'Le vent nous portera': Rescue and Confinement at Sea under Human Rights Law

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Abstract

As a response to the pandemic, sea-rescue operations in the Mediterranean have either come to a halt or have been perilously delayed. Since then, policies of port closure and semi-closure have been undertaken under different forms. Nevertheless, States have an obligation to assist ships' masters in delivering any shipwreck to a place of safety, even in times of COVID-19 or any other public emergency. This article explores whether State responsibility under international human rights law might be engaged whenever rescuing boats are compelled to lengthy standoffs with no coastal State allowing disembarkation. Therefore, in discussing the interim measures issued by the European Court of Human Rights (ECtHR) in cases of prolonged confinement at sea – following port closures and refusals of a place of safety – it suggests that the ECtHR should have ordered disembarkation of all shipwrecked onboard. Indeed, the actual conditions of migrants and asylum-seekers compelled to exhausting and unlawful standoffs at sea, in addition to their precarious physical and mental health, may amount to inhuman and degrading treatment and to a de facto deprivation of personal liberty under Articles 3 and 5 of the European Convention on Human Rights (ECHR). While contesting the increasing use of a language of 'crisis' and the recent 'practical and effective' approach of the Court of Strasbourg, aimed at preventing 'foreigners [including asylum seekers] circumventing restrictions on immigration', this article concludes highlighting the risks of such an approach, thereby exhorting the Court to challenge what may become a perpetual (rather than exceptional) emphasis on a migration crisis.

Keywords: search and rescue, European Court of Human Rights, inhuman and degrading treatment, interim measures, closed ports.

1 Introduction

On 12 April 2020, 150 migrants were rescued in the Mediterranean Sea by the Alan Kurdi (a vessel operated by the German NGO SeaEye), and after 12 days at sea – due to Italy and Malta's refusal to allow disembarkation – were eventually transferred onboard an Italian ship for another 14 days of quarantine.[1] Following the spread of COVID-19, Malta declared that it would no longer offer a safe place to irregular migrants, and denied disembarkation to the passengers of the Danish oil tanker Maersk Etienne.[2] In September 2020, the Court of Strasbourg turned down the request for interim measures of a group of persons who were rescued by the Etienne,[3] and only after 40 days at sea, they were allowed to land in Italy.

With the COVID-19 crisis, healthcare national systems have been overwhelmed, causing an increasing number of governments to declare a state of emergency and/or adopt measures constraining free movement of persons across land and maritime borders. Migrants, in particular, stand to be wronged by State authorities in several ways. As a response to the pandemic, sea-rescue operations in the Mediterranean have either come to a halt or have been perilously delayed.[4]

In April 2020, the Italian government established that:

> for the entire duration of the national health emergency caused by the spread of Covid-19, Italian ports do not fulfil the conditions to be classified and defined as places of safety, in accordance with the Search and Rescue (SAR) Convention, in all those cases of rescue operations conducted outside the SAR area by vessels flying the flag of foreign States.[5]

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1 BBC, 'Coronavirus: Italy Orders Rescued Migrants onto Quarantine Ship' (12 April 2020), www.bbc.co.uk/news/world-europe-52263969.

2 Press release by the Ministry for Foreign and European Affairs and the Ministry for Home Affairs, 'National Security and Law Enforcement: Malta Should Not Carry the Burden of Migrant Trafficking' (10 April 2020), www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/April/10/pr200650en.aspx.

3 Malta Today, 'Three Migrants Aboard Oil Tanker Maersk Etienne Jump Overboard in Desperation' (6 September 2020), www.maltatoday.com.mt/news/national/104574/three_migrants_aboard_oil_tanker_maersk_etienne_jump_overboard_in_desperation_#.X8KxWOVxfid.

4 Info Migrants, 'Don't Stop Rescue Ships Due to Coronavirus', *MSF to Italy* (2 March 2020), www.infomigrants.net/en/post/23106/don-t-stop-rescue-ships-due-to-coronavirus-msf-to-italy.

5 Executive Decree n. 150, issued by the Italian government on 7 April 2020, www.avvenire.it/c/attualita/Documents/M_INFR.GABINETTO.REG_DECRETI(R).0000150.07-04-2020%20(3).pdf. This Decree should be read together, but not without a certain degree of confusion, with Decree n. 1287 (12 April 2020) of the Head of Office of Civilian Defence (*Protezione Civile*) establishing instead that those people rescued at sea, for whom it was not possible to identify a place of safety, can be quarantined onboard designated ships, while those who have been able to autonomously reach the Italian territory are accommodated in suitable reception centres for the duration of the quarantine. *See Decreto del Capo Dipartimento* n. 1287 (12 April 2020).

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This decree denies access to a safe port in Italy only to certain people on the basis of random criteria, such as the place of rescue and the flag of the vessel rescuing the shipwrecked.[6] Given that it has provisionally been used as a blueprint by other countries, such as Malta, Libya and Tunisia, to enforce policies of port closure,[7] it provides the additional risk that more States will follow suit and deny their ports as places of safety, relying on COVID-19 (or any other potential future threat to public security and safety) as a justification to extend restrictive policies against aliens well beyond an emergency situation.

While 2 years after the outbreak of the COVID-19 pandemic there has been a gradual reopening of national borders and a notable increase in the number of migrants and asylum-seekers reaching Europe,[8] especially through the Central Mediterranean route,[9] the year 2021 was also the deadliest year since 2018.[10] Nevertheless, the indication of a place of safety to NGO vessels rescuing people in distress continues to be delayed in many cases, thereby forcing people to spend several days at sea in critical humanitarian conditions.[11]

In late October 2022, Italy's new right-wing-led government declared that NGO rescuing vessels operate in breach of international and domestic norms on security and border control, thus formalizing the closure of Italian ports to people rescued at sea.[12] As a consequence of the new decrees, more than 1,000 rescued migrants were stranded aboard four ships for several days amid deteriorating conditions onboard.[13] According to the government only people in urgent need of medical care could be allowed to disembark while all others should have left Italian territorial waters.[14] One of the underlying aims of the new Law-Decree 1/2023, enacted by the Italian government on 2 January 2023, is to further limit the work of rescuing NGOs. For instance, imposing them to reach without delay a port of disembarkation (which, in practice, is indicated very far from the area of distress)[15] de facto entails NGOs' disengagement from further rescue operations in the Mediterranean.[16]

Overall, the posture adopted by the new Italian government marks, to a certain extent, a return to the approach adopted by the former Ministry of the Interior, Mr Salvini, between 2018 and 2019, and the strategy implemented with the spread of the COVID pandemic aimed at closing ports to migrants rescued at sea. All these cases show how the issue of port closure and/or semi-closure with the consequent confinement of people at sea for several days is increasingly topical, assumes slightly different forms and might take place whenever an emergency is perceived as threatening the security of a State, thereby requiring urgent attention by both scholars and practitioners.

Being informed about a distress situation, the Maritime Rescue Coordination Centre of the coastal State receiving a distress call (e.g., Italy in all the cases hereinafter examined) has a duty to intervene and to cooperate with other coastal States in rescuing and disembarking the shipwrecked in the *next place of safety* – a duty which exists even if the boat calls from the outside of their territorial waters or SAR areas.[17] Although the issue of migrants' rescue at sea and their rapid disembarkation in a safe port raises a plethora of questions under asylum law, the law of the sea and the search and rescue legal framework,[18] this article will be limited to explore whether State responsibility under international human rights law is engaged every time rescuing boats are compelled to such standoffs with no coastal State allowing prompt disembarkation.[19]

6 *See* A. Algostino, 'Lo stato di emergenza sanitaria e la chiusura dei porti: sommersi e salvati', 2 *Questione Giustizia* (2020), https://www.questionegiustizia.it/articolo/lo-stato-di-emergenza-sanitaria-e-la-chiusura-dei-porti-sommersi-e-salvati_21-04-2020.php; V. Keller, F. Schöler, & M. Goldoni, 'Not a Safe Place? Italy's Decision to Declare Its Ports Unsafe under International Maritime Law' (14 April 2020), https://verfassungsblog.de/not-a-safe-place/.

7 U. De Giovannangeli, 'Porti chiusi ai migranti. Il Decreto della vergogna fa scuola a Malta e in Libia' (10 April 2020), Porti chiusi ai migranti. Il Decreto della vergogna fa scuola a Malta e in Libia | Globalist.

8 European Union Agency for Asylum, 'Asylum Applications in EU Approaching Highest Level since 2016' (28 January 2022), https://euaa.europa.eu/news-events/asylum-applications-eu-approaching-highest-level-2016.

9 Frontex, 'EU External Borders in 2021: Arrivals Above Pre-pandemic Levels' (11 January 2022), https://frontex.europa.eu/media-centre/news/news-release/eu-external-borders-in-2021-arrivalsabove-pre-pandemic-levels-CxVMNN.

10 IOM, Missing Migrants Project, https://missingmigrants.iom.int/region/mediterranean?region_incident=All&route=3861&year%5B%5D=2500&month=All&incident_date%5Bmin%5D=&incident_date%5Bmax%5D=.

11 *See, e.g.*, Fanpage.it, 'Migranti, 800 persone sulle navi di Open Arms e Humanity aspettano un porto da settimane', www.fanpage.it/attualita/migranti-800-persone-sulle-navi-di-open-arms-e-humanity-a; spettano-un-porto-da-settimane/; La Repubblica, 'Migranti, il Viminale concede il porto. I 450 migranti di Mare Jonio e Sea Watch sbarcheranno a Pozzallo', www.repubblica.it/cronaca/2022/06/08/news/migranti_braccio_di_ferro_tra_le_ong_e_il_viminale_o_ci_danno_un_porto_entro_10_ore_o_entriamo_lo_stesso-352996493/.

12 *See, e.g.*, Directive of the Ministry of the Interiors, no. 14100/141(8), 23 October 2022.

13 Euronews, 'Hundreds of Migrants in Limbo as Italy Closes Ports to NGOs', www.euronews.com/2022/11/05/hundreds-of-migrants-in-limbo-as-italy-closes-ports-to-ngos.

14 *See, e.g.*, Decree of the Ministries of the Interiors, Defence, and Infrastructures, 4 November 2022.

15 *See* ANSA, 'Migranti, la Ocean Viking giunta in porto a Ravenna', www.ansa.it/sito/notizie/cronaca/2022/12/31/migranti-la-ocean-viking-giunta-in-porto-a-ravenna_87fea78c-c385-4ecc-8b7f-b9d7076361a4.html.

16 For a thorough analysis of Law-Decree 1/2023, *see* ASGI, 'Contro la Costituzione, le ONG e i diritti umani: l'insostenibile fragilità del decreto legge n.1/2023' (5 January 2023), www.asgi.it/primo-piano/contro-la-costituzione-le-ong-e-i-diritti-umani-linsostenibile-fragilita-del-decreto-legge-n-1-2023/.

17 On cooperation duties, *see* Arts. 2.1. and 12.3 of the Annex to the Search and Rescue (SAR) Convention; and Regulation IV of Chapter 5 of the International Convention for the Safety of Life at Sea (SOLAS).

18 On the semi-closed ports policy and the responsibility of the flag State, *see* C. Favilli, 'La stagione dei porti semichiusi: ammissione selettiva, respingimenti collettivi e responsabilità dello Stato di bandiera', *Questione Giustizia* (November 2022). On asylum and allocation of competences, *see* M. Di Filippo, 'The Allocation of Competence in Asylum Procedures Under EU Law: The Need to Take the Dublin Bull by the Horns', *Revista de Derecho Comunitario Europeo* 41 (2018). On the law of the sea and protection of life, *see* I. Papanicolopulu, *International Law and the Protection of People at Sea* (2018); F. De Vittor and M. Starita, 'Distributing Responsibility between Shipmasters and the Different States Involved in SAR Disasters', in *The Italian Yearbook of International Law Online* (2019).

19 For reasons of space, and considering the human rights focus of this article, law of the sea obligations with regard to people rescued at sea will be addressed in another article.

Section 2 of this article provides an overview of the interim measures issued by the Court of Strasbourg in cases of lengthy confinement at sea, following port closures and refusals of a place of safety. Section 3 examines whether the containment onboard rescuing vessels for several days might amount to a de facto deprivation of liberty in breach of Article 5 of the European Convention on Human Rights (ECHR). Section 4 discusses to what extent the conditions onboard, combined with the precarious physical and mental health of rescued migrants, reach the threshold of inhuman and degrading treatment under Article 3 of the ECHR. Lastly, prior to the closing remarks, Section 5 briefly contests the recent 'practical and effective' approach of the Court in cases involving migrants and asylum-seekers, especially in a situation of 'crisis' and 'mass influx'.

2 No Place of Safety: An Overview of the European Court of Human Rights' Interim Measures on Rescuing Vessels' Standoffs

This section intends to examine the interim measures issued by the Court of Strasbourg in cases of lengthy standoffs at sea. Under Rule 39 of the Rules of the ECtHR,

> The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to para. 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.[20]

Interim measures are thus indicated either to the applicant or to the respondent State, at any stage of the proceeding, with the purpose of ensuring effectiveness of human rights and their preservation, while waiting for the resolution of the case before the Court.[21] Interim measures can require States either to take positive measures, such as providing protection to the victim, or more frequently negative measures, such as requiring a State to refrain from taking action that might, for example, endanger the life of the victim or facilitate her *refoulement*.[22] Overall, these measures have been defined as 'a unique tool that can help the Court impact an ongoing situation as this unravels, rather than provide *ex post facto* redress'.[23]

In *Mamatkulov and Askarov* v. *Turkey*,[24] the ECtHR has cemented the legally binding nature of interim measures by virtue of Article 34 of the Convention whereby States must refrain from any act or omission that might undermine the effective exercise of the right of individual petition.[25] The requirements that the Court has elaborated in its case law to grant interim measures concern the existence of a threat of irreparable harm of a serious nature; the imminence of the harm; and the presence of an arguable case that removal/extradition would violate, prima facie, the ECHR.[26] Therefore, used to prevent harmful violations that could not be repaired by a decision on the merits,[27] 'the application of Rule 39 has preserved the physical integrity, the liberty and even the lives of many people who by definition are vulnerable'.[28] Persons fleeing war, persecution, and poverty, enduring any sort of abuses and violence in Libyan detention camps, surviving long journeys onboard unseaworthy boats, experiencing situations of distress at sea, and assisting, as powerless spectators, the death of their fellows and family members are most likely in a vulnerable condition.[29] The question is whether their continued stay at sea onboard unequipped assisting vessels for several weeks might entail a further compression of their fundamental rights and a serious deterioration of their mental integrity, with a potential risk for their own life and the life of those with whom they share such draining journeys.

Comparing the first cases addressed by the Court of Strasbourg regarding port closure and migrants' standoffs in 2019, with those occurring during the pandemic

20 European Court of Human Rights, 'Rules of the Court'. *Registry of the Court* (October 2022), http://echr.coe.int/Documents/Rules_Court_ENG.pdf.

21 V. Stefanovska, 'The Significance of Interim Measures of the European Court of Human Rights in Extradition Proceedings', *Conference Proceedings of the Scientific International Conference "Towards a Better Future: The Rule of Law, Democracy and Polycentric Development"*, at 338 (2018).

22 H. Legeay, C. Ferstman, & D. Rodriguez-Pinzon, 'Panel I: The Use of Interim Measures by the Committee against Torture: Towards a Comprehensive Instrument for the Protection of Victims and Witnesses in Torture Cases', 20(4) *Human Rights Brief* 9, at 9 (2013), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1888&context=hrbrief.

23 K. Dzehtsiarou and V.P. Tzevelekos, 'Interim Measures: Are Some Opportunities Worth Missing?', 2 *European Convention on Human Rights Law Review* 1, at 2 (2021).

24 *Mamatkulov and Askarov* v. *Turkey*, ECtHR, App nos. 46827/99 and 46951/99 (2005).

25 O. de Schutter, 'The Binding Character of the Provisional Measures Adopted by the European Court of Human Rights', 7 *International Law FORUM du droit international* 16, at 18 (2005); F. de Weck, 'Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture', at 68 (Brill 2017).

26 European Legal Network on Asylum (ELENA) and European Council on Refugees and Exiles (ECRE). 'Research on ECHR Rule 39 Interim Measures' (April 2012), at 14, www.ecre.org/wp-content/uploads/2016/05/RULE-39-RESEARCH_FINAL.pdf.

27 H. Keller and M. Cedric, 'Interim Measures Compared: Use of Interim Measures by the UN Human Rights Committee and the European Court of Human Rights', 73 *ZaöRV* 325, at 326-7 (2013), www.zaoerv.de/73_2013/73_2013_3_a_325_372.pdf.

28 ELENA/ECRE 2012, above n. 26, at 7.

29 In *M.S.S.* v. *Belgium and Greece*, the ECtHR describes asylum-seekers *as* 'a particularly underprivileged and vulnerable population group in need of special protection', para. 263. *See also Tarakhel* v. *Switzerland (GC)* App. n. 29217/12 (2014), para. 9; *A.S.* v. *Switzerland*, App no. 39350/13 (30 June 2015) para. 29. Costello and Hancox speak of a vulnerability of asylum-seekers *to* the State. *See* C. Costello and E. Hancox, 'The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee', in V. Chetail, P. de Bruycker & F. Maiani (eds.), *Reforming the Common European Asylum System. The New European Refugee Law* (2016), at 442-3.

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in 2020, it is possible to note how the Court seems to concede an even ampler margin of appreciation to governments in managing their external borders. For example, in *B.G. and Others* v. *Italy* (January 2019), in its reply to a request for interim measures by the passengers of the NGO vessel Sea-Watch 3, the Court does not indicate disembarkation, but nonetheless requests the Government of Italy, under Rule 39, to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary until further notice. As far as the 15 unaccompanied minors are concerned, the government is requested to provide adequate legal assistance.[30]

In *Rackete and Others* v. *Italy* (June 2019), the Court decides not to indicate to the Italian government the interim measures requested by the applicants, which would have required that they be allowed to disembark in Italy from the ship Sea-Watch 3 after 10 days at sea off the coasts of Lampedusa.[31] The Court also indicates to the Italian government that it could rely on Italian authorities to continue to provide all necessary assistance to those persons onboard Sea-Watch 3 who are in a vulnerable situation on account of their age or state of health. Considering that interim measures are only granted in a very limited number of cases concerning an imminent risk of irreparable harm, the decision of the Court in *Rackete and Others* v. *Italy* should not be read as full endorsement of the 'closed ports' policy of the Italian government. Indeed, despite refusing to request the disembarkation of all traumatised passengers, there is, nevertheless, an acknowledgement by the Court of the critical conditions onboard while conceding leeway to governments in deciding how to offer adequate care to those in a vulnerable position.

Again, in the more recent cases of denial of a place of safety in the context of the COVID-19 pandemic, the Court does not consider the condition of migrants huddled up onboard of a rescuing ship for several days sufficiently serious to require immediate disembarkation. But it goes further, as the *Etienne* case shows. Etienne Maersk is a Danish commercial vessel which, in August 2020, rescued, in Maltese SAR waters,[32] 27 migrants including minors and a pregnant woman. Following their standoff at sea for a month with no State offering a port of safety, the ECtHR replies to the request of the applicants without indicating to the Government of Malta, under Rule 39, any interim measure (*O.O. and O.A.* v. *Malta*). It concludes that 'bearing in mind that the Maltese authorities do not intend to take any active action for the applicants' return to Libya, the current situation on the vessel is one where there is no risk of imminent and irreparable harm, or danger to life or health of the applicants'.[33]

Therefore, the abstract nature of interim measures and the seemingly hands-off approach of the Court in those cases of rescue and standoff at sea is grounded in the lack of imminent risk of removal to Libya, as if *refoulement* were the only cause of concern in these types of cases.[34] Accordingly, it finds no immediate danger for the migrants' life and health as to request disembarkation. It is hence to be asked what the acceptable threshold of suffering is to warrant the intervention of both State authorities and potentially the Court. Therefore, shifting focus from *non-refoulement* (and the foreseeable risk in case of pushback), the next section examines the actual conditions of migrants compelled to long standoffs at sea with no possibility both to land in the closest safe port and to rapidly access identification and asylum procedures, thereby investigating whether these practices can configure inhuman and degrading treatments and de facto deprivation of personal liberty under Articles 3 and 5 of the ECHR.

3 Prolonged Containment of Migrants at Sea: A Case of de facto Deprivation of Liberty?

In order for jurisdiction to arise under Article 1 of the ECHR, a State has to exercise effective control over the victims and the act that causes the human rights violation, and when performing such act, the authorities of the State have to know, or should have known, 'of the existence of a situation of real and imminent danger for the life of a specific individual or group of individuals, and fail to take the necessary measures within their area of responsibility that could reasonably be expected to prevent or to avoid that danger'.[35]

Once a State is aware of the distress situation, establishes (even visual) contact with the vessel or persons in danger and exercises its public powers by means of a territorially based decision to activate/non-activate/delay rescue services or close its ports, 'it starts at the same time to exercise authority and control over these persons, sufficient to trigger the application of the [relevant human rights treaty]'.[36] Therefore, even in the absence of direct physical force and contact, State's control can still be deemed 'effective' when it determines (even at a distance through, for instance, the use of helicopters or drones or the order not to enter their territo-

30 ECtHR, *B. G. and Others* v. *Italy*, App no. 5604/19 (29 January 2019).

31 ECtHR, *Rackete and Others* v. *Italy*, App no. 32969/19 (26 June 2019).

32 For a report on the role of private vessels engaged in rescue operations, *see* J.P. Gauci, *When Merchant Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations*, *BIICL* (2020).

33 ECtHR, *O.O. and O.A.* v. *Malta*, App no. 36549/20 (25 August 2020).

34 Rome's civil court ruling n. 229117/2019, which affirms that migrants falling under Italian jurisdiction have a *right to enter the Italian territory to lodge an asylum claim* in accordance with Art. 10(3) of the Italian Constitution (emphasis added).

35 Inter-American Court of Human Rights (IACtHR), *The Environment and Human Rights*, Advisory Opinion, OC-23/17 (15 November 2017), para. 120.

36 E. Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm', 21 *German Law Journal*, at 431 (2020).

rial waters/ports) the course of events bringing the persons in question under its jurisdiction.[37]

While the location (either territorial or extraterritorial) in which the sovereign authority nexus is established is immaterial in determining jurisdiction, what is instead needed is that 'effective control' is actually expressed, whether through physical contact and use of force, by means of the execution of a policy plan (it being a broader military, security or rescue/non-rescue/non-entrée operative framework), or via the enforcement of a piece of legislation or a court decision, which influences a certain situation and the position of those subjected to an exercise of public powers either domestically or outside territorial borders.[38]

The criteria developed by the Strasbourg organs with regard to the provision of adequate reception and dignified detention conditions have been primarily applied to the cases of both people deprived of their liberty and migrants/asylum-seekers physically present within the territory of the concerned States.[39] However, the ECHR also has an extraterritorial scope,[40] and breaches of Article 5, concerning the illegitimate deprivation of personal liberty, could be established also in cases of detention at sea of people placed under the respondent State's 'effective control'.[41] Therefore, the ECHR is not only applicable to people onboard rescuing vessels which are within the territorial waters of European coastal States, but it also applies on the high seas with regard to persons whose delay in disembarkation and prolonged permanence aboard a vessel in dire conditions is due to a 'no-entry' *order*, repeatedly issued by the authorities of a coastal State under whose remote surveillance they are placed.

The policy of 'closed ports' preventing people from disembarkation in Europe for several days has not only involved NGO rescuing boats on the high seas, but also coastguard assets, such as the Italian vessels *Diciotti* and *Gregoretti* moored in Italian territorial waters for a long time.[42] In these last instances, the indication of a place of safety by Italian authorities was de facto denied because of the lack of an agreement at the EU level on the distribution of the passengers after their landing at the port of Catania.

With regard to the compatibility of prolonged confinement of migrants on a rescuing vessel with Article 5 of the ECHR – whereby 'everyone has the right to liberty and security of person' – the Commissioner for Human Rights of the Council of Europe has affirmed that:

> human rights concerns may also arise from [delays in the disembarkation of migrants] when they result in the *de facto* deprivation of liberty of rescued persons by blocking their disembarkation from rescue vessels. When confinement on board is the result of State action, this may give rise to questions over the lawfulness of deprivation of liberty, and the existence of sufficient safeguards, such as judicial review under Article 5 of the Convention.[43]

As rescuing vessels have been used as a sort of *unconventional transit area* for migrants waiting for their disembarkation and admission, the case law of the ECtHR on transit zones can be of some assistance in making a few observations. In *Ilias and Ahmed* v. *Hungary*,[44] the Grand Chambre lists the following factors to determine whether 'confinement of foreigners in airport transit zones and reception centres' can be defined as deprivation of liberty:

a. the applicants' individual situation and their choices;
b. the applicable legal regime of the respective country and its purpose;
c. the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by the applicants pending the events; and
d. the nature and degree of the actual restrictions imposed on or experienced by the applicants.[45]

In *Ilias* v. *Hungary*, the Court held that confinement in the transit zone was not detention as it is an open zone

37 *Hirsi Jamaa and Others* v. *Italy*, App no. 27765/09 (23 February 2012), para. 180. *See also Women on Waves* v. *Portugal*, App no. 31276/05 (3 February 2009). On contactless jurisdiction, *see* M. Giuffré and V. Moreno Lax, 'The Raise of Consensual Containment: From "Contactless Control" to 'Contactless Responsibility' for Migratory Flows', in S. Juss (ed.), *The Research Handbook on International Refugee Law* (September 2019).

38 For a detailed examination of extraterritorial jurisdiction, *see* M. Giuffré, 'A Functional-Impact Model of Jurisdiction: Extraterritoriality before the European Court of Human Rights', *Questions of International Law* (2021), at 53-80.

39 *See* L. Tsourdi, 'EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?', in V. Chetail, P. de Bruycker & F. Maiani (eds.), *Reforming the Common European Asylum System* (2016).

40 On the extraterritorial application of the ECHR to migrants at sea, *see*, inter alia, *Hirsi Jamaa and Others* v. *Italy*, above n. 37; and *Women on Waves* v. *Portugal*, above n. 37. *See also* M. Giuffré, 'Watered-Down Rights on the High Seas: *Hirsi Jamaa and Others* v. *Italy*', 61(2) *International and Comparative Law Quarterly* (2012), at 731-747.

41 *See, e.g.*, *Vassis and Others* v. *France*, App no. 62736/09 (27 June 2013); *Medvedyev and Others* v. *France* [GC], App no. 3394/03, ECHR 2010; *Rigopoulos* v. *Spain* (dec.), App no. 37388/97 (12 January 1999).

42 The legal tools used to prevent access to Italian ports have been the directives issues by the Ministry of the Interior (Directive 18 March 2019; Directive 4 April 2019; Directive 15 April 2019; Directive 15 May 2019) and then the so-called 'Decreto sicurezza-bis' (Law-Decree 14 June 2019 no 53, converted into law on 8 August 2019, no 77). For a thorough examination of the 'Security Decrees', *see* G. Cataldi, 'Euro-Mediterranean Experiences on Management of Migration Governance', 9 *EuroMediterranean Journal of International Law and International Relations* (2021), https://revistas.uca.es/index.php/paetsei/article/view/8099/8054; and S. Zirulia, 'Decreto Sicurezza-bis: novità e profili critici', *Diritto Penale Contemporaneo* (2019). https://archiviodpc.dirittopenaleuomo.org/d/6738-decreto-sicurezza-bis-novita-e-profili-critici.

43 Council of Europe Commissioner for Human Rights, *Lives Saved. Rights Protected. Bridging the Protection Gap for Refugees and Migrants in the Mediterranean*, at 31 (2019), https://archiviodpc.dirittopenaleuomo.org/upload/9457-mediterranean-paper-en-web.pdf.pdf.

44 ECtHR, *Ilias and Ahmed* v. *Hungary* (GC), App no. 47287/15 (21 November 2019). For an examination of the case, *see* V. Stoyanova, 'The Grand Chamber Judgment in *Ilias and Ahmed* v. *Hungary*: Immigration Detention and How the Ground Beneath Our Feet Continues to Erode', *Strasbourg Observers*, https://strasbourgobservers.com/2019/12/23/the-grand-chamber-judgment-in-ilias-and-ahmed-v-hungary-immigration-detention-and-how-the-ground-beneath-our-feet-continues-to-erode/.

45 *Ilias and Ahmed* v. *Hungary*, above n. 44, para. 217. *See also* ECtHR, *Z.A. and Others* v. *Russia*, App nos. 61411/15, 61420/15, 61427/15, 3028/16 (28 March 2017), para. 145.

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that migrants can voluntarily leave to go back to Serbia. Likewise, in several other cases, the Court has accepted that containment of migrants on the Greek islands in semi-open facilities does not amount to unlawful detention under Article 5(1) and does not infringe Article 3.[46] In this respect, can rescuing vessels be labelled as open facilities? The shipwrecked would have concretely no possibility to safely leave the ship and lawfully enter a European country to have their case examined and potentially seek asylum – jumping overboard being their only option.

People held aboard vessels would be employed as a leverage to exercise pressure on the EU to reach an agreement with other Member States on migrants' relocation. Although deprivation of liberty for immigration-related purposes is permissible in certain circumstances (for example, to verify the aliens' right to enter), migrants confined on rescuing boats would be in a condition of *de facto deprivation of liberty*, which is arbitrarily justified on the basis of their status rather than a detention order.[47] The duration of their confinement would not be predictable, the statutory basis for their de facto deprivation of liberty would be uncertain as the underlying domestic rules are not sufficiently precise and foreseeable[48] and they would have no chance to access proceedings for challenging the lawfulness of their pre-admittance de facto detention. Therefore, being unable to enjoy procedural protection pending the event, they would be subjected to a measure of actual restriction with no individualised assessment[49] as to whether such de facto deprivation of liberty would be reasonable,[50] necessary[51] and proportionate.[52]

Protection of fundamental rights must always be 'practical and effective' rather than 'theoretical and illusory'.[53] As emphasised by the Court in *Khlaifia* – a case concerning detention of migrants aboard a vessel moored at the port of Palermo for 10 days – the aim of the ECHR is to 'protect […] human rights in a practical and effective manner'.[54] Accordingly, it affirms that no one should be deprived of his or her liberty in an arbitrary fashion, even in the context of a migration crisis.[55] Following the *Khlaifia* requirements, in the various cases of containment of migrants onboard military, NGO or merchant vessels, rescued persons were not the recipients of clear detention orders and there was no legal basis for their administrative detention. In some cases, for instance, the Ministry of the Interior rather justified their deprivation of personal liberty as a measure to protect Italian borders.

As a consequence, in the *Diciotti* case, the Italian Tribunal of Ministries, in January 2019, started a procedure requesting the Senate the authorisation to proceed against the Ministry of the Interior, Mr Salvini, for having deprived 177 migrants, including children, of their personal liberty.[56] They were indeed illegitimately forced to remain onboard the ship moored at the port of Catania for a long period of time.[57] Despite the Senate not conceding the authorisation to proceed against the Ministry, the case is particularly important as, for the first time, the judiciary acknowledged the unlawful compression of personal liberty onboard Italian vessels rescuing migrants at sea.

In the *Gregoretti* case, the Tribunal of Ministries held that Italy had an obligation to transfer the shipwrecked to a place of safety, and unlike the *Diciotti* case, the Italian Senate conceded the authorisation to proceed against the former Ministry of the Interior. Mr Salvini failed indeed to indicate a place of safety for 131 people rescued by the coastguard naval asset *Gregoretti* in July 2019, thereby constraining them onboard and limiting their freedom of movement.[58]

46 *See, e.g., J.R. and Others* v. *Greece*, App no. 22696/16 (25 January 2018); *O.S.A. and Others* v. *Greece*, App no. 39065/16 (21 March 2019); *Kaak and Others* v. *Greece*, App no. 34215/16 (3 October 2019).

47 With regard to the *Diciotti* case, *see* F. Cancellaro and S. Zirulia, *Border-Criminologies* (2018), www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/10/controlling.

48 On the general principle of legal certainty when deprivation of liberty is concerned, *see, e.g.*, the ECtHR *Khlaifia and Others* v. *Italy* (GC), App no. 16483/12 (15/12/2016), para. 92. On the concept of *'de facto deprivation of liberty'* of migrants held aboard rescuing vessels and whose disembarkation is significantly delayed, *see* F. Cancellaro, 'Dagli Hotspot ai "Porti Chiusi": Quali Rimedi per la Libertà "Sequestrata" Alla Frontiera?' *3 Diritto Penale Contemporaneo*, at 436 (2020), https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/DPC_Riv_Trim_3_2020_Cancellaro.pdf.

49 The Court has expressed reservations as to the practice of States to automatically detain asylum-seekers on dry land without an individual examination of their particular needs. *See, e.g., Thimothawes* v. *Belgium*, App no. 39061/11 (04 April 2017) para. 73; *Mahamed Jama* v. *Malta*, App no. 10290/13 (26 November 2015) para. 146.

50 The Court has confirmed that the length of the detention of foreign nationals subjected to a deportation order should not exceed that reasonably required for the purpose pursued. *See, e.g., A. and Others* v. *the United Kingdom*, App no. 3455/05, para. 164 (19 February 2009); *Yoh-Ekale Mwanje* v. *Belgium*, App no. 10486/10 (20 December 2011) para. 119.

51 On the test of necessity, with regard to Art. 5(1)(f) concerning the use of detention with a view to deportation, *see* ECtHR, *J.R. and Others* v. *Greece*, above n. 46, para. 111. The Court has paid particular attention to the specific situation of detainees, including the existence of any vulnerability that would render detention inappropriate. *See, e.g., Thimothawes* v. *Belgium*, App. no. 39061/11 (4 April 2017) paras. 73, 79-80.

52 Reasonableness, proportionality and necessity are principles that European States should adhere to also as contracting parties to the Covenant on Civil and Political Rights. *See* for example HRC, 'General Comment No 35: Article 9 (Liberty and Security of Person)' (2014) CCPR/C/GC/35, 18. On detention of migrants at sea in different geographical contexts, *see* V. Moreno-Lax, D. Ghezelbash, & N. Klein, 'Between Life, Security and Rights: Framing the Interdiction of "Boat Migrants" in the Central Mediterranean and Australia', *Leiden Journal of International Law*, at 715-740 (2019). With regard instead to the Court of Strasbourg and the principle of proportionality in cases of detention of aliens, *see, e.g., Saadi* v. *UK*, App no. 13229/03 (29 January 2008) paras. 68-74.

53 *See Hirsi Jamaa and Others* v. *Italy*, above n. 37, para. 175.

54 *Khlaifia and Others* v. *Italy*, above n. 48, para. 64.

55 *Ibid.*, para. 106.

56 *See* Tribunal of Catania, sez. Reati Ministeriali (23 January 2019), www.senato.it/Web/AutorizzazioniAProcedere.nsf/dfbec5c17bce92adc1257be500450dad/4c5c5e58bdf39bbac125838c00431f69/$FILE/Doc.%20IV-bis,%20n.%201.pdf. *See also* F. Cancellaro and S. Zirulia, 'Caso Diciotti: Il Tribunale dei Ministri Qualifica le Condotte del Ministro Salvini come Sequestro di Persona Aggravato e Trasmette al Senato la Domanda di Autorizzazione a Procedere', *Sistema Penale Contemporaneo* (28 January 2019).

57 According to the Tribunal of Ministries, the Ministry of the Interior, *'abusando dei suoi poteri (aveva) privato della libertà personale 177 migranti di varie nazionalità giunti al porto di Catania a bordo dell'unità navale di soccorso U. Diciotti della Guardia Costiera Italiana'*.

58 The Tribunal of Ministries held that *'l'omessa indicazione del 'place of safety' da parte del Dipartimento Immigrazione, dietro precise direttive del minis-*

To be more precise, being coercively forced to spend several days in a confined space at sea, whether onboard State vessels or NGO rescuing boats, implies a total annulment, rather than a mere limitation, of the freedom of movement.[59] For instance, in the *Open Arms* case concerning the vessel of the NGO *Proactiva*, which rescued more than a hundred persons in August 2019, the Italian Judge of Preliminary Investigations (GIP) explicitly recognised that the shipwrecked were subject to an 'illegal and deliberate deprivation of the personal liberty of rescued migrants, compelled onboard for a considerable lapse of time against their will […]',[60] in analogy with the *Diciotti* case.

These measures of de facto deprivation of personal liberty do not find a legal basis in the Italian legal system as they are not executed in accordance with the norms on the administrative detention of foreigners and can therefore amount to a violation of Article 5 of the ECHR. Moreover, as clarified by Cancellaro, while the shipwrecked formally had the possibility to challenge the ministerial order impeding their landing at the Italian ports, a remedy is considered effective under Article 5(4) of the ECHR only if the applicants can be immediately released upon determination of their unlawful detention.[61] However, as the *Open Arms* case demonstrates, despite the Administrative Tribunal of Lazio issuing an interim measure concerning their disembarkation, the rescuing vessel was forced at sea for another week because of the denial of a place of safety by the Ministry of the Interior. Additionally, it cannot be neglected that the difficulty for lawyers to reach people on the vessel made access to a remedy, in practice, not effective.

4 Prolonged Containment at Sea as Inhuman and Degrading Treatment

In most cases, the shipwrecked rescued in the Mediterranean are either migrants who have suffered atrocious treatment on their way to Europe, especially in Libyan detention camps, or asylum-seekers fleeing war or persecution in their home countries. Their high level of anxiety and uncertainty over their future, the risk of removal to Libya, past experiences of torture and a conflict-ridden relationship with other rescued people with whom they share confined and overcrowded spaces, in a status of promiscuity, inadequate sanitary facilities, limited possibility of movement, dearth of supplies and critical unhygienic conditions make their despair so unbearable that they often see suicide as the only way to escape the situation.[62] Such exacerbation of the conditions onboard also proves dangerous for the crew as tensions can suddenly escalate, and suicide threats force the rescuers to maintain constant vigil on the shipwrecked.[63] The increasing deterioration of the physical and mental health of the passengers is testified not only by numerous suicide attempts[64] but also by several emergency evacuations.

Despite the inevitable hurdles faced by people who are subjected to measures of 'contained mobility' at sea,[65] they should not be deprived of the benefit of the rights guaranteed by the ECHR. For instance, the reception conditions of asylum-seekers have been scrupulously gauged by the ECtHR,[66] with special attention to the rights of unaccompanied minors.[67] In the landmark *MSS* v. *Greece and Belgium* case, reception conditions were considered degrading under Article 3 as the applicant lived in Greece in extreme poverty without receiving any subsistence, accommodation or access to sanitary facilities. Due consideration should be given, according to the Court, to the vulnerability of the applicants because of the traumatic experiences they have endured before and during their journey to Europe.[68]

Likewise, in a case of removal of asylum-seekers to Italy (*Tarakhel* v. *Switzerland*), the Court, considering the applicants' inherent vulnerability, held that the reception conditions of an Afghan couple with six children gave rise to an issue under Article 3 of the Convention as the possibility that asylum-seekers were left in Italy without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, was not unfounded.[69] The conditions of confinement and its duration are both elements taken into account by the ECtHR in assessing whether immi-

tro dell'Interno, ha determinato una situazione di costrizione a bordo, con limitazione della libertà di movimento dei migranti'.

59 On the difference between Art. 5 and Art. 2 Protocol 4 of the ECHR, *see* F. Viganò, 'Art. 2 Prot. n. 4 Cedu: Libertà di circolazone', in G. Ubertis and F. Viganò (eds.), *Corte di Strasburgo e Giustizia Penale* (2016) at 353-59.

60 Translation by the author of the statement of the Italian GIP who described the Open Arms case as an '*illecita e consapevole privazione della libertà personale dei migranti soccorsi, costretti a bordo per un apprezzabile lasso di tempo contro la loro volontà*'. *See* Open (31 August 2019), www.open.online/2019/08/31/salvini-smentito-dal-giudice-ecco-perche-litalia-deve-accogliere-i-migranti/.

61 Cancellaro, above n. 48, at 15.

62 SeaEye, 'Attempted Suicide Aboard the Alan Kurdi After Ten Days of Blockade', https://sea-eye.org/en/attempted-suicide-aboard-the-alan-kurdi-after-ten-days-of-blockade/.

63 Reuters, 'Ship Captain Docked in Italy After Migrant Suicide Fears' (10 June 2019), www.thenationalnews.com/world/europe/ship-captain-docked-in-italy-after-migrant-suicide-fears-1.881128.

64 The Maritime Executive, 'Rescue Vessel Declares Emergency After Six Migrants Attempt Suicide', www.maritime-executive.com/article/rescue-vessel-declares-emergency-after-six-migrants-attempt-suicide. *See also* Procura della Repubblica presso il Tribunale di Agrigento, Decreto di sequestro preventivo di urgenza, at 10 (20 August 2019), www.asgi.it/wp-content/uploads/2019/08/2019_8_20_Agrigento_Open_Arms.pdf.

65 S. Carrera and R. Cortinovis, 'Search and Rescue, Disembarkation and Relocation Arrangements in the Mediterranean: Sailing Away from Responsibility?', *CEPS Papers in Liberty and Security*, at 5 (2019).

66 *M.S.S.* v. *Belgium and Greece*, App no. 30696/09 (21 January 2011) para. 251; ECtHR, *N.H. and Others* v. *France*, App nos. 28820/13, 75547/13 and 13114/15 (02 October 2020) paras. 184-86.

67 *See, e.g.*, *Khan* v. *France*, App no. 12267/16 (28 February 2019) para. 11; *SH.D. and Others* v. *Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, App no. 14165/16 (13 June 2019); *M.D.* v. *France*, App no. 50376/13 (10 January 2020); *Rahimi* v. *Greece*, App no. 8687/08 (5 July 2011) paras. 87-94.

68 *M.S.S.* v. *Belgium* and *Greece*, above n 66, paras. 232-238.

69 *Tarakhel* v. *Switzerland*, App no. 29217/12 (4 November 2014) paras. 120 and 122.

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gration detention can raise issues under Article 3 of the Convention, especially in respect of accompanied children,[70] unaccompanied children[71] and adults with specific health needs,[72] including pregnant women.[73]

Article 3 of the Convention imposes on the authorities a positive obligation to guarantee detention conditions which are compatible with the principle of human dignity. Moreover, the modalities of execution of the measure must not subject the person concerned to distress or hardship of an intensity which exceeds the inevitable level of suffering inherent in detention, and the health and well-being of the person must be adequately ensured.[74]

Despite the inevitable hurdles faced by people who are subjected to measures of 'contained mobility' at sea,[75] they should not be deprived of the benefit of the rights guaranteed by the ECHR. Subjecting rescued people to hardship exceeding the unavoidable level of suffering inherent in situations of de facto deprivation of liberty, as well as State unwillingness to offer prompt dignified solutions and appropriate physical and psychological care to so many persons in need of humanitarian assistance, and in most cases in need of international protection, amounts to a serious breach of the prohibition of inhuman and degrading treatment under international law.[76]

Regarding the assessment of the severity of security measures applied to suspected terrorists, the Court has developed three criteria relative to the threshold of degrading treatment:

a. the conditions of detention, including their duration and stringency;
b. the continued relevance of the goal pursued by a certain measure; and
c. the impact of these measures on the personality of a detainee and on his/her physical and mental health.[77]

There is no reason why this trichotomy compositing the 'degrading treatment' threshold with regard to inland detainees should not also be applied to distressed migrants, who are not suspected of any crimes, but nevertheless are the addressees of special measures of remote surveillance and control, held in sub-standard conditions at sea, as if their presence in the territory of a European State could irremediably endanger its security and public safety, thus involving a sense of debasement and humiliation. Where States, with knowledge of both the circumstances and the potential unlawful consequences of their conduct, force shipwrecked on unfitting and overcrowded rescuing vessels for prolonged periods of time where they are de facto immobilised (with no concrete possibility to safely leave the boat), the ECHR is at risk of being breached. And where such overly stringent measures of containment at sea – pursuing the goal of keeping migrant people outside the territorial borders of a certain State – have an impact on the passengers' physical and mental health augmenting their sense of powerlessness, frustration and anguish for the uncertainty of their future (including the fear of being handed over to the agents of their past persecution and suffering), the risk of infringement of the Convention rights is even greater, thereby warranting the urgent intervention of either national or international judges.

5 A New 'Practical and Realistic Approach' Towards Migrants and Asylum-Seekers?

Numerous cases concerning pushbacks of migrants at the Southern and Eastern border of Europe, detention in transit zones, rescue, pullbacks and confinement at sea are currently pending before the Court of Strasbourg. Assessing the role of the Court as a guarantor of the fundamental rights of migrants and asylum-seekers in Europe is therefore even more pressing.

The Court's decisions in the last decade since the Arab Spring, despite the language of 'crisis' used to describe the current trend of European migration, have been more migrant-protective than its initial judgments on detention of newcomers.[78] Crisis discourses have had more influence when assessing, instead, the conditions of migrants' detention facilities, justifying, for instance, exclusion of violations of Article 3.[79]

Nevertheless, something has significantly changed over the last years to the point of wondering whether a new well-established approach of the Court heavily leaning towards recognising State sovereignty over migrants' liberty interest is on the rise. Indeed, in a substantive

70 *See Popov* v. *France*, App nos. 39472/07 and 39474/07 (19 January 2012) para. 22; *S.F. and Others* v. *Bulgaria*, App no. 8138/16 (7 December 2017).

71 *See Mubilanzila Mayeka and Kaniki Mitunga* v. *Belgium*, App no. 13178/03 (12 January 2007) para. 39; *Rahimi* v. *Greece*, above n. 67, paras. 87-94; *Abdullahi Elmi and Aweys Abubakar* v. *Malta*, App nos. 25794/13 and 28151/13) (22 November 2016); and *Moustahi* v. *France*, App no. 9347/14 (25 June 2020).

72 *Aden Ahmad* v. *Malta*, App no. 55352/12 (9 December 2013) para. 97; and *Yoh-Ekale Mwanje* v. *Belgium*, App no. 10486/10 (20 December 2011).

73 *Mahmundi and Others* v. *Greece*, App no. 14902/10 (31 July 2012).

74 *Torreggiani and Others* v. *Italy*, App nos. 43517/09, 46882/09, 55400/09 (8 January 2013) para. 65.

75 Carrera and Cortinovis, above n. 65, at 5.

76 For a critique of the policy of 'port closure', *see* Algostino, above n. 6.

77 *See* Y. Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR', 21(3) *Netherlands Quarterly of Human Rights* (2003), at 407.

78 *See, e.g.*, *Saadi* v. *UK*, above n. 52. For a more migrants-protective approach, *see, e.g.*, *Abdullahi Elmi and Aweys Abubakar* v. *Malta*, App nos. 25794/13 and 28151/13 (22 February 2017) (minor asylum-seekers); *O.M.* v. *Hungary*, App no. 9912/15 (5 October 2016) (LGBT asylum-seekers); *Abdi Mahamud* v. *Malta*, App no. 56796/13 (3 May 2016) (asylum-seekers with physical and psychological illnesses); *M.S.S.* v. *Belgium and Greece*, above n. 66 (destitute asylum-seekers). The Court has also implicitly stipulated that detention under the terms of Art. 5(1)(f) shall not be applicable to asylum-seekers. *See, e.g.*, *S.D.* v. *Greece*, App no. 53541/07 (11 June 2009) para. 62; ECtHR, *Ahmade* v. *Greece*, App no. 50520/09 (25 September 2012) paras. 139, 143; *R.U.* v. *Greece*, App no. 2237/08 (7 June 2011) paras. 94-95.

79 *See, e.g.*, *Khlaifia and Others* v. *Italy*, above n. 48; *J.R. and Others* v. *Greece*, above n. 46; and *Ilias and Ahmed* v. *Hungary*, above n. 44.

body of recent case law, the Court has prioritised States' prerogatives to both control borders and prevent access to their territory and to asylum, whether this is requested at the geographical frontier of a European country or through embassies and/or consular representations.[80]

Indignation as to the legal uncertainty for the fundamental rights of African migrants attempting to seek asylum in Europe has been sparked, for instance, by the Grand Chamber's conclusion in *ND and NT* v. *Spain*.[81] While it confirms that jurisdiction is fully engaged at border zones,[82] and that enough evidence had been submitted as to the summary return of the applicants as part of a State policy,[83] the Court surprisingly finds no violation of Article 4 of Protocol 4 (prohibition of collective expulsion) despite the lack of access to an individualised examination of the applicants' claims by Spanish authorities.

More specifically, the Court refers to a completely new test as not having access to theoretical means of legal entry constitutes 'own culpable conduct' for sub-Saharan African nationals attempting to cross into Spain from Morocco.[84] They are described as persons 'deliberately taking advantage of their large numbers and use force…to create a clearly disruptive situation which endangers public safety'. And even more questionable – considering it has been drafted by a member of the highest human rights court in Europe – is the attached Concurring Opinion by Judge Pejchal, which gives the impression that the protection of the Convention should be limited only to citizens from Europe as they are the only ones fulfilling their fiscal duties and paying their contributions to the Council of Europe.[85]

In punishing the victims, the Grand Chamber accents the right of States to control their borders,[86] a method already affirmed in *Ilias and Ahmed* v. *Hungary*,[87] stating that 'its approach should be practical and realistic, having regard to the present-day conditions and challenges'. In this case, the Grand Chamber departs from its previous jurisprudence concerning migrants and asylum-seekers by adding reference to the right of States to prevent 'foreigners circumventing restrictions on immigration'.[88] This argument, reiterated also in *ZA and Others* v. *Russia*,[89] fails to acknowledge that the persons attempting to irregularly cross the European border are asylum-seekers claiming protection, and that, as such, should not be penalised, as this would be at variance with Article 31 of the Refugee Convention.

At a time when far-right or populist movements proliferate, favouring a persistent criminalisation of migration, it is of paramount importance that the Court plays such a reinvigorated role. But as Barker observes, the incidents involving migrants and asylum-seekers are 'more complicated than the far-right or populist accounts allow'. People confined onboard stranded vessels 'are caught in a paradigm shift. They [are] caught in a historic movement away from humanism and human rights norms and toward resurgent nationalism and its darker undercurrents [which] are backed by the violence of the State.'[90]

The Court of Strasbourg is increasingly inclined to rely on a 'practical and realistic approach' in times of emergency, namely, 'a mass influx of asylum-seekers and migrants at the border, which [necessitates] rapidly putting in place measures to deal with what [is] clearly a crisis situation'.[91] However, despite current difficulties and States' pressure, the Court seems to have developed its own strong antibodies allowing it to return to (or consolidate) its more migrant-protective approach,[92] thereby challenging what may become a perpetual (rather than exceptional) emphasis on a migration crisis.[93]

6 Conclusion

The duty to rescue people at sea, which can be considered terminated only upon disembarkation in a *place of safety*, is a State obligation which prevails over ministerial directives and decrees closing ports to vessels transporting people saved at sea. These restrictive policies raise cogent questions also in relation to the health and well-being of stranded migrants. Indeed, the lack of appropriate actions by the State promptly denying a safe port to the shipwrecked may raise issues crossing over into Article 3 of the ECHR, Article 5 (right to personal liberty) and/or the substantive and/or procedural limb of Article 2 (right to life), when such omission results in the death of any of the passengers.[94] This article also emphasised the self-effacing role assumed by the ECtHR in those cases in which applicants have asked the Court to indicate interim measures to make the protection of shipwrecked' rights practical and effective. It did not only concede ample leeway to States in the management of their external borders, but it also failed to provide a sharp and clear answer on whether prolonged

80 *See, e.g., MN and Others* v. *Belgium*, App no. 3599/18 (5 May 2020).
81 *N.D. and N.T.* v. *Spain* (GC), App nos. 8675/15 and 8697/15 (13 February 2020) para. 39. *See, e.g.*, Hakiki, '*N.D. and N.T.* v. *Spain:* Defining Strasbourg's Position on Push Backs at Land Borders?' *Strasbourg Observers*; N. Markard, 'A Hole of Unclear Dimensions: Reading *ND and NT* v. *Spain*', https://eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/.
82 *N.D. and N.T.* v. *Spain*, above n. 81, paras. 104-10.
83 *Ibid*., paras. 87-88.
84 *Ibid*., paras. 208 and 210. *See also* Hakiki, above n. 81.
85 *N.D. and N.T.* v. *Spain*, above n. 81, Concurring Opinion, para. 3.
86 *N.D. and N.T.* v. *Spain*, above n. 81, para. 167.
87 *Ilias and Ahmed* v. *Hungary*, above n. 44, para. 213.
88 *Ibid.*
89 *Z.A. and Others* v. *Russia*, App nos. 61411/15, 61420/15, 61427/15 and 3028/16 (21 November 2019) para. 135.
90 V. Barker, 'The Criminalization of Migration', in G. Shaffer and E. Aaronson (eds.), *Transnational Legal Ordering of Criminal Justice* (2020), at 155.
91 *Ilias and Ahmed* v. *Hungary*, above n. 44, para. 228. *See also* Stoyanova, above n. 44.
92 *See, e.g., R.R.* v. *Hungary*, App. no. 36037/17 (2 March 2021).
93 A. Sinha, 'Defining Detention: The Intervention of the European Court of Human Rights in the Detention of Involuntary Migrants', 50 *Columbia Human Rights Law Review*, at 226 (2019).
94 On lack of medical or specialist care leading to suicide, *see Coşelav* v. *Turkey*, App no. 1413/07(9 October 2012) para. 39.

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confinement at sea could cause immediate, serious and irreparable harm to the shipwrecked. Overall, by requesting generic interim measures, the Court might run the risk of missing the opportunity to set higher human rights standards or be involved in ongoing crisis, wars or generalised emergencies.

Closing ports and refusing/delaying the indication of a place of safety to migrants at sea are questionable practices at least for two intertwined reasons. First, they can bring about paradoxical and tragic scenarios in which the rescued shipwrecked endlessly meander at sea waiting for a political agreement among States on their relocation, with an inevitable deterioration of both the humanitarian conditions onboard and the mental health of the passengers. Second, these policies are grounded on the short-sighted assumption that the duty to protect life is exhausted as soon as State authorities guarantee emergency care to the most vulnerable migrants,[95] thus proceeding, in some cases, to the evacuation of pregnant women, very ill persons and minors only. States bear an obligation to protect both the right to life and the right not to be subjected to inhuman and degrading treatments to *everyone* onboard.

Rescued people need immediate assistance and disembarkation on dry land in the *next place of safety*, as they all are, first and foremost, *shipwrecked* (not migrants attempting to irregularly cross the frontier)[96] and their mental health would be even more compromised should their permanence on the restrained environment of a vessel be prolonged. This principle applies to all persons rescued at sea, including male migrants travelling alone, a group traditionally neglected although they face the cumulative vulnerability of various traumatic events and migration-related contextual circumstances, such as a desperate journey, which continues even after rescue at sea; a better treatment meted out to other 'traditionally' well-recognized vulnerable sub-groups; and the ensuing deterioration of mental health linked to a sense of hopelessness, desperation and lack of self-esteem.[97]

Even though the changing context and the temporality of a state of emergency could lead to a softening of restrictive, security-driven or discriminatory measures, States must not lose sight of States' law of the sea obligations and human rights duties, including their protective orientation. Therefore, neither ministerial decrees and directives nor ordinary laws and policies can derogate from the international law obligation to disembark the shipwrecked in a place of safety closest to the area of distress. Indeed, any measures affecting the enjoyment of fundamental rights under international law (in particular, the right to life, the absolute right not to be subjected to torture, inhuman and degrading treatment and the right to personal liberty) would find an insurmountable hurdle in the pre-eminence of the individual and the core principle of human dignity.

95 For a detailed examination of the concept of 'vulnerability', *see* F. Ippolito, 'La vulnerabilità quale principio emergente nel diritto internazionale dei diritti umani?', 2 *Ars interpretandi* (2019), at 63-94.

96 For a similar argument, *see* C. Pitea and S. Zirulia, 'Friends, not foes:' qualificazione penalistica delle attività delle ONG di soccorso in mare alla luce del diritto internazionale e tipicità della condotta', *SIDIBlog* (26 July 2019).

97 J. Arsenijević et al., '"I Feel Like I Am Less Than Other People": Health-Related Vulnerabilities of Male Migrants Travelling Alone on Their Journey to Europe', 209 *Social Science & Medicine* 86 (2018), www.sciencedirect.com/science/article/pii/S0277953618302818?via%3Dihub.

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