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*Ce mois-ci, l'EDEM bénéficie de l'expertise de **Kristof Gombeer**, Boursier de la Fondation pour la recherche, Flandre et doctorant à la Vrije Universiteit Brussel (Belgique) et à l'Université de Leiden (Pays-Bas), travaillant sur la sécurité maritime, la migration et les droits de l'homme.*

*This month, EDEM benefits of the expertise of **Kristof Gombeer**, Fellow of the Research Foundation, Flanders and PhD candidate at the Vrije Universiteit Brussel (Belgium) and Leiden University (The Netherlands), working on maritime security, migration and human rights.*

## Sommaire

### 1. UN Human rights committee, 27 January 2021, Communication N° 3043/2017, S.A. et al. v MALTA and communication n°3042/2017, S.A. et al. v ITALY – Rescue operations at sea and human rights. **Kristof Gombeer** ..... 3

**Rescue operations at sea – Human rights jurisdiction – Exhaustion of domestic remedies – Right to life – Inhuman and degrading treatment – Right to an effective remedy – Obligations to cooperate.**

*The UN Human Rights Committee has rendered a decision regarding the application of human rights to rescue operations at sea in response to communications brought against Malta and Italy. The Committee's move to apply human rights extraterritorially to persons in distress at sea has generally been welcomed, but the precise reasons for doing so raise several questions. While commentaries have primarily focussed on the 'factual' or 'causal' grounds to prop the so-called extraterritorial*

CeDIE – Centre Charles de Visscher  
pour le droit international et européen  
EDEM – Equipe droits européens et migrations  
Place Montesquieu, 2  
1348 Louvain-la-Neuve  
Belgique  
[cedie@uclouvain.be](mailto:cedie@uclouvain.be)

Éditeur responsable :  
Sylvie Sarolea [[sylvie.sarolea@uclouvain.be](mailto:sylvie.sarolea@uclouvain.be)]

Équipe :



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*'human rights jurisdiction' of Malta and Italy, this contribution focuses on the role of legal obligations arising under the law of the sea in justifying 'human rights jurisdiction'.*

2. C.J.U.E, 11 MARS 2021, M.A., C-112/20, EU:C:2021:197 – L'affaire M.A. : la Cour réaffirme la portée large du principe de l'intérêt supérieur de l'enfant dans le contexte de la directive retour. *Laura Cools*.....16

**Directive 2008/115/CE, art. 5 – Décision de retour prise à l'encontre d'un ressortissant d'un Etat tiers qui est le père d'un enfant citoyen de l'UE – Intérêt supérieur de l'enfant – Droit au respect de la vie familiale - Charte des droits fondamentaux de l'Union européenne, art. 7 et 24 – Convention internationale relative aux droits de l'enfant, art. 3 - T.F.U.E., art. 20 - Droit de séjour dérivé aux membres de la famille d'un citoyen de l'Union « sédentaire ».**

*Dans son arrêt récent du 11 mars 2021, rendu dans l'affaire M.A. contre la Belgique, la Cour de justice de l'Union européenne a affirmé que l'article 5 de la directive retour, lu en combinaison avec l'article 24 de la Charte des droits fondamentaux de l'Union européenne, impose aux États membres de tenir dûment compte de l'intérêt supérieur de l'enfant avant d'adopter une décision de retour, même lorsque le destinataire de cette décision n'est pas le mineur lui-même, mais le père de celui-ci. Ainsi, la Cour souligne l'importance du principe de l'intérêt supérieur de l'enfant et la nécessité d'une interprétation large de ce principe.*

3. Court of cassation (ITALY), II Civil Chamber sent. 12 november 2020 – 24 february 2021, n° 5022 – “The ineliminable core constituting the base of personal dignity”: the road-map for the protection of people fleeing the effects of climate change? *Francesca Raimondo* .....25

**Court of Cassation (Italy) - Vulnerability - Environmental Disaster - Climate Change - Humanitarian Protection.**

*In the ordinance no. 5022/2021, the Italian Court of Cassation has established the principle of law that trial judges should follow whilst evaluating the presence of serious threats in cases of repatriation to the country of origin, and the consequent vulnerability, that legitimates the need for humanitarian protection. Starting from the principles affirmed by the United Nations Human Rights Committee in the renowned case *Ioane Teitiota v. New Zealand*, the Court of Cassation establishes that “the ineliminable core constituting the base of personal dignity” represents the basic limit below which the right to life and the right to decent living conditions are not ensured. This limit must not be passed in the case of armed conflict as well as when there is a context that in concreto puts at risk of being breached (or going below the above-mentioned minimum threshold) the fundamental right to life and the paramount principles of freedom and self-determination, including situations of social, environmental or climate degradations, climate changes or the unsustainable exploitation of natural resources.*

## 1. UN HUMAN RIGHTS COMMITTEE, 27 JANUARY 2021, COMMUNICATION N° 3043/2017, S.A. ET AL. V MALTA AND COMMUNICATION N°3042/2017, S.A. ET AL. V ITALY

### *Rescue operations at sea and human rights*

*Kristof Gombeer\**

For the first time, a human rights body has evaluated rescue operations at sea in the context of unauthorised migration. On 27 January 2021, the Human Rights Committee adopted two decisions – one concerning [Malta](#), another concerning [Italy](#). The decisions addressed communications brought by the relatives of Palestinian and Syrian nationals who lost their lives during a shipwreck in the Mediterranean Sea.

With regard to Malta, the Committee declared the communication inadmissible. Although the Committee considered the victims to have been within the 'jurisdiction' of Malta for the purposes of Article 2 (1) of the [International Covenant on Civil and Political Rights](#) ('ICCPR' or 'Covenant'), it determined that they had not exhausted remedies available in Malta. The Committee thus refrained from scrutinising Malta's obligations under the Covenant. With regard to Italy, however, the Committee found that the individuals came within the scope of application of the Covenant. Under the substantive limb of the right to life (Article 6 ICCPR) the Committee found that Italy failed to meet its due diligence obligations to protect the individuals at sea. Under the procedural limb of the right to life, it ruled that Italy failed to conduct a prompt investigation of the allegations relating to a violation of the right to life.

The two decisions have been accompanied by dissenting and concurring opinions by several independent experts serving in the Committee. They have moreover attracted attention in the wider legal community, with commentaries from [Busco](#), [Citroni](#), [Milanovic](#), and Vella de Fremeaux and Attard ([Part I](#) and [Part II](#)).

This contribution reports on the facts of the case and the decisions of the Committee, which must be read closely together (A). Secondly, it discusses the Committee's reasoning with regard to the interaction between human rights law and the law of the sea (B).

#### **A. Facts and Ruling**

For obvious reasons, every minute counts for search and rescue operations at sea. Yet time also plays a crucial role in determining which party bears which legal responsibilities at a given moment. The facts in *S.A. and Others* read as a complex timeline whereby the conduct of the victims and the respondent governments is disputed to the minute.

Clear is that a fishing vessel provided by smugglers departed outside the Libyan port of Zawarah on the 11<sup>th</sup> of October 2013 at 01:00 in the morning. Onboard: around four hundred individuals, including the relatives of the authors (one Palestinian and several Syrian nationals). 113 km south of

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\* Kristof Gombeer is a Fellow of the Research Foundation, Flanders and PhD candidate at the Vrije Universiteit Brussel (Belgium) and Leiden University (The Netherlands), working on maritime security, migration and human rights.

Lampedusa and 218 km from Malta, the vessel was allegedly 'shot at by a boat flying a Berber flag' and started taking in water.

According to the authors of the communication, the individuals on board the vessel contacted the Italian emergency number at 11:00 in the morning. According to the Italian government, however, it only received the first call around 12:26 at noon. The parties more or less agreed that around 13:00, the Maritime Rescue Coordination Centre of Rome (MRCC) contacted the Rescue Coordination Centre of Malta (RCC), given that the vessel found itself within the Search and Rescue Region (SAR Region) of Malta based on the coordinates provided through the distress call. According to Italy, the MRCC informed the Maltese RCC about a vessel seeking assistance while also providing information on three vessels closest to the distress scene: two commercial vessels and one vessel of the Italian Navy, the *Libra*. Around 13:17, the individuals aboard the vessel called MRCC Rome again. They were told to contact RCC Malta. At 13:34, MRCC Rome issued a navigational warning to all the vessels in the relevant area. According to the authors, they called the Maltese RCC at 13:34, while according to the Maltese government, the first contact with the vessel occurred at 14:22 when the RCC itself called the vessel to receive an update about their situation. This occurred after MRCC Rome, acting as 'first RCC' (see further below, 2.), formally requested RCC Malta by fax to take over the coordination of the distress incident at 14:05.

At 14:35, Malta formally took over the coordination as the RCC responsible for the area in which the distress incident occurred. Yet already before taking over, RCC Malta instructed a Maltese coast guard vessel, the *P61*, to proceed to the distress scene (14:10), ordered one of its aircraft to conduct a flight over the relevant area (14:25) and issued another navigational warning to all vessels in the area (14:30). According to the Maltese government, it subsequently requested MRCC Rome to confirm the availability of any Italian vessels in the vicinity (14:35). MRCC replied that it had no Italian coast guard vessels available but that an Italian Navy vessel – the *Libra* – was in the vicinity of the distress scene (15:09). It appears from the facts that a disagreement ensued between MRCC Rome and the Italian Navy command. According to the authors, the Navy command ordered the *Libra* to move *away* from the distress scene (15:37). Maltese requests addressed to Italy asking to instruct the *Libra* to proceed to the distress scene as it was the vessel closest to the scene (16:22) and to put the *Libra* in direct contact with RCC Malta (16:38) were denied by Italy. The *Libra* was said to be engaged in surveillance activities from which it could not abscond. Finally, MRCC confirmed to RCC Malta at 16:42 that the *Libra* was going to proceed to the distress scene. Yet by 16:55, the *Libra* had still not changed its course in the direction of the scene. Malta's attempts to contact the *Libra* directly remained unanswered.

The vessel with 400 people on board capsized around 17:07. The Maltese *P61*, which had been on its way since 14:10 and a small boat launched from it, reached the scene between 17:45 and 17:50. Both started retrieving individuals from the capsized vessel and the sea and rescued 147 individuals. Ten minutes later, at 18:00, the *Libra* arrived. It rescued 56 individuals. Two hundred individuals, including 60 children, died.

The relatives of the victims contacted the Maltese Red Cross but did not pursue legal remedies in Malta. Malta itself did not initiate an investigation into the rescue incident. Neither Italy took the initiative to investigate the shipwreck. One of the authors, however, submitted a complaint to the

Public Prosecutor of Agrigento, Sicily, while another submitted a complaint to the Prosecutor of Syracuse. The latter opened a criminal procedure against unknown persons, yet the author did not receive any information on its outcome. Following an additional complaint, a third criminal proceeding was initiated in Rome. By the end of 2018, this proceeding was still ongoing.

### **1. Complaint**

The authors complained that both Malta and Italy had violated both the substantive and procedural limb of the right to life by failing to take all appropriate steps to safeguard the lives of their relatives and by failing to investigate the incident.

With regard to Malta, they submitted that RCC Malta did not promptly respond to the distress calls and had delayed the request for an intervention by the Italian Navy, knowing that Maltese vessels were unable to provide prompt assistance. Had the *Libra* received a prompt request, it could have rescued their relatives (Malta decision, § 3.1). They also claimed that Malta had failed to undertake any investigation into the shipwreck, which not only violated the procedural limb of the right to life (§ 3.2) but also caused the authors anguish, amounting to inhuman and degrading treatment (§ 3.3).

With regard to Italy, the authors complained that Italy had violated the substantive obligations pertaining to the right to life by failing to promptly pass the distress calls that the MRCC Rome received to the competent SAR authorities, namely RCC Malta. They also allegedly failed to promptly inform the people on board to contact RCC Malta and had thereby delayed the rescue operation. They also submitted that had the Italian authorities instructed the *Libra* to proceed to the distress scene, the vessel could have reached the one in distress in one hour and thus well before it capsized (Italy decision, § 3.1). Similar to their complaint directed to Malta, the authors argued that Italy had breached the procedural limb of the right to life and the prohibition of inhuman and degrading treatment by failing to undertake an investigation to identify and punish those responsible for the loss of life (§§ 3.2-3).

### **2. Admissibility**

While the Committee found that the victims had come within the 'human rights jurisdiction' of Malta for the purposes of triggering the applicability of the Covenant, it declared the communication inadmissible because the authors had failed to pursue any legal remedies in Malta. With regard to Italy, the Committee was satisfied that the authors had sufficiently pursued a remedy in the Italian legal system while also affirming that the victims had moreover come within the 'jurisdiction' of Italy.

Of particular importance is the Committee's reasoning with regard to establishing the applicability of the Covenant both with regard to Malta and Italy ('human rights jurisdiction').

Malta argued that the shipwreck had occurred on the high seas and not within the Maltese territorial sea. It moreover submitted that rescue operations do not amount to an exercise of jurisdiction. It therefore concluded that there was no jurisdictional link between the victims and Malta that would justify human rights scrutiny under the Covenant (Malta decision, § 4.3). The Committee stated that

it is undisputed that the vessel in distress was located in the SAR area for which the State party authorities undertook responsibility to provide for overall coordination of search and rescue operations, in accordance with section 2.1.9 of the SAR Convention and Regulation 33 of the SOLAS

Convention (*sic*). It further notes that it is undisputed that the State party authorities formally accepted to assume the coordination of the rescue efforts at 2.35 p.m. on the day of the shipwreck. The Committee therefore considers that the State party exercised effective control over the rescue operation, potentially resulting in a direct and reasonably foreseeable causal relationship between the State parties' acts and omissions and the outcome of the operation (§ 6.7).

Because the distress incident occurred within the Maltese SAR Region, the Committee had to rely on a different argument to establish human rights jurisdiction vis-à-vis Italy. Italy itself argued that 'the responsibility for protecting the lives onboard a vessel on the high seas belongs to the competent MRCC of the State responsible for the SAR area' and that in the present case, that responsibility belonged to RCC Malta (Italy decision, § 4.5). It submitted that just because Italy intervened in distress situations in an 'autonomous and non-obligatory manner' in another SAR area did not amount to assuming responsibility for that area (§ 4.5). The Committee established the human rights jurisdiction of Italy in the following words, which are worth citing in full:

The Committee considers that in the particular circumstances of the case, *a special relationship of dependency* had been established between the individuals on the vessel in distress and Italy. This relationship comprised of *factual elements* – in particular, the initial contact made by the vessel in distress with the MRCC, the close proximity of ITS *Libra* to the vessel in distress and the ongoing involvement of the MRCC in the rescue operation and – as well as *relevant legal obligations* incurred by Italy under the international law of the sea, including a duty to respond in a reasonable manner to calls of distress pursuant to SOLAS Regulations and a duty to appropriately cooperate with other states undertaking rescue operations pursuant to the International Convention on Maritime Search and Rescue. As a result, the Committee considers that the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy, and that they were thus subject to Italy's jurisdiction for the purposes of the Covenant, notwithstanding the fact that they were within the Maltese search and rescue region and thus also subject concurrently to the jurisdiction of Malta. The conduct of criminal investigations in Italy regarding the conduct of various naval officers involved in the incident further underscores the potential legal responsibility (albeit under domestic law) of Italian officials vis-à-vis the victims of the incident (§ 7.8, italics added).

According to the Committee, both *factual* and *legal* elements justified the establishment of human rights jurisdiction. As the communication was therefore admissible with regard to Italy, the Committee continued to evaluate Italy's conduct in the light of the right to life.

### 3. Merits

Under the substantive limb of the right to life, the Committee considered that Italy failed in its due diligence obligations (Italy decision, § 8.5). Even though the responsibility for coordinating SAR in the relevant area lay with Malta, the Committee found that Italy had not promptly answered the distress call, did not correctly communicate with RCC Malta with a view to handing over the coordination of the incident, and failed to explain as to why it had not dispatched the *Libra* to the incident but instead instructed it to move away from it.

Under the procedural limb of the right to life, the Committee considered that Italy provided 'no clear explanation for the long duration of the ongoing domestic proceedings, other than a general reference to their complexity.' Together with the fact that Italy had no timeline for its conclusion in

view, the Committee found that it had also failed to meet its obligation to conduct a prompt investigation of alleged violations of the right to life (§ 8.7).

## B. Discussion

It is the first time that a human rights body evaluates rescue operations at sea in the context of unauthorised migration. Several human rights bodies have, of course, rendered decisions in the context of unauthorised maritime migration: from the Inter-American Commission on Human Rights in 1997 (*Haitian Centre for Human Rights et al v the United States of America*) and the Committee against Torture in 2008 (*JHA v Spain*), to the European Court of Human Rights ('ECtHR') in 2012 (*Hirsi Jamaa et al v Italy*). Yet these cases concerned persons already rescued or intercepted and not situations in which persons in distress still needed assistance. The ECtHR has ruled on a maritime rescue operation in the past in *Leray et al v France* (2001). The incident, however, concerned the shipwreck of a commercial vessel and occurred in a context predating the international legal rescue regime as it is in force today. The Court moreover declared the application inadmissible as far as France's conduct in light of the substantive limb of the right to life was at issue. To that end, it relied on the findings of the French courts that had ruled that the authorities had made no serious mistakes during the rescue operation. To the extent that the ECtHR has evaluated rescue operations on the merits, it has only done so in the context of a climber accident in mountainous terrain within the territory of a state (*Furdík v Slovakia*, 2008).

This discussion firstly provides a brief legal analysis under the law of the sea (1). When subsequently discussing the human rights approach to rescue operations, the focus does not lie as much on the competing 'models' that circulate for triggering human rights obligations (covered in the academic commentaries mentioned above), but on how the Committee sets up the interaction between human rights law and the international law of the sea (2 and 3).

### 1. Two types of obligations under the law of the sea

Paolo Busco has remarked that 'there is little doubt that conduct by Italy and Malta was in breach of fundamental provisions on search and rescue of the [United Nations Convention on the Law of the Sea](#) ('UNCLOS'), the [International Convention on Maritime Search and Rescue](#) ('SAR Convention') and the Regulations adopted pursuant to the [International Convention for the Safety of Life at Sea](#) ('SOLAS Convention').' While this is certainly true with regard to Italy, this is not that clear-cut when it comes to Malta's conduct. In this regard, one must distinguish between two types of obligations arising under the law of the sea: obligations of assistance and obligations under the search and rescue regime.

#### - *Obligations of assistance*

Firstly, there is the obligation of every captain at sea – irrespective of whether they are navigating a private or a state vessel – under the domestic law of the flag state to proceed to distress scenes in order to assist those in peril. The obligation of flag states to enshrine this obligation into their domestic law is itself based in Article 98 (1) UNCLOS, Regulation 33 of the SOLAS Convention and in customary international law. Under the law of the sea, a state will violate this obligation when it does not impose an obligation to assist in its domestic law or fails to investigate and enforce violations of this obligation vis-à-vis the captains who fail to assist. Moreover, a state will violate this obligation

when state vessels do not assist people in distress. While a flag state may not have the direct control over private vessels necessary to force them to assist people and may thus only be able to sanction them after the facts, authorities ordinarily have the necessary control over their own state assets to ensure interventions at sea. In this regard, Malta did not fail to meet its obligations: once it had information about the distress situation and the approximate location, it dispatched both state aerial and naval assets to the area, even though the naval asset – the *P61* – was a few hours away from the incident and other vessels (two commercial ones and the *Libra*) were known to be closer to the distress scene. Italy, however, clearly violated its obligation because a state vessel over which it had control – the *Libra* – did not immediately proceed to the distress scene, even though it was – like two other commercial vessels – in the vicinity of the scene.

- *Obligations under the search and rescue regime*

Secondly, the obligation to assist must be distinguished from obligations of coastal states arising under the search and rescue (SAR) regime, a regime that complements and supports the system of obligations of captains. The basis of SAR obligations can be found in Article 98 (2) UNCLOS and in more detail in the SAR Convention.

Under the SAR Convention, each coastal state is responsible for establishing a SAR service within their respective SAR Region. Aside from basic elements like SAR vessels and equipment as well as communication facilities to receive distress calls and coordinate SAR operations, a SAR service must have *a legal framework that clarifies which authorities are responsible for search and rescue and which rules apply to their organisation and operations*. The IMO has developed manuals, guidelines, and principles on search and rescue, the most important of which are the [IAMSAR Manuals](#) and the [IMO Guidelines on the Treatment of Persons Rescued at Sea](#) ('IMO Guidelines'). While these instruments are not legally binding as such, states have to, as far as practicable, follow these minimum standards and guidelines in their implementation of the SAR Convention.

Paramount in every case of distress at sea is to determine which MRCC is responsible under the SAR regime. The starting point is that, in principle, the MRCC state in whose SAR Region an incident occurs is responsible for the coordination of assistance (Section 2.1.1 SAR Convention). As the IMO Guidelines make clear, 'SAR services throughout the world depend on ships at sea to assist persons in distress. It is *impossible* to arrange SAR services that depend totally upon dedicated shore-based rescue units to provide timely assistance to all persons in distress at sea' (Section 5.1). If necessary, however, MRCC states must launch and coordinate of search and rescue operations (Section 2.1.9 SAR Convention). Sometimes, however, the MRCC receiving a distress call is a different one than the one in whose SAR Region the distress situation unfolds. That is what happened in the present case. In those situations, it is up to the so-called 'first MRCC' to take initial action – whether that is calling on vessels in the vicinity to assist or to initiate search and rescue. The principally responsible MRCC must then be notified without delay (Section 4.2.1. SAR Convention). Until this MRCC takes over, the 'first MRCC' is required to coordinate the situation (Section 4.3 SAR Convention; Section 3.6 IAMSAR Manual, *Vol. II*). In the instant case, Italy did not immediately inform the Maltese RCC and thus violated the SAR Convention. On the other hand, a coastal state that is *de jure* responsible, like Malta, for a SAR Region in which an incident occurs cannot be legally scrutinised if it did not have any intelligence of that incident in the first place.



The rationale behind the 'first MRCC' system is to ensure that there is always an actor in charge to make sure that assistance is rendered to any person in distress at sea. They can do so firstly by *relaying distress information to vessels in the relevant area* (the so-called 'navigational warnings') and secondly by *undertaking and coordinating search and rescue operations* where necessary. In the present case, Malta issued a navigational warning as soon as it became formally responsible as a SAR coordinator. It moreover immediately dispatched aerial and naval assets to the area. Given that it may be challenging to identify small vessels at sea depending on the weather conditions and information available, it is thus not necessarily straightforward that Malta violated any of its obligations under the SAR regime. Neither can RCC Malta be blamed for not being able to engage the Italian *Libra* ship into the operation, as MRCC states have no authority over foreign vessels within their SAR Region. So-called SAR-instructions by an MRCCs to vessels in its SAR Region must indeed be seen as *requests for cooperation*, reminding the captain of the vessel of their obligations to assist under the legislation of the flag state. Not only are SAR areas no jurisdictional areas, then, but also discrete SAR instructions do not constitute an exercise of 'jurisdiction', 'authority' or 'control' over vessels at sea ([Gombeer and Fink](#)).

The judgement for Italy is different: if it indeed received the first distress call at 11:00 as the authors claim, it manifestly failed to respond promptly in terms of issuing a navigational warning, in terms of contacting the Maltese RCC, and in terms of setting up a rescue operation in case no vessels in the vicinity would be able to assist. Particularly problematic is Italy's failure to rely on a Navy vessel, the *Libra*, to contribute to the saving of lives of the victims: not only in terms of Italy's obligation to ensure that captains of a ship flying an Italian flag render assistance at sea (a violation of the law of the sea identified already above), but in terms of Italy's obligation *as an MRCC state* to have a proper SAR system in place, which includes a clear legal framework and operational plans when it comes to knowing which SAR units a coastal state can rely on. Pursuant to the IAMSAR Manual, a state can and should integrate different types of SAR capacities into a state's operational SAR system:

States may wish to designate specific facilities as SRUs. These designated SRUs may be under the direct jurisdiction of the SAR service *or other State authorities* or may belong to non-Governmental or voluntary organisations. In the latter situation, agreements between the SAR service and these organisations should be developed. SRUs need not be dedicated solely to SAR operations but should have the training and equipment necessary for proficient operations (Section 2.5.3 IAMSAR Manual, *Vol. I*).

The incident in the present case painfully lays bare the limits of the Italian SAR capacities and a lack of internal coordination within the Italian state apparatus. Italy, in its submissions, mentioned it carried out 23 rescue operations that day (§ 4.2). It can be therefore assumed that all the SAR units under the authority of the Italian coast guard may have been occupied. In this sense, one should consider a state's limits in being able to provide SAR services. On the other hand, SAR states are required to integrate where necessary units that may perform SAR services but which resort under different governmental authorities, such as in this case, the Italian Navy. As already mentioned above, it is clear that an MRCC has no authority over foreign vessels on the high seas. That an MRCC is unable to request vessels that are part of the state's own fleet, however, points at inadequacies that a state should internally seek to resolve in to comply with its obligations under the SAR regime. In other words, Italy should have had an internal mechanism in place for an MRCC to be able to rely

on Navy assets when this is reasonable and necessary to save lives. In sum, the instructions given to the *Libra* amounted to not only a violation of the obligation to assist but also a breach of Italy's obligations under the SAR regime.

When every actor does their part, whether as a captain, as a flag state, or as a coastal state responsible for SAR activities, the law of the sea provides a complementary system for coping with distress incidents. Nearby captains will assist, and flag states will ensure that. Nearby coastal states will coordinate such assistance and will dispatch assets of their own where necessary and possible. That does not mean that every person in distress can be helped (on time), as the sea remains an inhospitable environment and resources are limited. In this sense, the law of the sea is about coordinating collective efforts, not about creating rights – neither for states nor for those in distress. In this sense, the law of the sea is also about relations between flag states and those using their flag and between flag states and coastal states cooperating and coordinating their moves.

While the eventual object of this entire regime certainly is the saving of lives, the state obligations under public international law involved are in principle not geared towards creating direct effects and subjective rights which private individuals may seek to enforce. When interacting with human rights law, however, the Committee's decisions suggest that interactive effects may take place: firstly, the law of the sea becomes a legal hook to establish 'human rights jurisdiction' between states and individuals, where human rights law would ordinarily fail to do so absent state power over the individual in distress (2). Secondly, human rights law, in turn, becomes a legal hook in order to enforce and elaborate state obligations under a different public international law regime, in the present case: the law of the sea (3).

## **2. Factual and legal elements for establishing human rights jurisdiction**

Commentators have devoted careful attention to the issue of 'human rights jurisdiction', the concept that functions as a catalyst for triggering relations of duty between state and individual (see references provided in the introduction). The gist is that human rights obligations are justified in relation to individuals when a state exercises *power over* individuals or over stakes in society relevant to the human rights of individuals. Or when they have the *power to* do so. In a territorial context, both have been relatively uncontroversial. Yet, in the extraterritorial context, relations of duty have so far only arisen when a state *exercises* its power, either *over* individuals directly or *over* an area in which an individual finds herself. As an additional ground for justifying relations of duty for human rights purposes, both human rights bodies and commentators have pointed at the relevance of specific *factual relations* between states and individuals, i.e. the *producing of effects* on the enjoyment of rights or the *capacity to produce effects* on the enjoyment of rights.

Almost nobody believes Malta or Italy exercised authority or control over the victims of the distress incident. For many lawyers, the discussion ends there (see, for example, the dissenting Individual Opinion of Andres Zimmermann in Malta decision, Annex; dissenting Individual Opinion of Yuval Shany, Christof Heyns and Photini Pazartzis in Italy decision, Annex 1). The Human Rights Committee in the present decisions (Malta decision, § 6.7; Italy decision, § 7.8) and several commentators have thought otherwise. Most attention has gone to the above-mentioned additional justifications of relations of duty when the commentaries on *S.A. et al v Malta* and *v Italy* came out: the *factual, causal* relations between the respondent states and the victims. For example, [Milanovic](#) has

discussed the 'undoubtedly functional' approach the Committee took by focusing on Italy's 'capacity to help the vessel in distress'. Similarly, [Busco](#) has highlighted the 'impact model', while [Vella de Fremaux and Attard](#) found it 'more plausible to focus' on 'the causal link' created through a delay or failure to act following a distress call. These analyses show that only pragmatism can delimit the consequences of 'functional', 'impact' or 'effects' models for justifying relations of duty between states and individuals; that is, for triggering the applicability of human rights instruments. Elements such as 'proximity', a relationship of dependency that is 'special' (through contact over a phone, for example), or effects of state conduct that are 'direct' and 'reasonably foreseeable' function as filters to be able to draw a line 'somewhere' that somehow seems reasonable. Yet, as Marko Milanovic has pointed out, where can that line be drawn? What is 'proximate'? A vessel an hour away; two hours, perhaps three but not four? Is dependency not 'special' when there has been no contact over the phone?

Less attention has gone to the *legal* elements in the considerations of the Human Rights Committee for establishing 'jurisdiction', namely the two types of obligations arising under the law of the sea (above, **B.1.**): flag state obligations regarding legislating and enforcing assistance (Malta decision, § 6.6; Italy decision, § 7.6), and coastal state obligations regarding search and rescue (Malta decision, § 6.6 and 6.7; Italy decision, § 7.6). Thus concerning Italy, for instance, the Committee held that the 'special relationship of dependency' not only consisted of factual elements but also on 'relevant legal obligations incurred by Italy under the international law of the sea' (Italy decision, § 7.8).

SAR Regions do not constitute areas of jurisdiction. Persons present within them, therefore, cannot be considered as falling within the 'human rights jurisdiction' of the relevant coastal state. That much everyone seems to agree on (see the academic commentaries referred to above). As submitted above (**B. 1.**), *specific actions* related to search and rescue also do not amount to jurisdiction, neither over persons, nor over vessels requested to assist.

Arguably, jurisdiction over someone (be it a person in distress or vessels able to assist) is not what the Committee was aiming at when referring to the relevance of legal obligations arising from another regime of public international law such as the law of the sea. What matters, it seems, is that public international law imposes legal obligations on states that are directly relevant to the enjoyment of human rights of persons, not that public international law allows or imposes obligations to exercise 'jurisdiction' over persons (out of academic fashion for a while since the focus came to lie on actual power). What is perhaps most remarkable about the Committee's decisions, then, is not how 'low' the threshold has become in terms of *factual* relations (a shift from power over persons to the power to do something or to affect someone causally), which is undoubtedly a critical issue of its own, but that *obligations under other treaty regimes are considered as relevant elements for establishing relations of duty for human rights purposes*. State obligations under international law – even when ordinarily perceived as having not directly to do with creating subjective rights or power over individuals – may thus come to function as bases for justifying relations of duty vis-à-vis individuals for human rights purposes if they have a bearing on the enjoyment of rights by individuals.

The repercussion of setting up such an interaction between human rights law and other treaty regimes of public international law would be to widen the bases for establishing 'human rights jurisdiction' significantly; whether it concerns state obligations under international humanitarian law,

international and transnational criminal law, or environmental law to name a few<sup>1</sup>. In the present case, this move towards international legal obligations as a basis of 'jurisdiction' may not seem noticeable, as the issue of the widening of the type of *factual* relations is much more 'out there' in the Committee's decision and in the academic commentaries it has received. The 'capacity' and 'proximity' elements seem more decisive in the present case (perhaps rightly so). Yet, the seeds for new jurisprudential developments drawing on this novel use of international legal obligations as *de jure* bases for establishing 'human rights jurisdiction' (not to be confused with using 'jurisdiction under public international law', such as flag state jurisdiction, as a *de jure* basis for establishing 'human rights jurisdiction', as argued above) may have been laid nonetheless.

One may ask how wide the gap is between the Human Rights Committee's decisions and the jurisprudence of other human rights bodies. While the Inter-American Court of Human Rights in a 2017 Advisory Opinion rejected the role of international legal obligations in triggering 'human rights jurisdiction' (*The Environment and Human Rights*, § 88)<sup>2</sup>, it has accepted the broadening of relevant *factual* relations from control to causation to the end (§§ 101 and 104). In all likelihood, the ECtHR will not embrace a broadening of factual relations to justify relations of duty ('jurisdiction') for human rights purposes. Thus, the Strasbourg Court has only considered a factual effects model to a minimal extent, namely when the effects produced by state conduct are 'isolated, specific and proximate' such as the targeted shooting of persons from a relatively close range. And it has certainly not considered the mere *capacity* of states to produce such effects as normatively relevant for triggering the Convention. However, the water between the Human Rights Committee's reliance on *legal* elements and a growing trend in the Strasbourg case law may not be as deep as one would expect.

Two recent examples involving the procedural limb of the right to life illustrate the point. In *Hanan v Germany* (2021), the ECtHR considered that

Germany was obliged under customary international humanitarian law to investigate the airstrike at issue, as it concerned the individual criminal responsibility of members of the German armed forces for a potential war crime (§ 137).

That Germany in *Hanan* had started its own investigation did not suffice for human rights obligations to be triggered vis-à-vis an airstrike that had occurred in Afghanistan. Yet the fact that Germany had an obligation under international law (obligation to investigate) that had a direct bearing on an aspect of the right to life (its procedural limb) created a relation of duty ('jurisdiction') under the ECHR, even

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<sup>1</sup> Compare: Joint Partly Dissenting Opinion of Judges Grozev, Ranzone and Eicke, §21 in ECHR, 16 February 2021, *Hanan v Germany* App. no. 4871/16 (writing that 'if a State's acceptance of an obligation within the UN framework to conduct criminal investigations creates a jurisdictional link for the Court to apply the Convention, then *any* obligation under international humanitarian law might have the same effect. If not, what is the legal rationale and what are the criteria to distinguish one obligation from the other? As the list of the international obligations potentially engaged is so broad, we are concerned that preserving "jurisdiction" as a tenable concept will become impossible or, at least, will entail a haphazard application of the concept, dependent on unclear legal considerations.')(own italics).

<sup>2</sup> Stating in § 88 of the Advisory Opinion that '[the] request presented by Colombia suggests the possibility of equating the environmental obligations imposed under these regimes [to prevent, reduce and control pollution] to human rights obligations so that the State's conduct in the area of application of these regimes is considered an exercise of the State's jurisdiction under the American Convention. However, ... [even] though compliance with environmental obligations may contribute to the protection of human rights, this does not equate to the establishment of a special jurisdiction common to the States parties to those treaties in which it is understood that any action of a State in compliance with the treaty obligations constitutes an exercise of the jurisdiction of that State under the American Convention.'

though Germany never had factual power over the victims (to the degree embraced by the Strasbourg case law) and without having to accept a functional approach to 'human rights jurisdiction'. In *Makuchyan and Minasyan* (2020), the ECtHR held that Azerbaijan's obligation to enforce a prison sentence by virtue of the right to life under the Convention was triggered by Azerbaijan's obligations under the Council of Europe's Transfer Convention (§ 50). This accrued, even though the underlying facts in that case (murder in a hotel in Hungary committed by an Azeri national, investigated and prosecuted under the Hungarian criminal justice system before transferring the convicted person to Azerbaijan to sit out the remainder of his prison sentence) never came under the authority or control of Azerbaijan.

In both these cases, the consequences of 'human rights jurisdiction' based on legal elements have, however, been limited to obligations under the procedural limb of the right to life. Unlike the Human Rights Committee's decisions, they have not led the Court to consider substantive obligations: for example, Germany's role in the airstrike in Afghanistan as such; or Azerbaijan's hypothetical obligations to prevent the murder in a Hotel in Budapest. For rescue operations and human rights, the question, then, is whether the Strasbourg Court will similarly rely on legal obligations arising under the law of the sea (for instance of flag states to investigate and enforce the obligation to assist of captains under domestic flag state legislation, above **B.1.**) to embrace – be it a circumscribed – 'human rights jurisdiction' accompanied by obligations to investigate under the procedural limb under the right to life.

### ***3. Individuals' enforcement of state obligations under public international law***

The previous section highlighted how the law of the sea could become a legal hook to establish relations of duty between states and individuals ('jurisdiction'), where human rights law would ordinarily fail to do so absent state power over the individual in distress. This final section notes how, the other way around, human rights law, in turn, can become a legal hook to enforce state obligations under a different public international law regime (the law of the sea) and provides an opportunity to elaborate on certain types of state obligations, such as the obligation to cooperate.

Firstly, where the traditional subjects of international law (states) may sometimes seek enforcement against other states (for instance, on behalf of their nationals or vessels flying their flag) before an adjudicative body like the ICJ, ITLOS or an arbitral tribunal, states lack an incentive to seek enforcement of the two types of obligations discussed (the obligation to legislate and enforce assistance and obligations under the SAR regime) in the context of unauthorised seaborne migration. In the present case, it was indeed unlikely that Malta or Italy, or any other state for that matter, would have taken up the plight of the victims and their relatives and seek to address what went down during the rescue operation. For example, it is unlikely that Malta would have taken the initiative to seek an adjudicative forum to complain about Italy's conduct in the present case. The ability for individuals to bring in the law of the sea regime via the human rights door, however, means that state obligations under such regimes may become increasingly subjected to the scrutiny of human rights bodies, even though they may express a sense of restraint in that regard<sup>3</sup>.

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<sup>3</sup> Compare: ECHR, 26 May 2020, *Makuchyan and Minasyan v Azerbaijan and Hungary* App. no. 17247/13§161 (stating that 'the Court stresses in this context that it does not have authority to review the Contracting Parties' compliance with instruments other than the European Convention on Human Rights and its Protocols; even if other international treaties

Secondly, bringing in the scrutiny of the law of the sea obligations via the human rights door allows elaborating on obligations such as the obligations to cooperate (for an analysis of due diligence obligations in the present case, see [Vella de Fremeaux and Attard](#)). The Human Rights Committee, in the present case, unfortunately did not go into depth when it comes to how human rights jurisprudence may shed light on obligations of cooperation in the context of rescue operations (see also dissenting Individual Opinion Hélène Tigroudja in the Malta decision, Annex 3). Therefore, one will need to wait for other adjudicative bodies to address the collective dimension so particular to the law of the sea regime governing distress incidents.

### C. Suggested Reading

**To read the case:** HRC, 27 January 2021, *S.A. et al v Malta* Comm. no. 3043/2017; HRC, 27 January 2021, *S.A. et al v Italy* Comm. no. 3042/2017.

#### Case law:

IACmHR, 13 March 1997, *Haitian Centre for Human Rights et al v the United States of America* Case 10.675.

ECtHR, 16 January 2001, *Leray and Others v France* App. no. 44617/98.

ECtHR, 20 December 2001, *Leray and Others v France* App. no. 44617/98.

CAT, 21 November 2008, *JHA v Spain* Comm. no. 323/2007.

ECtHR, 2 December 2008, *Milan Furdík v Slovakia* App. no. 42994/05.

ECtHR, 23 February 2012, *Hirsi Jamaa and Others v Italy* App. No. 27765/09.

IACtHR, 15 November 2017, *The Environment and Human Rights* OC-23/17.

ECtHR, 26 May 2020, *Makuchyan and Minasyan v Azerbaijan and Hungary* App. no. 17247/13.

ECtHR, 16 February 2021, *Hanan v Germany* App. no. 4871/16.

#### Doctrine:

GOMBEER, K and FINK, M, 'Non-Governmental Organisations and Search and Rescue at Sea' (2018) 4 *Maritime Safety and Security Law Journal* 1-25.

MILANOVIC, M, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011).

RAIBLE, L, *Human Rights Unbound: A Theory of Extraterritoriality* (Oxford University Press 2020).

SHANY, Y, 'Taking universality seriously: functional approach to extraterritoriality in international human rights law' (2013) 7 (1) *Law & Ethics of Human Rights* 47-71.

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may provide it with a source of inspiration it has no jurisdiction to interpret the provisions of such instruments (...). It has no authority, therefore, to determine whether Azerbaijan has complied with its obligations under the Transfer Convention.').

TREVISANUT, S, 'Is there a right to be rescued at sea? A constructive view' (2014) 4 *Questions of International Law* 3-15.

TREVISANUT, S, 'Search and Rescue Operations at Sea' in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 426-50.

TZEVELEKOS, VP and KATSELLI PROUKAKI, E, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?' (2017) 86 *Nordic Journal of International Law* 427-69.

**To cite this contribution:** K. GOMBEER, "Rescue operations at sea and human rights", *Cahiers de l'EDEM*, April 2021.

## 2. C.J.U.E, 11 MARS 2021, M.A., C-112/20, EU:C:2021:197

### *L'affaire M.A. : la Cour réaffirme la portée large du principe de l'intérêt supérieur de l'enfant dans le contexte de la directive retour*

Laura Cools

#### A. Arrêt

##### 1. *Litige au principal : faits et question préjudicielle*

Les faits du litige au principal donnant lieu à la question préjudicielle peuvent être résumés comme suit. Le 24 mai 2018, le requérant, M.A., a fait l'objet d'un ordre de quitter le territoire belge ainsi que d'une interdiction d'entrée. Ces décisions, prises par l'Etat belge, étaient fondées sur les infractions que M.A. avait commises sur le territoire belge (vol à l'étalage) et, partant, sur le fait qu'il devait être considéré comme pouvant compromettre l'ordre public. Cependant, à ce moment-là, M.A. avait une partenaire de nationalité belge et une fille née en Belgique une dizaine de jours avant la délivrance de l'ordre de quitter le territoire belge. Le recours contre ces décisions, introduits par M.A., a été rejeté par le Conseil du contentieux des étrangers (ci-après : le CCE), dans son **arrêt** du 21 février 2019.

M.A. a introduit un pourvoi contre cet arrêt devant la juridiction de recours, *in casu* le Conseil d'Etat, qui estime que le CCE avait considéré, de manière implicite mais certaine, que l'intérêt supérieur de l'enfant ne doit être pris en compte que si la décision administrative en cause vise explicitement l'enfant (voy. *infra*, titre B.1.). Une telle affirmation porte sur l'interprétation de l'article 74/13 de la [loi du 15 décembre 1980 sur l'accès au territoire, l'établissement, le séjour et l'éloignement des étrangers](#) (ci-après, « Loi des Étrangers »), qui transpose l'article 5 de la [Directive 2008/115/CE relative aux normes et procédures communes applicables dans les États membres au retour des ressortissants de pays tiers en séjour irrégulier](#) (ci-après, « la directive retour »), imposant aux Etats membres de tenir dûment compte, entre autres, de l'intérêt supérieur de l'enfant lorsqu'ils mettent en œuvre cette directive.

*In casu*, la juridiction de renvoi a demandé à la Cour si cette obligation s'applique également si le destinataire d'une décision de retour, assortie d'une interdiction d'entrée, est non pas un mineur, mais le père de celui-ci.

##### 2. *Raisonnement de la Cour*

La Cour a répondu à cette question par l'affirmative, en stipulant que l'article 5 de la directive retour, lu en combinaison avec l'article 24 de la [Charte des droits fondamentaux de l'Union Européenne](#), (ci-après Charte) impose aux Etats membres de tenir dûment compte de l'intérêt supérieur de l'enfant, citoyen de l'Union, même lorsque la décision de retour est prise à l'égard du seul parent de l'enfant (pt. 43).

Pour arriver à cette conclusion, la Cour remarque d'abord que l'article 5, sous a) de ladite directive constitue une règle générale qui s'impose aux Etats membres dès qu'ils mettent en œuvre cette directive. Ceci est notamment le cas lorsque, comme en l'occurrence, une décision de retour, assortie



d'une interdiction d'entrée, est prise à l'égard d'un ressortissant d'un pays tiers, en séjour irrégulier sur le territoire d'un Etat membre, et qui est, par ailleurs, le père d'un mineur en séjour régulier sur ce territoire (pt. 32).

Ensuite, la Cour conclut à la nécessité d'une interprétation large de cet article 5. Elle souligne, dans la lignée de sa [jurisprudence antérieure](#), qu'il ne saurait être déduit de cette disposition que l'intérêt supérieur de l'enfant ne doit être pris en compte que lorsque la décision de retour est prise à l'égard d'un mineur, à l'exclusion des décisions de retour adoptées contre les parents de ce mineur (pt. 33).

À l'appui de cette interprétation large de l'article 5 de la directive retour, la Cour invoque, d'une part, l'objectif poursuivi par cette disposition et d'autre part, le contexte général de ladite directive.

Premièrement, par rapport à la finalité poursuivie par l'article 5 de la directive retour, la Cour rappelle que, comme le confirment les considérants 22 et 24 de cette directive, cette disposition vise à garantir le respect de plusieurs droits fondamentaux, dont les droits de l'enfant, tels qu'ils sont consacrés à l'article 24 de la Charte. Elle ajoute qu'une telle interprétation large se déduit également du libellé en des termes larges de l'article 24, § 2 de la Charte et de l'article 3, § 1 de la [Convention internationale relative aux droits de l'enfant](#) (ci-après, « CIDE »), (pts. 35 - 38) (voy. *infra*, titre B.1.).

Deuxièmement, s'agissant du contexte dans lequel s'insère l'article 5, a) de la directive retour, la Cour fait valoir trois arguments. En premier lieu, elle attire l'attention sur l'article 5, c) qui stipule, de façon explicite et à la différence de l'article 5, sous a) et b), que les Etats membres ne doivent prendre dûment en compte que l'état de santé du « ressortissant concerné d'un pays tiers », à savoir, le destinataire de la décision de retour. Ainsi, si le législateur de l'Union avait voulu que les éléments énumérés à cet article ne soient pris en compte que dans le chef du ressortissant d'un pays tiers faisant l'objet de la décision de retour, il l'aurait prévu expressément (pt. 39). En deuxième lieu, elle se réfère à l'article 5, sous b), imposant également de tenir dûment compte de la vie familiale lors de la mise en œuvre de ladite directive (pt. 41). En effet, il est de jurisprudence constante de la Cour que l'article 7 de la Charte, relatif notamment au droit au respect de la vie familiale, doit être lu en combinaison avec l'article 24, §2 de la Charte (voy. e.g. les arrêts *S.M.* pt. 67 et *Chavez-Vilchez* pt. 70). Finalement, toujours dans le cadre du contexte général de la directive retour, la Cour évoque que cette directive contient également quelques autres dispositions qui imposent de tenir compte l'intérêt supérieur de l'enfant, y compris lorsque la décision en cause n'est pas prise à l'encontre de celui-ci (pt. 42).

En conclusion, la Cour déduit de ce qui précède que l'article 5 de la directive retour, lu en combinaison avec l'article 24 de la Charte, doit être interprété en ce sens que les Etats membres sont tenus de prendre dûment en compte l'intérêt supérieur de l'enfant avant d'adopter une décision de retour, assortie d'une interdiction d'entrée, même lorsque le destinataire de cette décision n'est pas le mineur lui-même, mais le père de celui-ci (pt. 43).

## B. Éclairage

### 1. *Le principe de l'intérêt supérieur de l'enfant et la portée de la notion « décisions qui concernent les enfants »*

- *La non-prise en compte du principe de l'intérêt supérieur de l'enfant par le CCE*

Dans le cas d'espèce, M.A. avait notamment invoqué, devant le CCE, la violation de son droit à la vie familiale (au titre de l'article 8 de la CEDH, ainsi que de l'article 7 de la Charte), le principe de l'intérêt supérieur de l'enfant (article 24 (2) de la Charte) et l'article 74/13 de la *Loi des Étrangers* qui stipule que « *lors de la prise d'une décision d'éloignement, le ministre ou son délégué tient compte de l'intérêt supérieur de l'enfant, de la vie familiale, et de l'état de santé du ressortissant d'un pays tiers concerné* ».

Toutefois, malgré son analyse approfondie d'une violation éventuelle du droit à la vie familiale, le CCE ne s'est pas penché sur l'existence éventuelle d'une violation du principe de l'intérêt supérieur de l'enfant. A l'exception de deux petits paragraphes, le CCE n'invoque nulle part le principe de l'intérêt supérieur de l'enfant, et ne procède pas à une appréciation détaillée ni individualisée de ce principe en ce qui concerne la fille de M.A. En effet, dans son *arrêt* de rejet, le CCE fait valoir qu'il n'aperçoit pas l'intérêt de M.A. au grief pris de la violation de l'article 24 de la Charte, dès lors qu'il n'indique pas agir au nom de son enfant mineur (pt. 4.1.). Ensuite, dans son analyse de l'article 74/13 de la *Loi des Étrangers*, le CCE juge, dans une phrase simple, que « *la partie défenderesse a pris en considération la vie familiale du requérant, dans les actes attaqués* » (pt. 4.2.3.). De cette façon, le CCE semble présumer que l'intérêt supérieur de l'enfant ne doit être pris en compte que si la décision administrative en cause vise explicitement cet enfant. Cependant, une telle interprétation n'est pas compatible avec le principe de l'intérêt supérieur de l'enfant en tant que principe fondamental et transversal de droit international (tel que prévu par l'article 3 de la CIDE).

- *Le principe de l'intérêt supérieur de l'enfant et la notion de « décisions qui concernent les enfants »*

La prise en compte de l'intérêt supérieur de l'enfant est le principe essentiel du droit de l'enfant. En droit international, la source principale du principe est l'article 3 (1) de la CIDE, qui prévoit, comme règle transversale, que l'intérêt supérieur de l'enfant doit être une considération primordiale dans toute décision qui le concerne. Par ailleurs, le principe a été codifié à différents niveaux et dans différents contextes. Au niveau de l'UE, par exemple, le principe ne figure pas seulement en droit dérivé (e.g. dans la directive retour), mais il est aussi incorporé comme droit fondamental dans l'article 24 (2) de la Charte, qui se fonde directement sur l'article 3 (1) de la CIDE (voy. « *Explications relatives à la Charte des Droits Fondamentaux* »).

Dans l'arrêt commenté, la Cour invoque, entre autres, l'article 24 (2) de la Charte à l'appui de la nécessité d'une interprétation extensive de l'article 5, sous a) de la directive retour. En effet, la Cour déduit du « libellé en des termes larges » de cet article 24 (2), « *qu'[il] s'applique à des décisions qui, telle une décision de retour adoptée contre un ressortissant d'un pays tiers, parent d'un mineur, n'ont pas pour destinataire ce mineur, mais emportent des conséquences importantes pour ce dernier* » (pt. 36).

Un tel constat est confirmé par l'article 3 (1) de la CIDE, prévoyant, également en des termes larges, que :

« *Dans toutes les décisions qui concernent les enfants, qu'elles soient le fait des institutions publiques ou privées de protection sociale, des tribunaux, des autorités administratives ou des organes législatifs, l'intérêt supérieur de l'enfant doit être une considération primordiale.* »

Bien que tous les éléments de cette définition nécessitent une analyse approfondie, c'est notamment la portée de la notion « décisions qui concernent les enfants » qui est sujet de discussion dans le contexte de l'arrêt analysé. En effet, la question se pose de savoir dans quelle mesure cette notion peut impliquer une décision prise à l'encontre d'un adulte.

A cet égard, le Comité des droits de l'enfant – qui est chargé d'interpréter la CIDE et de surveiller la mise en œuvre de celle-ci par ses États parties – a fourni quelques instructions pertinentes. Dans son [Observation Générale n° 14](#), le Comité a clarifié que l'obligation de tenir dûment compte de l'intérêt supérieur de l'enfant « s'applique à toutes les décisions et à toutes les actions qui touchent directement ou indirectement les enfants », ce qui implique les « mesures qui ont un effet sur un enfant [...], même s'il n'est pas la cible directe de la mesure » (p. 4). Dès lors, le Comité conclut que la notion de « décisions qui concernent les enfants » doit s'entendre dans un sens très large, comprenant toutes les mesures prises par un État qui touchent les enfants d'une manière ou d'une autre.

Bien que dans le cas d'espèce, la décision d'éloignement prise à l'égard de M.A., ne vise pas directement son enfant, elle peut avoir un impact réel sur la petite fille. Dans cette hypothèse, le Comité recommande d'apprécier un tel effet « au regard des circonstances propres à chaque cas » (voy. CDE, Obs. Gén. n° 14, p. 4). Toutefois, dans l'arrêt, la Cour ne procède pas à une telle appréciation. Elle rappelle simplement que l'article 3 (1) de la CIDE est une disposition qui « vise, de manière générale, toutes les décisions et toutes les actions qui touchent directement ou indirectement les enfants, comme l'a relevé le Comité » (pt. 38). Ainsi, la Cour semble présumer qu'une décision d'éloignement prise à l'égard d'un parent ressortissant d'un pays tiers, peut être considéré comme ayant un impact non simplement 'indirect' mais même 'direct' sur son enfant citoyen de l'Union. Une telle présomption s'inscrit dans la jurisprudence de la Cour dans le contexte du regroupement familial impliquant une situation interne, où la Cour attache une importance considérable à l'impact d'une décision de refus de séjour au parent ressortissant d'un Etat tiers sur son enfant citoyen de l'UE (voy. *infra*, titre B.3).

## **2. L'arrêt M.A. à la lumière de la jurisprudence de la Cour relative à l'article 5 de la directive retour**

Là où l'interprétation large du principe de l'intérêt supérieur de l'enfant, telle que prévue par l'article 5 de la directive retour, n'est pas une conclusion surprenante, il y a deux autres enseignements de l'arrêt qui méritent d'être abordés. En effet, l'arrêt commenté donne lieu à une discussion, d'une part, sur la jurisprudence de la Cour par rapport à l'application de l'article 5 de la directive retour, et notamment celle en cas d'éloignement d'un mineur étranger non accompagné, et d'autre part, sa jurisprudence relative au regroupement familial dans le cadre de situations internes, au titre de l'article 20 T.F.U.E.

### *- La jurisprudence pertinente de la Cour en contexte de la directive retour*

Dans son arrêt [Boudjlida](#), qui est relatif au contenu du droit d'être entendu (art. 41 de la Charte) d'un étranger (adulte) ressortissant d'un pays tiers en situation irrégulière devant faire l'objet d'une décision de retour, la Cour s'est exprimée, pour la première fois, sur l'article 5 de la directive retour. En effet, dans cet arrêt, elle a souligné que, en application de l'article 5 de la directive retour,

lorsqu'un État membre envisage d'adopter une décision de retour, il doit, d'une part, tenir dûment compte de l'intérêt supérieur de l'enfant, de la vie familiale et de l'état de santé du ressortissant concerné d'un pays tiers, ainsi que, d'autre part, respecter le principe de non-refoulement. En plus, il est tenu d'entendre l'intéressé à ce sujet (*Boudjlida*, pts. 48-49). Toutefois, cet arrêt *Boudjlida* ne concerne pas des décisions de retour ayant des incidences sur un enfant, ni directement, ni indirectement.

Ensuite, dans un arrêt *K.A. et autres*, plus pertinent dans ce contexte, la Cour a dénoncé la pratique des autorités belges consistant à refuser de prendre en considération des demandes de regroupement familial (y inclus des demandes d'un parent d'un enfant citoyen de l'Union) au motif que le regroupé fait l'objet d'une interdiction d'entrée encore en vigueur, sans que soient pris en compte les éléments de sa vie familiale, et notamment l'intérêt supérieur de son enfant mineur. Par ailleurs, dans cet arrêt, la Cour a pour la première fois jugé qu'il ne saurait être déduit de l'article 5 de la directive retour que l'intérêt supérieur de l'enfant ne doit être pris en compte que lorsque la décision de retour est prise à l'égard d'un mineur, à l'exclusion des décisions de retour adoptées contre les parents de ce mineur. Ainsi, l'arrêt *K.A. et autres* constitue la base du raisonnement de la Cour dans l'arrêt commenté.

De plus, l'arrêt commenté fait suite à un autre arrêt très récent sur l'interprétation de la directive retour, prononcé par la Cour le 14 janvier 2021 dans l'affaire *T.Q.* (pour un commentaire de cet arrêt, voy. [ici](#)). Dans cet arrêt, la Cour s'est prononcée sur, entre autres, l'obligation pour l'Etat, en cas de renvoi d'un mineur étranger non accompagné (ci-après, « MENA ») vers son pays d'origine, de procéder à des investigations par rapport à l'accueil sur place, qui doit être adapté et conforme à l'intérêt supérieur de l'enfant. *In casu*, la Cour a souligné que l'article 5 de la directive retour a pour effet que les Etats membres doivent nécessairement prendre en compte l'intérêt supérieur de l'enfant, à tous les stades de la procédure, lorsqu'ils entendent prendre une décision de retour à l'encontre d'un MENA (pt. 44). A cet égard, seule une appréciation générale et approfondie de la situation individuelle du MENA en cause permet d'identifier son intérêt supérieur (pt. 46).

Dans l'arrêt commenté, la Cour a prolongé son raisonnement adopté dans l'arrêt *T.Q.*, en ce sens qu'elle a confirmé que, en contexte de retour, le principe de l'intérêt supérieur s'impose également lorsque le destinataire d'une telle décision n'est pas un enfant, mais le père de celui-ci. Ainsi, la Cour a érigé la prise en compte de l'intérêt supérieur de l'enfant comme un principe de fond absolu lorsqu'une décision d'éloignement affecte un enfant, soit directement (*T.Q.*), soit indirectement (*M.A.*).

Alors que la Cour n'invoque l'article 3 CIDE que dans l'arrêt analysé, elle fait bien référence, dans les deux arrêts (*T.Q.* en cas de retour d'un MENA, et *M.A.* en cas de retour d'un père d'un enfant accompagné), à l'article 24 (2) de la Charte. A cet égard, dans son arrêt *T.Q.*, la Cour a même estimé que « [l'article 24 (2) de la Charte], lu en combinaison avec l'article 51, § 1 de la Charte, affirme le caractère fondamental des droits de l'enfant, y compris dans le cadre du retour des ressortissants de pays tiers en séjour irrégulier dans un État membre » (pt. 45). Notons que, en optant pour une telle formulation large (incluant le retour des « ressortissants de pays tiers » au lieu de seulement le retour des « MENA »), la Cour a, déjà dans son arrêt *T.Q.* laissé une porte ouverte à l'application des droits

de l'enfant, dont le principe de l'intérêt supérieur est l'élément central, à la situation de l'éloignement d'un ressortissant étranger majeur, qui est le père d'un enfant en séjour légal.

### 3. *Le rôle croissant de l'intérêt supérieur de l'enfant en contexte de la jurisprudence de la Cour par rapport au regroupement familial au titre de l'article 20 TFUE*

Malgré le fait que dans l'arrêt commenté, il s'agit d'une affaire d'expulsion plutôt que d'une affaire relative à l'octroi d'un titre de séjour, la Cour a profité de l'occasion pour rappeler les grands principes de sa jurisprudence concernant l'octroi éventuel d'un droit de séjour dérivé aux membres de la famille d'un citoyen de l'Union « sédentaire » au titre de l'article 20 T.F.U.E. Ainsi, la Cour souligne qu'il ressort de sa [jurisprudence antérieure](#) que, *in casu*, *M.A.* pourrait prétendre à la reconnaissance d'un titre de séjour sur le territoire belge si, à défaut de celui-ci, lui et sa fille de nationalité belge se voyaient contraints de quitter le territoire de l'Union (voy. e.g. les arrêts [Subdelegacion del Gobierno en Ciudad Real](#) pt. 41, [K.A. et autres](#) pt. 52, [Chavez-Vilchez](#) pt. 69).

De cette façon, l'arrêt peut être considéré comme une affirmation de la protection accordée à la relation entre un enfant et son parent étranger par la Cour dans sa jurisprudence relative au regroupement familial (situations internes). En effet, à plusieurs reprises, la Cour s'est penchée sur l'octroi éventuel d'un droit de séjour dérivé, au titre de l'article 20 T.F.U.E. (citoyenneté de l'Union), aux parents ressortissants d'un pays tiers d'un enfant citoyen de l'Union « sédentaire ». Dans le contexte de cette jurisprudence, le principe de l'intérêt supérieur de l'enfant a progressivement occupé une place de plus en plus importante.

Dans son célèbre arrêt [Ruiz Zambrano](#), la Cour a jugé que les Etats membres de l'UE ne peuvent éloigner les ressortissants d'un pays tiers, membres de la famille d'un citoyen de l'Union, si ce faisant, ledit citoyen se voyait forcé *de facto* de quitter le territoire de l'UE, ce qui priverait le citoyen de la jouissance effective de l'essentiel des droits attachés au statut de citoyen de l'Union (et en particulier, le droit de séjourner sur le territoire de l'UE).

Dans les affaires faisant suite à [Ruiz Zambrano](#), la Cour a progressivement développé cette jurisprudence, afin d'y inclure une approche favorisant les droits de l'enfant et d'y introduire une notion de « dépendance ». Ainsi, le refus d'accorder un droit de séjour à un ressortissant d'un pays tiers n'est susceptible de mettre en cause l'effet utile de la citoyenneté de l'Union que s'il existe, entre ce ressortissant d'un pays tiers et le citoyen de l'Union, membre de sa famille, *une relation de dépendance* telle qu'elle aboutirait à ce que ce dernier soit contraint d'accompagner le ressortissant d'un pays tiers en cause et de quitter le territoire de l'Union, pris dans son ensemble ([K.A. et autres](#) pt. 52).

Dans son arrêt clé [Chavez-Vilchez et autres](#), la Cour a apporté plus de précisions sur l'appréciation de cette relation de dépendance. A cet effet, il faut déterminer, d'une part, quel est le parent qui assume la garde de l'enfant, et d'autre part, s'il existe une relation de dépendance effective à l'égard de ce parent ressortissant d'un pays tiers. De plus, la Cour ajoute que dans le cadre de cette appréciation, les autorités doivent tenir compte du droit au respect de la vie familiale (art. 7 de la Charte) et accorder une attention particulière à l'intérêt supérieur de l'enfant (art. 24 (2) de la Charte). A cet égard, la circonstance que l'autre parent, citoyen de l'Union, est réellement capable à assumer seul la charge quotidienne et effective de l'enfant constitue un élément pertinent. Toutefois, ce

paramètre n'est pas à lui seul suffisant pour pouvoir constater qu'il n'existe pas, entre le parent ressortissant d'un pays tiers et l'enfant une relation de dépendance. En effet, une telle constatation doit être fondée sur la prise en compte, dans l'intérêt supérieur de l'enfant concerné, de l'ensemble des circonstances de l'espèce, notamment de son âge, de son développement physique et émotionnel, du degré de sa relation affective tant avec le parent citoyen de l'Union qu'avec le parent ressortissant d'un pays tiers, ainsi que du risque que la séparation d'avec ce dernier engendrerait pour son équilibre (*Chavez-Vilchez*, pt. 71).

Notons que, dans les premiers arrêts par rapport à ce sujet (e.g. *Ruiz Zambrano*, *Dereci et autres*, etc.) la Cour n'a même pas mentionné le principe de l'intérêt supérieur de l'enfant, ni le droit au respect de la vie familiale. Depuis l'arrêt *Chavez-Vilchez*, la prise en compte de l'intérêt supérieur de l'enfant ainsi que du respect à la vie familiale ont joué un rôle croissant dans ce type de jurisprudence.

Dans l'arrêt clé rendu dans l'affaire *K.A. et autres*, la Cour a dénoncé la pratique des autorités belges consistant à refuser de prendre en considération des demandes de regroupement familial au motif que le regroupé fait l'objet d'une interdiction d'entrée encore en vigueur, sans que soient pris en compte les éléments de sa vie familiale, et notamment l'intérêt de son enfant mineur. Par cet arrêt, la Cour a confirmé, à l'égard des mineurs, la ligne jurisprudentielle « généreuse » de l'arrêt *Chavez-Vilchez* plutôt que celle beaucoup plus restrictive de l'arrêt *Dereci et autres*, dans lequel la Cour avait exclu la situation d'enfants séparés d'un de leurs parents si l'autre parent pouvait demeurer avec eux.

L'arrêt *K.A. et autres* démontre par ailleurs que l'approche adoptée par la Cour varie considérablement selon qu'il s'agit de citoyens mineurs ou de citoyens majeurs. S'agissant d'un adulte, la Cour estime que, à la différence des mineurs, un adulte est en principe, en mesure de mener une existence indépendante des membres de sa famille. Ainsi, la reconnaissance d'une relation de dépendance entre deux adultes de nature à créer un droit de séjour dérivé au titre de l'article 20 T.F.U.E., n'est envisageable que dans des cas exceptionnels, dans lesquels, "eu égard à l'ensemble des circonstances pertinentes, la personne concernée ne devrait, d'aucune manière, être séparée du membre de sa famille dont elle dépend" (*K.A. et autres*, pt. 65). S'agissant, par contre, d'un citoyen mineur, l'octroi d'un droit de séjour dérivé à son parent ressortissant d'un Etat tiers n'est pas considéré comme exceptionnel par la Cour. Au contraire, lorsqu'il est question d'un citoyen mineur, la Cour souligne l'importance de la prise en compte du droit à la vie familiale et de l'intérêt supérieur de l'enfant.

Dès lors, le principe de l'intérêt supérieur de l'enfant a joué un rôle croissant dans la jurisprudence de la Cour par rapport au droit de séjour dérivé au titre de l'article 20 T.F.U.E. Dans l'arrêt commenté, la Cour invoque cette jurisprudence, avant même de se pencher sur la question préjudicielle. Ainsi, la Cour semble suggérer que, dans le cas d'espèce, la prise en compte de l'intérêt supérieur de l'enfant de *M.A.* pourrait non seulement aboutir à l'annulation de la décision d'éloignement ou de l'interdiction d'entrée, mais également à l'octroi éventuel d'un droit de séjour à *M.A.*

### C. Conclusion

Par cet arrêt, la Cour a confirmé la nécessité d'une interprétation large du principe de l'intérêt supérieur de l'enfant dans le contexte de la directive retour. Les Etats membres doivent tenir dûment compte de l'intérêt supérieur de l'enfant, non seulement lorsqu'ils prennent une décision de retour

à l'encontre d'un mineur non accompagné (T.Q), mais également lorsque la décision de retour est prise à l'égard du seul parent de l'enfant. Une telle conclusion est fondée sur l'interprétation de l'article 5 de la directive retour, lu en combinaison de l'article 24 de la Charte. De cette façon, la Cour a érigé la prise en compte de l'intérêt supérieur de l'enfant comme un principe de fond absolu lorsqu'une décision d'éloignement affecte un enfant, soit directement (T.Q), soit indirectement (M.A.).

Une telle évolution s'inscrit dans la jurisprudence de la Cour relative au regroupement familial au titre de l'article 20 T.FU.E. Dans ce contexte, la Cour a progressivement accordé plus de poids au principe de l'intérêt supérieur de l'enfant et au droit à la vie familiale afin de déterminer si un droit de séjour dérivé doit être accordé au parent ressortissant d'un Etat tiers d'un enfant citoyen de l'UE

#### D. Pour aller plus loin

**Lire l'arrêt :** C.J.U.E., 11 mars 2021, M.A., C-112/20, EU :C :2021 :197.

#### Jurisprudence :

C.J.U.E., 14 janvier 2021, T.Q., C-441/19, EU:C:2021:9 ;

C.J.U.E., 27 février 2020, *Subdelegacion del Gobierno en Ciudad Real*, C-836/18, EU :C :2020 :119 ;

C.J.U.E. (G.C.), 26 mars 2019, S.M., C-129/18, EU:C:2019:248 ;

C.J.U.E. (G.C.), 8 mai 2018, K.A. et autres, C-82/16, EU:C:2018:308 ;

C.J.U.E. (G.C.) 10 mai 2017, Chavez-Vilchez, C-133/15, EU:C:2017:354 ;

C.J.U.E. (G.C.), 8 mars 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124 ;

C.E., 6 février 2020, n° 246.987, M.A. c. l'Etat belge;

C.C.E., 21 février 2019, n° 217 230.

#### Doctrine :

L. COOLS, « Kafala, 'descendant direct' et 'autre membre de la famille' : commentaire de l'arrêt S.M. contre Entry Clearance Officer, UK, Visa Section de la Cour de justice de l'Union européenne du 26 mars 2019 », *JDJ*, 2019, n° 394, pp. 3 – 10;

Ch. FLAMAND, « Pas d'éloignement sans une solution durable réelle et effective pour le MENA », *Cahiers de l'EDEM*, février 2021;

M. KLAASEN ET P. RODRIGUES, « The best interests of the child in EU family reunification law: a plea for more guidance on the role of article 24(2) Charter », *European Journal of Migration and Law*, 19(2), pp. 191 – 218;

K. LALLAM, « Quel poids conférer à l'intérêt supérieur de l'enfant dans la balance à effectuer entre protection de l'intérêt général et protection de la vie familiale ? », *Newsletter EDEM*, avril 2016;

L. LEBOEUF, « Une interdiction d'entrée n'implique pas le rejet systématique de toute demande de regroupement familial ultérieure », *Cahiers de l'EDEM*, mai 2018;

S. PLATON, « Droit de séjour des membres de la famille d'un citoyen de l'Union 'sédentaire' : la CJUE précise encore sa jurisprudence Ruiz Zambrano », *JADE*, 2018, n° 12;

M. HAAG, « Case C-133/15 Chavez-Vilchez and Others – Taking EU Children's Rights seriously », *European Law Blog*, mai 2017.

**Autres :**

Comité des droits de l'enfant, « Observation générale no 14 (2013) sur le droit de l'enfant à ce que son intérêt supérieur soit une considération primordiale », CRC/C/GC/14.

**Pour citer cette note :** L. COOLS, « L'affaire M.A. : la Cour réaffirme la portée large du principe de l'intérêt supérieur de l'enfant dans le contexte de la directive retour », *Cahiers de l'EDEM*, avril 2021.



### 3. COURT OF CASSATION (ITALY), II CIVIL CHAMBER SENT. 12 NOVEMBER 2020 – 24 FEBRUARY 2021, N° 5022

*“The ineliminable core constituting the base of personal dignity”:  
the road-map for the protection of people fleeing the effects of climate change?*

*Francesca Raimondo*

#### A. Facts and Ruling

On November 12<sup>th</sup> 2020 the Second Civil Chamber of the Italian Court of Cassation (Seconda Sezione Civile, Corte di Cassazione) by way of ordinance no. 5022/2021 upheld the appeal against the decision of the court (Tribunale di Ancona) that had declined to recognize humanitarian protection to an applicant on the basis of the situation of environmental degradation in the country of origin. The applicant came from the Niger Delta, in Nigeria. This area is characterized by environmental degradation [caused by oil exploitation](#) – carried out mainly by Western companies – and by long-lasting ethnic and political conflicts.

In its decision, the Tribunal of Ancona had acknowledged the complexities and the instabilities of the [Niger Delta](#), and the fact that situation could be subsumed to an environmental. Various paramilitary groups operate in the area, and sabotages and thefts to oil infrastructures have led to numerous oil spills which result in contamination of the soil. In addition, the population lives in extreme poverty – not benefiting of the natural resources of the area – and there is a high level of insecurity due to sabotages, damages, attacks, kidnapping and widespread acts of violence, carried out against the police as well. Notwithstanding, the Tribunal established that this situation did not amount to generalized violence, relevant to the recognition of subsidiary protection, due to the fact that it is not an armed conflict or an equivalent situation. Moreover, the Tribunal did not take into account the possibility of recognizing humanitarian protection in light of the environmental degradation and the widespread insecurity of Niger Delta.

Based on this latter point, the Court of Cassation developed its reasoning and affirmed an important principle of law that must be followed by the Tribunal of Ancona, with a different composition, when it issues a new decision on the case at stake, but which also represents a step forward in the field of the protection of people fleeing the effects of environmental degradation and climate change.

Starting from the principles established by the United Nations Human Rights Committee (hereinafter the UN Committee) in the renowned case [Ioane Teitiota v. New Zealand](#), the Court of Cassation widened the grounds that breach the right to life and the right to an existence with dignity. Therefore, the Court established that the trial judge, whilst evaluating the presence of serious threats in cases of repatriation to the country of origin and the consequent vulnerability that legitimates the need for humanitarian protection, should consider that environmental degradation, climate change and unsustainable development could hinder the enjoyment of the right to life and to the right to an existence with dignity. The Court of Cassation specified that besides armed conflicts, social and environmental conditions could also endanger human life and breach the right to life and the principles of freedom and self-determination or, in any case, restrict them beyond the threshold of their core significance. To this end, the Court of Cassation established the criterion that should be

followed by the trial judge: “*the ineliminable core constituting the base of personal dignity*” represents the basic limit below which the right to life and the right to decent living conditions are not ensured. Thus, this limit must not be exceeded in the case of armed conflict as well as when there are, *in concreto*, social, environmental or climate degrading situations, climate changes or the unsustainable exploitation of natural resources to a point where human survival is at risk, and the fundamental right to life and the paramount principles of freedom and self-determination are breached or are below the above-mentioned minimum threshold.

## B. Discussion

### 1. The Humanitarian Protection regime in Italy: vulnerability in context

In the decision commented, the Court of Cassation refers multiple times to humanitarian protection status and to the ground of individual vulnerability that justifies its recognition. Some clarification on the humanitarian protection regime is necessary, for two reasons. First of all, the general precondition for granting this protection is a situation of vulnerability. Thus, the flexibility in the application of this protection – both in the legal text and in the jurisprudential interpretation – has led to its recognition in a wide array of situations. Secondly, because of its flexibility, the humanitarian protection regime has progressively become [the largest gateway](#) for receiving protection in Italy until 2018. In that year, the humanitarian protection was abrogated by the [Decree Law no. 113/2018](#), known also as the [Security Decree or Salvini Decree](#), implemented by Law no. 132/2018. The Government’s aim was to limit the issuance of this permit only in certain cases. Therefore, the humanitarian protection has been replaced by special protection permits and permits for “special cases” concerning certain established categories and situations. Recently, the humanitarian protection permits have been partly re-introduced, with different name, through [Decree Law no. 130/2020](#) that has softened the restrictive rules on migration championed by the then-Minister of Interior Salvini.

The humanitarian protection regime was introduced with the Law 40/1998 and thereafter enshrined in art. 5(6) of the [Legislative Decree 286/1998](#) (Consolidated Act of provisions concerning the immigration regulations and foreign national conditions norms; hereinafter Consolidated Act) and applied to those who were not eligible for refugee status or subsidiary protection but could not be expelled due to “*serious reasons of humanitarian nature, or resulting from constitutional or international obligations of the State*”<sup>1</sup>. As specified by a [Circular of the Ministry of Interior in 2015](#), the “international obligations of the State” on which the issuance of humanitarian protection could be based include the [European Convention on human Rights](#), the [International Covenant on Civil and Political Rights](#) and the [Convention against the Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#). The humanitarian protection regime granted a two-years residence

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<sup>1</sup> Even though humanitarian protection does not find its ground in the [Qualification Directive](#), it is nevertheless legitimated by EU Law, in article 6(4) of the [Directive n. 115/2008](#) which establishes: “Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory”. A study on the complementary protection in some European countries has been done in 2009 by European Council on Refugees and Exiles (ECRE). [ECRE, Complementary Protection in Europe, July 2009](#).

permit, renewable, during which the beneficiaries had the possibility to work and study. In addition, there was the possibility to convert the residence permit into a work permit.

Humanitarian protection was considered the last resort to obtain protection in Italy and, along with refugee status and the subsidiary protection, it implemented the constitutional right to asylum enshrined in [Article 10\(3\) of the Italian Constitution](#). The latter establishes: “A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law”. Moreover, the United Chambers of the Supreme Court of Cassation had established that Article 10(3) is immediately preceptive, therefore it can be directly recognised by the authorities through these three forms of protection even though there is not a legislation that defines the constitutional right to asylum ([Decision no. 907/1999](#)). Conversely, besides refugee status, subsidiary and humanitarian protection, no direct application of Article 10(3) of the Constitution was foreseeable (Court of Cassation, [ordinance no. 10686/2012](#)).

Humanitarian protection as such has been abolished by the Security Decree and has been replaced by special protection permits and permits for “special cases” concerning certain established categories and situations (such as medical treatment, particular civil value, calamity). However, the United Chambers of the Court of Cassation ruled on the [non-retroactivity](#) of the Security Decree, putting an end to a conflict of the case-law on this point (Decisions nos. [29459/2019](#), [29460/2019](#), [29461/2019](#)). Therefore, even though humanitarian protection does not exist anymore in the protection regime, it can be granted for the asylum procedure that had already initiated at the time of the entry into force of the Decree, on October 5<sup>th</sup> 2018.

With Decree Law no. 130/2020, implemented by Law no. 173/2020, humanitarian protection has newly found its way, to some extent, into the Italian asylum system. Even though the legislator has not resumed the old regulatory framework, and the special protection permits can now be issued only in specific hypothesis – the most striking situations of vulnerability such as torture and inhuman and degrading treatment *et alia* – it has re-introduced the reference to the respect of *constitutional or international obligations of the State* in case of the refusal or the withdrawal of the residence permit. Although it is not excluded that such a reference could be only a statement of principle, one of the conditions for granting the special protection permit is the respect of private and family life, which could be interpreted extensively and applied to a wide array of (vulnerable) situations<sup>2</sup>.

The humanitarian protection regime has represented a driving force in the implementation of the constitutional right to asylum<sup>3</sup>. Before Security Decree or Salvini Decree, the legislator had not pre-defined the grounds falling within the open clause of “*serious reasons of humanitarian ground*” for the recognition of humanitarian protection, not even by way of example. However, the case-law has

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<sup>2</sup> Given that the decision of the Tribunal of Ancona dates back to 12.06.2019 and that the Court of Cassation refers to the humanitarian protection, it is not unreasonable to conclude that the regime applicable at the case at stake is the one in force before the Salvini Security Decree. However, in establishing the principle of law that the Tribunal should follow in issuing a new decision on the case, the Court of Cassation refers to the “humanitarian protection” as ruled in Article 19 (1 and 1.1.) of the Consolidated Act, *id est* the regime in force after the most recent amendments introduced by Decree Law no. 130/2020. With regard to the issues of transitional law in the humanitarian protection regime, please see the [Relation n. 20 of 20.11.2020](#) of the Supreme Court of Cassation, pp. 7-10.

<sup>3</sup> L. Minniti, «Introduzione. La Costituzione italiana come limite alla regressione e spinta al rafforzamento della protezione dello straniero in Europa», *Questione Giustizia*, n. 2/2018, p. 9.

progressively clarified the scope of humanitarian protection. More specifically, some criteria for the recognition of humanitarian protection have been highlighted in the [case-law](#): a) situations of vulnerability that could derive from the repatriation of the applicant; b) cases at stake which are *intrinsically different* from those that are relevant for the recognition of the status of refugee or the subsidiary protection; c) situations of vulnerability could be present even in the case where there is an impediment to granting international protection; d) an application based on humanitarian grounds (the Court mentioned healthcare problems or being a single mother with children)<sup>4</sup>. Therefore, a situation or condition of vulnerability was the general pre-condition for the recognition of humanitarian protection<sup>5</sup>. The Court of Cassation ([Decision no. 10922/2019](#)) specified that the judges deciding on humanitarian protection cases should verify the existence of situations of vulnerability, on an objective base, even when lack of credibility has been established with reference to the statements and other pieces of evidence that supported the request for refugee and subsidiary protection. Where necessary, the judge could also supplement the allegations of the claimant, in force of the duty of cooperation in the inquiry (*principio di cooperazione istruttoria*).

The flexibility of the concept of humanitarian protection made it capable of adapting to all the new and potentially different humanitarian grounds and situations of vulnerability that justify the granting of protection. By way of example, a recent decision of the Tribunal of Naples recognised the humanitarian protection to a Pakistani national as the repatriation to the country of origin could put the applicant in a *condition of extreme vulnerability* due to the difficult situation the country is facing during the COVID-19 pandemic and the (already existent) deficiencies of the healthcare system. Interestingly, the current situation was taken into account by the judges of the Tribunal of Naples who, of their own accord, without a specific request on this point by the defence, referred to the international sources to ascertain the security situation in Pakistan, together with the condition due to COVID-19 and the healthcare system capacity. The Tribunal of Naples recalled article 46(3) of [Procedure Directive](#) – which establishes that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law – and the related principle affirmed by the European Court of Justice in the [Alheto](#) case: “a court or tribunal of a Member State seized at first instance of an appeal against a decision relating to an application for international protection must examine both facts and points of law (...), which the body that took that decision took into account or could have taken into account, and those which arose after the adoption of that decision” (para. 118). Therefore, humanitarian protection was issued in order to protect the applicant’s right to health – that could have been put at risk in Pakistan – and taking into account the level of integration in Italy ([Tribunal of Naples, 25.06.2020](#)). Likewise, the Tribunal of Bari granted the humanitarian protection to a Bangladeshi national, in light of the pandemic situation in the country ([Tribunal of Bari, 24.07.2020](#)).

## **2. Environmental conditions and the risk for the right to life and the principles of freedom and self-determination**

The decision commented herein is particularly important because the Court of Cassation has clearly established that environmental conditions, more specifically *environmental disaster, climate change*

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<sup>4</sup> More recently, *ex multis*, Court of Cassation, [Decision no. 4455/2018](#); Court of Cassation, [Decision n. 8020/2020](#).

<sup>5</sup> M. Balboni, «Abolizione della protezione umanitaria e tipizzazione dei casi di protezione: limiti e conseguenze (art. 1 d.l. no. 113/2018, conv. con modd. da l. 132/2018)», F. Curi (ed.), *Il Decreto Salvini. Immigrazione e sicurezza. Commento al d.l. 4 ottobre 2018, no. 113, conv. con mod. in Legge 1 dicembre 2018, no. 132*, Pisa, Pacini Giuridica, 2019, p. 22.

*and the unsustainable exploitation of the natural resources*, must be taken into due account, in relation to the protection of the right to life and the principles of freedom and self-determination, when evaluating the granting of humanitarian protection.

The Court of Cassation started the reasoning by drawing attention to the decision of the United Nations Human Rights Committee (hereinafter “UN Committee”) in the case *Ioane Teitiota v. New Zealand* (commented in the [Cahier by Marie Courtoy](#)). The UN Committee was called to decide on the refusal by the New-Zealand authorities to recognize the status of refugee to Mr. Teitiota. Indeed, the case attracted world-wide attention. The applicant was a resident of Tawara Island in the Republic of Kiribati in the Pacific where the rise in the sea level, caused by climate change, has led to coastal erosion and is increasing every day the likelihood that the island will become uninhabitable and, ultimately, go underwater. Therefore, Ioane Teitiota equated his situation to the one of migrants fleeing war given that the rising level of the sea caused a wide array of consequences affecting land, housing and property (e.g. reduction of the inhabitable land on Tawara, increased population density per square kilometre, house crisis, land disputes, shortage of freshwater, destruction of the crops) leading to a deterioration in people’s health and a growing level of social tension.

The Court of Cassation acknowledged that, even though the application of Mr. Teitiota had been rejected, the UN Committee affirmed important principles of law that were deemed relevant for the case at stake. The Court of Cassation recalled the decisive passages of the decision. First of all, the UN Committee highlighted the obligation on the States parties to respect and ensure the right to life and the right not to be arbitrarily deprived of one’s life, enshrined in Article 6 of the [International Covenant on Civil and Political Rights](#), which must be interpreted as extending also to the “*reasonably foreseeable threats and life-threatening situations*” that can result in the loss of life. However, States could violate Article 6 of the Covenant even when there is no loss of life. Among such *threats and situations*, the UN Committee mentioned “*environmental degradation, climate change and unsustainable development*” which represent some of the “*most pressing and serious threats to the ability of present and future generations to enjoy the right to life*” (para. 9.4). Likewise, individual well-being could also be adversely affected by severe environmental degradation, leading to a violation of the right to life (para. 9.5). In addition, the UN Committee stressed that the right to life should not be interpreted in a restrictive manner, but it includes also “*the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death*” (para. 9.4).

In light of the UN Committee decision, the Court of Cassation highlighted that, when the trial judge ascertains a situation of environmental degradation, such as the one in the Niger Delta, the assessment of the serious threats in the country of origin – that need to be done for the recognition of the humanitarian protection – should take into due account the risk for the right to life and for the right to an existence with dignity deriving from environmental disaster, climate change and unsustainable development. Indeed, the Court noted that the right to life and the paramount principles of freedom and self-determination are at risk not only in the case of an armed conflict, but also when there are situations that, *in concreto*, put at risk the above-mentioned rights, including degradations at social, environmental or climate level.

Other Italian Tribunals have already recognised the right to humanitarian protection due to the situation in the country of origin – connected with environmental and climate conditions – that could have interfered with the individual's fundamental rights. Numerous cases were connected to natural calamities (such as floodwaters, water streams, earthquakes), but some of them recognised humanitarian protection for reasons related more specifically to climate change. By way of example, the [Tribunal of Aquila \(16.02.2018\)](#) granted humanitarian protection to a Bangladeshi national on this basis. The judge of Aquila highlighted that, due to deforestation and climate change, currently the rainy season in Bangladesh leads to the underwatering of the land, due to higher raising of the water level. Therefore, small land owners lose their source of subsistence and are forced to migrate. Moreover, the judge took note of the growing phenomenon of land grabbing. Likewise, the [Tribunal of Cagliari \(12.03.2019\)](#) has issued the humanitarian protection to a Senegalese national. Indeed, even though Senegal is one of the most stable economies in Africa, it is still affected by a high poverty rate and precarious healthcare system, and the State was facing a humanitarian crisis due to drought of the 2017.

### 3. Conclusion

Article 20 of the Consolidate Act establishes that temporary protection measures could be adopted by the Government to respond to humanitarian emergencies, which include natural calamities. In addition, article 20-bis of the Security Decree of 2018 introduced specific permit for calamity. Undoubtedly it is too soon to, on the one hand, evaluate the reach of article 20-bis and, on the other, to welcome the decision of the Court of Cassation as definitive change especially in light of the numerous amendments occurred with reference to the humanitarian protection in the last few years. Nonetheless, this decision is of historical significance, in part also because of the reference to the UN Committee decision. Thus, it is an important step towards the recognition of the mobility and the migration connected (or caused by) environmental conditions and climate change, and it highlights the necessity to address them in the near future.

### C. Suggested Reading

**To read the case :** [Court of Cassation \(Italy\), II Civil Chamber, sent. 12 November 2020 – 24 February 2021, no. 5022](#)

**Case law:** United Nations Human Rights Committee, Views on Communication No. 2728/2016, [Ioane Teitiota v. New Zealand](#), 24 October 2019.

#### Doctrine :

A. BRAMBILLA, [“Migrazioni indotte da cause ambientali: quale tutela nell’ambito dell’ordinamento giuridico europeo e nazionale?”](#), *Diritto, Immigrazione e Cittadinanza*, Fascicolo 2/2017;

M. COURTOY, [“An historic decision for ‘climate refugees’? Putting it into perspective”](#), *Cahiers de l’EDEM*, February 2020;

E. COLOMBO, [“Il ruolo dellq protezione umanitaria nel panorama normative europeo e le possibili implicazioni della sua abolizione”](#), *Eurojus*, Fascicolo 1 – 2019;

F. CURI (ed.), *Il Decreto Salvini. Immigrazione e sicurezza. Commento al d.l. 4 ottobre 2018, no. 113, conv. con mod. in Legge 1 dicembre 2018, no. 132*, Pisa, Pacini Giuridica, 2019;

L. MINNITI, "Introduzione. La Costituzione italiana come limite alla regressione e spinta al rafforzamento della protezione dello straniero in Europa", *Questione Giustizia*, n. 2/2018;

C. SCISSA, "La protezione per calamità: una breve ricostruzione dal 1996 ad oggi", *Forum di Quaderni Costituzionali*, 1/2021;

N. ZORZELLA "La protezione umanitaria nel sistema giuridico italiano", *Diritto, Immigrazione e Cittadinanza*, Fascicolo 1/2018.

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