 July 2019, available at <https://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/Broschueren/das-deutsche-asylverfahren.pdf?__blob=publicationFile>.
[157] MOUZOURAKIS, M., POLLET, K. & OTT, J.D., *Airport procedures in Germany: Gaps in quality and compliance with guarantees*, European Council on Refugees and Exiles, 2019, available at <http://www.asylumineurope.org/sites/default/files/airportproceduresgermany.pdf>.
[158] *Id.*, p.8
[159] Informationverbund Asyl und Migration for AIDA, *supra* note 133, p. 61

states. For example, Nauru and Papua New Guinea have both received financial compensation for their cooperation and partial sovereignty concession.

However, the Australian government does not only implement these rather controversial migration policies in third countries, but it applies similar provisions to territories, in particular to islands, such as Christmas Island and Ashmore and Cartier Islands, which are geographically distant from mainland Australia but politically part of it.

Before the infamous «Pacific Solution» was undertaken, Australia had constructed an immigration detention centre on Christmas Island, an island which is closer to the coast of Indonesia than to Australia, and which is used as an "extraterritorial island" within Australian territory[160]. Its distance from the mainland and the inability of legal advisors and NGOs to gain access to people detained there have permitted the government to act with a certain degree of freedom and discretion when dealing with potential asylum claims[161]. In 2001, with the aim of curtailing migration flows especially from Indonesia towards Christmas Island, a more drastic law was approved by the Government: The Migration Amendment (Excision from Migration Zone) Act. The purpose of these strict policies was to state that certain external territories would no longer form part of Australia's migration zone.

For the sake of this report, the example of Christmas Island acting as a *de facto* offshore processing centre can easily be compared to many European countries' migration policies regarding international transit zones. Starting from the consideration that every State enjoys exclusive authority over its territory and all people within it, these States cannot absolve themselves of their international law obligations, even in such zones that have been designated as transit or international transit zones: this because of the precise jurisdiction States have on ITZs[162].

With reference to the situation asylum-seekers face, once reaching excised offshore territories like Christmas Island, they are prevented from the refugee status determination system that is commonly applied on mainland Australia. Their rights are consequently violated, having no access to the Refugee Review Tribunal, little access to Australian courts and being processed through non-legally binding guidelines. Also, the possibility to obtain or even to apply for a protection visa is completely subordinated to ministerial discretion.

[160] The «Pacific Solution» was a policy instituted in 2001 by John Howard's administration and extended until 2008, it diverted asylum seekers to Pacific Island states—including Nauru and Papua New Guinea—for offshore processing. The policy resulted in the detention of refugees in camps for years in conditions that raised human-rights concerns.

[161] AFEEF, K. F., *The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific*, RSC Working Paper No. 36, Refugee Studies Centre – University of Oxford, available at <https://www.rsc.ox.ac.uk/files/files-1/wp36-politics-extraterritorial-processing-2006.pdf>.

[162] LARKING, E., *Refugees and the Myth of Human Rights: Life Outside the Pale of the Law*, New York, NY: Routledge, 2014.

In 2012, the Australian government decided to adopt an even stricter measure on arriving refugees by excising all of mainland Australia from the definition of "migration zone" found in the Migration Act.

The proposal passed by the Parliament read as follows: «The Migration Act 1958 be amended so that arrival anywhere on Australia by irregular maritime means will not provide individuals with a different lawful status than those who arrive in an excised offshore place». This measure contained dramatic consequences for refugees that now had to be transferred to offshore camps: here, though their asylum request could be processed, procedures were not consistent with the State's obligations towards the 1951 Geneva Convention Relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees.

Seemingly enough, asylum-seekers that are subject to "extraterritorial processing" are situated in a "legal black-hole" in which the legal provisions applied are very unclear[163]. While awaiting a more consolidated and especially commonly recognised case law on international transit zones, the frequently precarious conditions that asylum-seekers face will become an unfortunate growing trend among many countries worldwide.

[163] KNEEBONE, S., *Controlling Migration by Sea: The Australian Case*, in: RYAN, B. & MITSILEGAS,V. (eds.), *Extraterritorial Immigration Control: Legal Challenges*, Leiden – Boston, MA: Martinus Nijhoff Publishers, 2010.

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CASE-LAW

A. CJEU

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