ISSN 2384-9169
Fascicolo n. 4 - 2020
rivista.eurojus.it

State sovereignty *vs.* migrants' individual rights: looking for a new balance[1]

DI BRUNO NASCIMBENE* E ALESSIA DI PASCALE**

1. I would like to make some remarks, also in the light of the attractive project Globmig ("New Approaches to understanding and modelling Global Migration Trends") and the fruitful discussion that has just followed its presentation. This interdisciplinary project has tried to develop conceptual tools to better understand and model global migration patterns and to investigate the implications of legal and policy reforms at a European level. I take my cue from the Working Summary Paper, that has been prepared in view of todays' seminar, and where, addressing the topic of our session ("State sovereignty vs. migrants' individual rights"), it can be found the following emblematic phrase: "Migration is an area typically affecting the heart of State sovereignty and the right to control the entry and the stay of aliens in the national territory". In fact, the affirmation of the sovereign rights of the State with regard to admission and expulsion of foreigners has become a "mantra" (I use an expression by Professors Jean-Yves Carlier and Sylvie Sarolea) of the Strasbourg Court's case law (see the recent judgment by the European Court of Human Rights [GC], M.N. and others v. Belgium, Application no. 3599/18, 5 May 2020, mentioning a similar case decided by the European Court of Justice (Grand Chamber) of 7 March 2017, X and X v État belge, Case C-638/16 PPU). But it is this same jurisprudence that raises the question that has been discussed in this session. The migrant

[1] Concluding reflections in the margins of the session "State sovereignty *vs.* migrants' individual rights", within the framework of the seminar "Changing trends and dynamics of EU Migration Law and Governance: a critical assessment of the evolution of migration legislation and policy in Europe", organized by EDEM - Équipe Droits Européens et Migrations, University of Louvain (UCLouvain), on 17 November 2020. The paper is the result of a common reflection, but specifically paragraphs 1 and 4 are by Bruno Nascimbene and 2 and 3 by Alessia Di Pascale.

* Emeritus Professor of EU Law – Former Professor of International Law, Università degli Studi di Milano.
** Associate Professor of EU Law, Università degli Studi di Milano.

is a person who enjoys human rights, protected by the complex (a sort of "cornucopia") of international human rights law instruments. In this regard I would like to make six observations.

a. *The historical evolution.* The evolution in favour of the affirmation of the rights of the foreigner, in particular of the migrant, cannot be well understood unless a historical analysis is made and the changes that classical international law has undergone are assessed.

b. *The case-law.* The case law has played an important role in changing the traditional approach. I believe that one topic that deserves reflection is the evolution the European jurisprudence, of the Strasbourg and Luxembourg Courts. But how much has it influenced and does it influence national case-law? How sensitive are the judges in the European States to these decisions and orientations, which are sometimes judged extraneous or even eccentric to the national system? Sovereign or nationalist currents are "contagious" and inspire judges to make distinctions or "caveat" that lead to conclusions that are dangerous for the protection of personal rights. I recall statements in case-law, such as the Italian one, in which, after acknowledging the obligations of international law and those imposed by European Union law, the prerogatives of the State were nevertheless affirmed, referring both to the requirements of public order and security, and to a necessary evaluation of the historical moment. I must say that it seems clear that the phenomena of international crime and terrorism are decisive in influencing the decisions of national courts.

c. *The European Union Law.* The third point concerns the still existing gaps in European Union law, which should be the most intensive form of cooperation to date. Immigration for economic reasons, in order to seek work, is left to the competence of the States. This is stated in Article 79(5) of the Treaty on the Functioning of the European Union and confirmed by the recent European Commission's Pact on Migration and Asylum of last October. In these terms it is §6.6. dedicated to the truly generic objective (allow me at least one criticism on the vagueness) of developing legal pathways to Europe.

d. *The solidarity principle.* Another topic that deserves attention, as demonstrated by this first session, and which will certainly be the subject of the next ones, is the principle of solidarity between States. I am not referring to the theoretical one, contained in Article 80 TFEU, but to the actual one. There is no effective integration if there is no implementation of that fundamental rule on loyal cooperation (Article 4 TEU). The issue is much broader than the one we are examining today, and not only from a legal point of view, but also from a political one. Just think of the litigation before the Court of Justice which saw both the Council and the Commission opposing Slovakia and Hungary in the first case (judgment of 6.9.2017), Poland, Hungary and the Czech Republic in the second case (judgment of 2.4.2020).

e. *Human rights Law and Sovereignty.* Professor Chetail's presentation and the discussion confirmed the difficulty of making humanitarian law prevail over the traditional sovereign power of States, also with regard to the issuing of humanitarian visas and the

applicability of art. 25 of the Visa Code which provides for an exceptional issuing of a visa with limited territorial validity "on humanitarian grounds" (art. 25, 1 a). Today's J*us gentium* is very different from that of de Francisco de Vitoria, Emmeric de Vattel, Hugo Grotius: authors that Chetail studied well when he examined the issues of the sovereignty of States, the movement of people, the possible limits to the power of States, being recognized an obligation of hospitality and reception and the granting of asylum. It can be said that exceptions to State discretion in the fields of movement and migration were allowed, recognising the role of *jus necessitatis* (right of necessity) and *jus communicationis* (right of communication). *Jus gentium* has certainly evolved over time.

f. *International Law and Human Rights Law.* A final note is inspired by the conclusions of a paper by Chetail of some years ago (2005, *International Legal Protection of Migrants and Refugees: Ghetto or Incremental Protection? Some Preliminary comments*). International law, thanks to the affirmation of human rights protection, has changed: "it is gradually moving from a State-centre to an individual-oriented paradigm". There is a dynamic orientation that is getting stronger and stronger. Bilateral and multilateral treaties between States and acts adopted by the United Nations in the field of human rights contribute to it: I recall in the past, but the principles are still current, the Declaration on the Human Rights of Individuals Who are not National of the Country In Which They Live (adopted by the General Assembly resolution 40/144 of 13 December 1985) and the Final Report of the Special Rapporteur David Weissbrodt "Prevention of discrimination. The rights of non citizen" prepared for the sub-commission on the promotion and protection of human rights (E/CN.4/Sub. 2/2003/23, 26 May 2003).

2. However, despite the significant evolution that has characterized the theme over the past decades, with the emergence of human rights, States seek to jealously preserve their sovereignty, to the detriment of the fundamental rights of the person. Emblematic of this persistent ontological dichotomy are the statements contained in the most recent Compact for safe, orderly and regular migration, where in affirming the will to "ensure effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle", it is reiterated "the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law". Although essentially aimed at fostering international cooperation among all relevant actors on migration, without establishing any new set of migrant's rights and anyhow devoid of a binding legal nature, as expressly pointed out in the text, it is in any case the result of a negotiation process that has involved the majority of the international community (albeit with some significant distances) of which it must be considered to express at least a shared vision on the established points.
In its attempt to mediate between opposing interests the most recent attitude of the two European Courts appears ambiguous. Although they have contributed to important affirmations, such as for instance the wider European scope of the principle of *non-refoulement*, formulated "in absolute terms and enshrining one of the fundamental values of democratic societies" (see among the many judgements, ECtHR, *Chahal v.* The *United Kingdom*, Application No.

22414/93, 15 November 1996), a value of civilisation closely bound up with respect for human dignity (ECtHR, *Khlaifia and Others v. Italy* [GC], Application no. 16483/12, 15 December 2016; ECJ, *Aranyosi e Căldăraru*, joined cases C-404/15 e C-659/15 PPU, 5 April 2016, ECLI:EU:C:2016:198), such as to impose obligations on states also with reference to return of foreigners to an intermediate country, compared to other universal instruments that tolerate conditions and exceptions, they nonetheless show a worrying withdrawal in recent years. The crisis of migrants seems to have interrupted that evolutionary momentum, making *real politik* prevail, as evidenced by the emphasis given in the arguments to States' reasons. As the ECtHR affirmed "its approach should be practical and realistic, having regard to the present-day conditions and challenges. It is important in particular to recognize the States' right, subject to their international obligations, to control their borders and to take measures against foreigners circumventing restrictions on immigration" (ECtHR (GC), 21 November 2019, *Ilias and Ahmed v. Hungary,* Appl. no. 47287/15, § 213; in the same terms ECtHR (GC), 21 November 2019, *Z.A. and Others v. Russia,* Appl. nos. 1411/15, 61420/15, 61427/15 and 3028/1, § 135).
Emblematic of this approach is the most recent judgment in case *N.D. and N.T* (ECtHR [GC], *D. and N.T* v. *Spain*, Application Nos. 8675/15 and 8697/15, 13 February 2020) in relation to what has been defined by Judge Pinto de Albuquerque as the "more burning issue in European politics today", i.e. the *refoulement* of migrants at land borders or in transit zones and the resulting State liability for human-rights breaches during immigration and border-control operations (see his concurring opinion in ECtHR, *.A. and others v. Lithuania*, Application no. 59793/17, 11 December 2018). The conclusion that the conduct implemented by the Spanish government does not integrate a violation of Article 4, Protocol 4 is supported by the identification of an exception (the applicant's own conduct) of which there is no trace in the norm, well formulated in absolute terms. And so eight years ago in *Hirsi* (ECtHR, [GC], *Hirsi Jamaa and Others* v *Italy*, Application No. 27765/09, 23 February 2012), the ECtHR, while showing understanding for the difficult conditions in which the States at the external borders of Europe are, for the burden and the migratory pressure to which they are subjected, declared nevertheless that the absolute character of the rights secured by Article 3 cannot absolve a State of its obligations under that provision. At the beginning of this year, in that case which has caused so much uproar, it has instead assessed differently the position of a border state exposed to massive migratory flows. Faced with migrants, including asylum seekers, who attempted to enter irregularly, by taking advantage of their large numbers and using force, the Court found that the circumstance that the Spanish border guards did not identify them individually could be justified and the lack of individual removal was thus a consequence of their own conduct. Accordingly, it did not find a violation of Article 4 of Protocol No. 4.
This upheaval of established principles that emerges from the most recent pronouncements shows an approach in the relationship between sovereignty and migrants' human rights worthy of attention as the law appears almost bent and subordinated to the needs of politics. International law ends up no longer being an embankment to sovereignty, but a support to its possessive claims.

3. Considering the many cues of this fruitful discussion I would like to choose one of the topics covered and focus on the theme of borders, a legal concept, but also a metaphor evocative

of the barrier between citizens and foreigners, and which in recent years has often materialized in the elevation of walls, real or only threatened.

The issue is that of internal and external border controls. How many times has the Schengen system, defined by the European Commission as "one of the greatest achievements of the EU", has appeared to yield under the blows of the claimed interest of the State to protect the population, in the face of the terrorist threat, the invasion of migrants or more recently the health emergency? Concern for the defense of that achievement and the will to preserve it has led the Commission to intervene, encouraging Member States to better use their police powers and to give precedence to police checks before deciding on the temporary reintroduction of internal border controls, thus recommending the use of mechanisms that should be exceptional and occasional, but which may become instead structural insofar as they allow to preserve the apparent area without internal borders (see *Commission Recommendation of 12.5.2017 on proportionate police checks and police cooperation in the Schengen area*, in OJ L 122 of 13.5.2017, p. 79). And also in this case the Commission operates a reference to the needs posed by the reality of the facts: "in the current circumstances of threats related to public policy or internal security from terrorism and other serious cross-border crime and risks of secondary movements of persons who have irregularly crossed the external borders, the intensification of police checks in the entire territory of Member States…may be considered necessary and justified". Despite the various provisions contained in the Schengen Borders Code prohibiting the implementation of internal border controls focused on nationality, race or ethnic origin (see notably art 7 (2) and 22), in the practice of many internal borders such controls are well directed towards foreigners, and far from random and occasional. And so the wish for a revision of the Schengen system becomes expressed (as stated by President Macron in recent days after the terrorist attacks in Nice) or is implemented in fact.

Or I am thinking of the use of bilateral readmission agreements or administrative arrangements on transfer of migrants, enforced in violation of substantive and procedural obligations related to the implementation of the right of asylum. Problems that scholars have in recent years well highlighted (see in particular the case of German bilateral arrangements on transfer of asylum seekers). These critical issues also closely affect Italy, and its land borders. The latter issue has recently become the subject of great attention, so much so as to solicit also a parliamentary question, due to the increasingly frequent use of the so-called chain rejections on the basis of bilateral readmission agreements. In July, in its reply, the Ministry of Interior admitted the ordinary recourse to informal readmission procedures in Slovenia "even if the intention to apply for international protection is expressed". This triggers a sequence that ignores the attempts of migrants to make explicit and formalize their protection needs, through the submission of applications that would activate the complex (and too slow - at least so perceived by States) mechanisms of the Dublin Regulation and the various directives of the Common European Asylum System. And so through this chain, ignoring people's requests, and contradicting the rights affirmed in the different instruments of EU law and the above mentioned principles upheld by the Courts, the migrant is expelled, sending him/her out of the EU territory.

In this framework, an embankment seems rather represented by some national courts. I am thinking of the statements made by the French Council of State (8 July 2020) and the Slovenian Administrative Court (17 July 2020) last summer. Both originate from the appeal

introduced respectively by a Central African citizen and a Cameroonian citizen, who were rejected when crossing the internal borders (respectively between Italy and France and Slovenia and Croatia), on the basis of bilateral agreements, despite having expressed before the border authority the intention to submit an application for international protection. In the Slovenian case the applicant, after being rejected towards Croatia, was then sent back to Bosnia and then expelled from the European Union. The French Council of State called for the respect of the procedural obligations established in national law and in particular those arising from the Dublin Regulation, considering that the refusal to receive the application and the subsequent referral to the country of origin (Italy) had constituted a serious violation of the right of asylum. The Slovenian court also found the prohibition of collective expulsions (Article19 §1) and the principle of non-refoulement (Article19 §2) to be violated, expressly recalling the provisions of the Charter. The following month, however, the Slovenian Supreme Court, in another case, adopted different principles, a sign of the existing uncertainty and confusion, so that even the timid signals to invoke the principle of the rule of law risk to remain isolated and without follow-up.

But the desire not to allow foreigners to cross that physical and symbolic barrier, from which state sovereignty suffers an inevitable compression, due in particular to the obligations arising from the EU system, clearly emerges in the new pact on immigration and asylum. Without dwelling on the questionable mechanism that should guarantee European solidarity, I would instead like to recall the set of rules proposed to prevent entry into the European Union, keeping the migrant in a no-man's-land, which facilitates the rapid return to the country of origin and provenance, without even crossing that border line.

4. At the conclusion of these findings we can say that the most recent evolution of the normative framework seems to go in a different direction compared to the last decades, probably also due to the significant increase in the migratory phenomenon. The balance tends to lean in favor of sovereignty through the development of a legal framework of increasing closure to entry, the more widespread use of tricks that exploit all the margins left by the rules in force to which it seems to add the European courts' condescension. The risk is that in the absence of adequate management measures, sovereign anxieties and impulses will prevail, and that the dramatic impact of the reality will cause the important evolution of the issue to be reversed.