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Alexander Balthasar*

Foreword to the ELI-SIG Papers

In June 2017 and in June 2018, the then newly formed 'Administrative Law Study and Interest Group' of the European Law Institute (ELI) met in Budapest, at Andrássy University, for two conferences. The main idea was – as it is in general the remit of ELI – to meet colleagues from all parts of Europe (several local universities, AUB, ELTE and CEU, included) and to discuss in such an inspiring climate matters of common interest. Whereas the first conference had a somewhat general focus (starting with 'generalia and fundamentalia' and then tackling such a classical topic as 'the right to good administration' as well as various fields of 'administration in action', ranging from mutual recognition to the impact of independent agencies, from access to documents to environmental law and to such a burning issue as migration, the second one centred on the Commission's White Paper on the Future of Europe [COM(2017) 2025 of 1 March 2017] and its possible impact on administrative law.

Moreover, the conferences gave the opportunity to visit the Kúria (2017) and the Hungarian Constitutional Court (2018) and thus to make direct contact with the presidents of these courts, Péter Darák and Tamás Sulyok, respectively. On the other hand, we also had, as a participant in the second conference, a member of the European Political Strategy Center of the European Commission and thus actually first-hand information on the most recent ideas and developments in our field.

Whereas it is, therefore, quite true that the principal purpose of these two conferences was to build bridges and to exchange thoughts, I am very grateful that vice dean Pál Sonnevend of the ELTE Law Faculty – in his capacity as co-organiser of these conferences – offered the additional opportunity to publish a fully-fledged written version of the presentation in this journal. You will therefore find four contributions assembled in this issue – some more are still in the pipeline.

I do hope that you will enjoy reading and I would be glad if you could be motivated by this to join ELI in general and our group in particular – our Europe needs scientific cooperation and enhanced mutual understanding, perhaps today even more than in former decades.

Alexander Balthasar

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Alexander Balthasar*

Alternative Dispute Resolution in Administrative Law: A Major Step Forward to Enhance Citizens' Satisfaction or Rather a Trojan Horse for the Rule of Law?**

I 'Alternative to What' and Why Do We Need It at All?

The term 'ADR' seems to have been coined, some decades ago, in the context of *US private law court proceedings;*[1] hence, it originally reflects the *dissatisfaction* of US society of that time (judges included) with *this type* of proceedings;[2] however, the concept also spread over to other parts of the world and also to other fields of law,[3] such as *administrative* law, the

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** This paper was originally presented in English at a conference held at the Masaryk University Brno in April 2016 and subsequently published in Czech (Alternativní řešení sporů ve správním právu – významný krok vpřed pro větší spokojenost občanů, nebo trojský kůň pro právni stát?) in Soňa Skulová, Lukáš Potěsil et al. (eds), *Prostředky ochrany subjektivních práv ve veřejné správě – jejich systém a efektivnost* (Beck 2017), 419 ff.

1 Cf Carrie Menkel-Meadow, Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal' in Regulating Dispute Resolution, in Felix Steffek, Hannes Unberath, Hazel Genn, Reinhard Greger, Carrie Menkel-Meadow (eds), *ADR and Access to Justice at the Crossroads* (Hart 2013, Oxford), 419ff, 422; Elena Nosyreva, 'Alternative Dispute Resolution in the United States and Russia: A Comparative Evaluation' Annual survey of International & Comparative Law 2001, 7ff, 8f. See now the definition given in Sec 651 (a) of the US Code as amended by the Alternative Dispute Resolution Act of 1998: '… an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration…'

2 See Menkel-Meadow (n 1) 422. Nevertheless, the essence of ADR seems to be deeply rooted not only in US history, but already in mediaeval English common law tradition, see Michael McManus, Brianna Silverstein, 'Brief History of Alternative Dispute Resolution in the United States' (2011) 1 (3) Cadmus 100-105; cf also Nosyreva (n 1) 11, cf, however, also infra n 10 for the impact of *Canon Law* on the development of arbitration in England.

3 With regard to *penal paw* it seems that one has to distinguish between
(i) the classical 'plea bargaining' which developed already in the early 19th century in the US and has gained nowadays overwhelming importance there (cf. George Fisher, *Plea Bargaining's Triumph. A History of Plea Bargaining in America* (SUP 2003, Stanford), but also Paul Craig Roberts, 'Die nackte Haut zum Kadi tragen' <https://www.freitag.de/autoren/der-freitag/die-nackte-haut-zum-kadi-tragen> accessed 2 April 2019.
(ii) forms of genuine 'ADR' like the 'Tatausgleich' (paragraph 204 of the Austrian Penal Law Procedures Act [StPO]) which developed much later than (i).

topic on which we now focus.[4] *This finding, however, far from being obvious, causes bewilderment in two respects:*

(i) Isn't *'access to court'* one of the essential features of the 'rule of law', and, therefore, enshrined in all our high-ranking human/fundamental rights documents – at the global and continental level (Article 8 UDHR; Article 14 ICCPR; Article 6 ECHR; Article 47 EUCFR)?

So: if there are any shortcomings in existing procedural law or practice – *why* not thinking of amending the shortcomings *within* the court's procedure rather than seeking an external alternative?[5]

(ii) Even seeking for 'alternatives' to court proceedings could be justified with regard to US private law court proceedings, is there sufficient commonalty to seek 'alternatives' with regard to *European administrative* law proceedings as well?

What is more, the term of 'ADR in *Administrative* Law' seems to be *ambiguous:*

When looking into the US Administrative Dispute Resolutions Act of 1996,[6] we see that the means mentioned there ('any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombudsman, or any combination thereof')[7] are meant already as an *alternative to 'administrative proceedings'* which 'have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes'.[8]

Apparently, however, 'ADR' may also be understood in a narrower sense, focusing not primarily on 'alternatives' to the proceedings led by an administrative authority, but rather *to*

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[4] Cf the Recommendation of the Committee of Ministers of the *Council of Europe* Rec (2001)9 on alternatives to litigation between administrative authorities and private parties and, apart from Nosyreva (n 1), Aldo Sandulli, 'L'arbitrato nel codice del processo amministrativo' (2013) 2 Giornale di diritto amministrativo and the contributions assembled in Dacian Dragos, Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014), parte pro toto, the following literature: Polonca Kovač, 'Mediation and Settlement in Administrative Matters in Slovenia' (2010) 10 (3) Hrvatska Javna Uprava 743ff; Salvija Kavalnė, 'Mediation in Disputes between Public Authorities and Private Parties: Comparative Aspects' (2011) 18 (1) Jurisprudencija 251ff; Gatis Litvins, 'Alternative Methods of Judicial Protection and Dispute Resolution in Administrative Law' (2013) spec edn, 1 European Scientific Journal 371ff; Gregory Garde, 'Alternative Dispute Resolutions – Can it work for Administrative Law' (of 26. 2. 2014, <http://www.austlii.edu.au/au/journals/VicJSchol/2014/2.pdf> accessed 2 April 2019). Just for clarification: for the purpose of this presentation, neither Investor-State Disputes nor relationships between public bodies are considered to be covered by the term 'administrative law' and are therefore left aside.

[5] One answer could, of course, be that communication between human rights lawyers and practitioners of procedural law is suboptimal, to the extent that, in the view of the judicial review remains a *dream* whereas the latter have come to consider it rather as a nightmare, a *trauma*…

[6] Pub. Law 104–320; below: ADRA.

[7] § 571 (3) of the US Code, as amended by the ADRA of 1996. Note the slight differences between this definition and that applied for private law procedures (cf supra n 1).

[8] Section 2 (2) of the ADRA of 1996.

the proceedings of an administrative law court and, thus, also considering 'administrative appeals', besides 'mediation' and 'ombudsman', as part of 'ADR'.[9]

In order to assess the need for 'ADR' in 'Administrative Law' properly, covering *both* meanings we have, therefore,

(i) to look first at the role *courts* play in *private* law, taking also into account divergences between Anglo-Saxon and European (continental) tradition;

(ii) it is only afterwards that we are able to assess whether the reasons that are valid to justify 'alternatives' in private law may also be invoked in the field of administrative law, the structure of which, as is well-known, cannot be fully equated to that of private law. In addition, we will also have to deal with alternatives to the proceedings of an administrative *authority of first instance.*

II ADR and the General Role of Courts in Private Law

1 The Fundamental Principles: Subsidiarity and Judicial Self-restraint

Acting in the sphere of private law is, with only a few limitations, acting by virtue of one's *private autonomy;* hence,

(i) the *settling of disputes* between the parties concerned also remains, at least in principle, within their ambit of private autonomy, still following the overarching paradigm of private law, i.e. the *model of contract.* The State and its courts have come into play mainly only in a *subsidiary* manner, i.e. if the parties did not find a peaceful way to solve their dispute among themselves, due to the progressive prohibition of taking the (enforcement of the) law into one's own hands.

(ii) at least in the original concept, the main focus of state courts in private law cases was just to provide an *formal alternative to a private feud, not* so much to establish *material 'justice'* by 'investigating the real facts' (i.e. 'the truth'), nor a specific care whether each party was likewise capable of making use of its procedural rights in a sufficiently effective manner.

2 The Mitigations of the Original Judicial Self-restraint in Continental Law

It has to be said, however that, at least *on the European continent,* this original concept has already undergone successive and considerable changes (at least mitigations) for *centuries* with regard to the procedural role of the *court:*

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[9] See for such an understanding (i) Dacian Dragos, Bogdana Neamtu, 'From the Editors: The Story of a Comparative Interdisciplinary Research Project' in (n 4) V; (ii) Brian J Preston, 'The Use of Alternative Dispute Resolution in Administrative Disputes. A Paper presented to the Symposium on Guarantee of the Right to Access to the Administrative Jurisdiction' on the Occasion of the 10th Anniversary of the Supreme Administrative Court of Thailand' (9. 3. 2011; available under: <http://www.lec.justice.nsw.gov.au/Documents/preston_use%20of%20alternative%20dispute%20resolution%20in%20administrative%20disputes.pdf> accessed 2 April 2019), referring to the Australian use of the term.

Already since medieval times, we notice the influence of the ecclesiastical ('canonical') procedure (building on the *'cognitio extra ordinem'* and the *'cognitio summaria'* of the ancient Roman Empire), where the duty of the judge to investigate *ex officio* was strengthened and the time-consuming formalism was significantly reduced.[10]

With regard to the public interest (both in speedier proceedings and in substance), some issues of private law were subsequently conferred to *administrative* authorities, at least for a *provisional judgement;* as a consequence, the principles of administrative proceedings (in particular: a reasonable investigation of 'the truth' *ex officio*) started to apply to these private law cases as well.[11]

Closely related to these issues are those matters (mainly in the field of family law)[12] where a non-contested procedure has to be applied by private law courts.

Finally, with regard to Austria, I would like to mention that we had an in-depth reform of private law proceedings at the end of 19th century,[13] which aimed to reduce most of the inherited formalism[14] and which, therefore, could in turn serve as a model for the (still much simpler) codification of our general administrative proceedings some 25 years later[15] (and nowadays it is exactly this codification which governs, only slightly adapted, the proceedings of our recently established administrative courts, too[16]).

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[10] Cf e.g. Olivier Descamps, aux origines de la procédure sommaire: *Remarques sur la constitution Saepe contingit,* and David von Mayenburg, Die Rolle des kanonischen Rechts bei der Entwicklung des officium iudicis als rechtliche Handhabe in Untertanenkonflikten, both in Yves Mausen, Orazio Condorelli, Franck Roumy, Mathias Schmoeckel (eds), *Der Einfluss der Kanonistik auf die europäische Rechtskultur* Bd. 4. Prozessrecht (Böhlau 2014, Köln – Weimar – Wien) 45ff, and 113ff, in particular until p. 126. In contrast, Canon Law in *England* did not so much influence procedures *in* court but *arbitration* as the major *alternative,* see Anthony Musson, 'The Influence of the Canon Law on the Administration of Justice in Late Medieval England,' in the same volume, 325ff, in particular 326–334.

[11] Cf, with regard to Austria, already *Maria Theresia's* decision of 30. 1. 1751 [see Alexander Balthasar, Die unabhängigen Verwaltungssenate. Verwaltungsbehörden und/oder Verwaltungsgerichte? (Manz 2000, Wien) 71, fn 301]. Cf further Article 118 (3) of the Austrian Federal Constitution (B-VG) where the *municipalities* are conferred with the task of establishing 'öffentliche Einrichtungen zur außergerichtlichen Vermittlung von Streitigkeiten' (public bodies for the settlement of disputes outside the courts). In contrast, the most recent Austrian Federal Act on ADR (Federal Law Gazette – BGBl I 2015/105, implementing Directive 2013/11/EU) is considered to be part of private law.

[12] These issues seem to have formed part (at least in Austria before 1848), of the competences of feudal landlords [see Balthasar (n 11) 71, fn 300].

[13] Imperial Law Gazette – RGBl 1895/113.

[14] See e.g. Walter Rechberger, 'Die Ideen Franz Kleins und ihre Bedeutung für die Entwicklung des Zivilprozessrechts in Europa' (2008) 25 Ritsumeikan Law Review 101ff.

[15] BGBl 1925/273ff.

[16] Cf in particular paragraph 17 of the Verwaltungsgerichtsverfahrensgesetz, – VwGVG, BGBl I 2013/33 and paragraph 62 of the Verwaltungsgerichtshofgesetz – VwGG, BGBl 1985 (current version).

3 Remaining Reasons for Seeking Other 'Alternatives'

While the subsequent reforms just mentioned may have decreased the need on the continent to look for ADR in the field of private law, it is nevertheless – to the extent that 'private autonomy' is allowed to rule private law cases – still perfectly legitimate for the parties to *agree conjointly* on *tailor-made dispute resolution tools* (mainly to arbitration, but also to mediation), allowing the autonomous selection

- of appropriate judges[17]
- of the applicable law (substantive as well as procedural)
- of the legal effects of the ruling.

The main drawback (at least of genuine arbitration) is, however, that significant *imbalances between the parties* concerned are very likely to affect the quality of the result directly, so that external supervision by state courts will be needed at least to ensure that the fundamental conjoint agreement was actually concluded by both sides in a sufficiently voluntary manner.[18]

III ADR and Administrative Law

1 The Vertical Relationship

a) The fundamental principle: judicial review of the legality of administrative acts

It is quite obvious that the role of a *court* acting in the field of *administrative* law is quite *different* to that in *private* law, due to the fact that the role of an administrative *authority* differs substantially from that of a *private party:*

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[17] There might be many reasons to prefer an autonomous selection of judges:
(i) As to *quality,* most state jurisdiction systems provide three or even more stages of courts, the most qualified judges being found only at the top of the hierarchy; in addition, specific knowledge is not always available within the deciding court of a sufficient quality. Parties could therefore agree to nominate a panel of top judges already at first instance but this would reduce the options for appeal.
(ii) As to *quantity:* more often than not a considerable backlog of cases impedes speedy decisions to incoming cases. A court of arbitration appointed by the parties concerned may start to deal with the case without any delay.
(iii) As to *balance of composition,* while the composition of a state court chamber is up to court organisation and, in all events, limited to judges appointed in that specific state, an arbitration panel may be composed of judges of different nationalities, thus reflecting better, in particular with regard to international cases, the complexity of the case; in addition, also other balances (gender, religion, …) might be considered as felt appropriate.

[18] Cf in this regard in particular the quite recent judgements of German civil law courts (of first instance and at the appeals stage) in the *Pechstein* case, where a previous judgement rendered by the Court of Arbitration for Sport (CAS) was considered void for want of free consent of the athlete (see interim judgement of the Appeals Court Munich of 15. 1. 2015 – U 1110 / 14 Kart).

At least to the extent that an administrative authority is bound by the *principle of legality,*[19] it may still be allowed *some discretion*, but it *lacks* the full amount of *private autonomy*.[20]

Hence, given the overarching paradigm of administrative law being the *decision imposed unilaterally* by the administrative authority on the parties concerned,[21] according to 'the law'[22], neither the principle of 'subsidiarity' nor the principle of 'judicial self-restraint' can – with regard to the role of the administrative court – have the same meaning as in the field of private law;[23] rather, the scope of application of both principles is, by the very nature of fact, substantially reduced, because the yardstick of the *judicial review* ('the law') is *not at the parties' disposal.*

b) The remaining field of application of ADR with regard to administrative courts/authorities I: mediation or arbitration

It is, therefore, hard to see how – with regard to a dispute between the administrative authority and the parties concerned[24] – tools such as mediation or arbitration could play a major role as an alternative to the formal proceedings of the authority/the court – as long as 'the law' as the ultimate yardstick is to be preserved.[25]

However:

– 'Mediation' can be most welcome with regard to *improving communication,* in particular by providing 'translation' in both directions, thus helping to convince the authority, as well as

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[19] Note that this principle has been inserted in the horizontal provision of the EUCFR containing the limitations for fundamental rights (Article 52 [1]: 'any limitation … must be provided for by law'), following the model of the ECHR (cf Articles 5 [1], 8 [2], 9 [2], 10 [2], 11 [2]; cf also Articles 2 [1], 6 [1], 7 [1] conv cit).

[20] This limitation is nowadays considered also to apply when a public body acts within the framework of private law, cf Alexander Balthasar, 'Wer ist künftig zur Sicherung der Gesetzmäßigkeit der gesamten öffentlichen Verwaltung berufen?' (2014) 22 (1) JRP 38 ff, 61, and the (Austrian) case-law and references cited there in fn 202.

[21] Due to the principle of legality applying to all kinds of State action, the vertical paradigm *prevails even in* prima facie *horizontal relationships* such as public law contracts between the State (represented by an authority) and an subordinate individual; the more so, the stricter the legality principle is construed. That is the main reason that the form of administrative contracts flourishes more in Germany than in Austria, cf Harald Eberhard, *Der verwaltungsrechtliche Vertrag. Ein Beitrag zur Handlungsformenlehre* (Springer 2005, Wien – New York) 130.

[22] Following on from the previous footnote, this proposition applies too when the form of the 'decision' is a 'contract' (of public or of private law); that is why Article IV-7 (1) of the 'ReNEUAL Model Rules on EU Administrative Procedure' <http://www.reneual.eu/> states that most provisions on single-case-decision making should apply *'mutatis mutandis'* also for concluding contracts.

[23] Up to now, not even elements of veritable *'plea bargaining'*, well-known in US penal law (see supra n 3) seem to have been introduced in administrative law (maybe with the exception of tax law, where agreements between the tax authority and the tax payer are very conceivable).

[24] See, however, for the horizontal relationship infra lit C.

[25] This assessment seems to be backed by the Rec(2001)9 (which remains rather vague and general with regard to the possible 'scope of alternative means', cf point I/2 of the Appendix), as well as by most of the doctrine cited supra in n 4.

the parties concerned, already at an early stage of the proceedings that a *specific interpretation* of the law will, most probably, be the most reasonable from all perspectives.[26]

– While it seems rather strange that an administrative authority should be allowed to escape from the ordinary judicial review by an agreement concluded by itself with the parties concerned[27], the *legislator* could very well *offer alternatives* – as does indeed the Austrian Federal Constitution, in principle, when enabling the legislator to provide judicial review against administrative decisions by private law courts rather than by the newly established administrative courts.[28] With the code of private law procedure in turn allowing state courts' jurisdiction to be replaced by arbitration (even by courts of arbitration based outside the State's territory), one could indeed wonder whether the legislation now enables a complaint against an Austrian administrative authority to be lodged even at a foreign court of arbitration.[29]

c) The remaining field of application of ADR with regard to administrative courts/authorities II: qualified mediation, including ombudsmen

As the French term for 'ombudsman' – *'médiateur'* – shows 'mediation' in the meaning just outlined above (in subsection 2) can, in principle, also be performed by an ombudsman (general or specialised). Ombudsmen are particularly qualified to enhance public confidence in the proper performance of the duties of administrative authorities (and, in principle, also of courts).[30]

Some Ombudsmen – among them the EU Ombudsman and the Dutch Ombudsman – show a remarkable interest in developing an *additional set of norms* besides the positive

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[26] In a way this has always been the task of *advocates;* unfortunately, however, experience shows that many advocates have a tendency to aggravate and prolong the conflict instead of contributing to find a reasonable solution already at an early stage. That seems to be why the British system still upholds the separation of tasks between 'solicitors' (chosen by the parties) and 'barristers' (who have the exclusive privilege of communicating directly with the court).

[27] Apparently, however, exactly this option seems to have been inserted quite recently into the Italian Code of administrative procedures (cf its Article 12 as amended by Decreto legislativo, 15/11/2011 n° 195, G.U. 23/11/2011); the efficacy of this new provision is, however, stll very limited, cf Sandulli (n 4) 205ff. Cf also, with regard to Germany, Kaspar Möller, *Echte Schiedsgerichtsbarkeit im Verwaltungsrecht. Eine Studie zu Rechtsrahmen und Kontrolle nichtstaatlicher Streitentscheidung im Verwaltungsrecht* (Duncker & Humblot 2014, Berlin), in particular 134ff.

[28] Article 94 (2) B-VG.

[29] Cf paragraph 17 (4) of the Federal Anti-Doping Act, explicitly allowing the athlete to contest decisions of the national Anti-Doping Tribunal (which might be considered as an administrative tribunal!) before the CAS.

[30] Note that the Swedish Parliamentary Ombudsman (the model from which all other European ombudsmen stem) is in a way a general supervisory authority, ensuring that the law (made by Parliament) is observed as diligently by administrative authorities (needed because central government as well as regional executives lack the competence to interfere in individual cases led by – in this regard – independent administrative authorities) as by the courts.

legislation related to the concept of 'Good Governance/Good Administration'.[31] From a 'rule of law' perspective, such an approach is most justified when it would turn out that this 'additional set of norms' is, in essence, derived from *general principles of law* (such as the principle of proportionality, principle of equal treatment, respect for human dignity, fair trial, etc.), which indeed rank at the top of the hierarchy of law but had been neglected by the specific positive legislation. In this case, ombudsmen might *supplement constitutional courts* in particular where they still are missing.

d) The remaining field of application of ADR with regard to administrative courts/authorities III: contesting general administrative norms?

Individual administrative decisions are, more often than not, based not only on ordinary legislation made and passed by Parliament but also on administrative acts of general application, in which the parties of the individual proceedings had not been involved. When it turns out during the individual proceedings that the parties object more to the norm of general application than the individual decision based on it, there should be appropriate legal remedies available to deal with such complaints; if not, it is not only highly probable but also justified from the 'rule of law' aspect that parties seek to disregard that norm of general application they considered to be 'unjust' – even by invoking ADR tools of whatever kind.

2 Administrative Appeals

Appeals to an administrative authority may be considered as an alternative to judicial review if 'ADR' is understood in a narrow sense (see supra section I).

Coming from a country that just abolished its longstanding tradition of administrative appeals (completed by access to one single Administrative Court of highest quality), due to constant and reiterated pressure from Western Europe[32] where the mantra for decades had been to facilitate access to court, I am least prepared to deny the advantages of administrative remedies which have to be exhausted before a complaint to a court may be lodged, in particular:

– Availability of specialised knowledge of a high level
– Uniformity of application of the law[33]
– Affordability for the private parties concerned

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[31] For the EU Ombudsman, see his European Code of Good Administrative Behaviour ex 2001, even now exceeding what some years later had been enshrined at primary law level in Article 41 EUCFR; for the Dutch concept cf Philip Langbroek, Milan Remac, Paulien Willemsen, 'The Dutch System of Dispute Resolution in Administrative Law' in Dragos, Neamtu (n 4) 113ff, 132f ('mainly an ethical category').

[32] See in more detail Friederike Bundschuh-Rieseneder, Alexander Balthasar, 'Administrative Justice in Austria in the Stage of Transition: From Administrative Appeals to Administrative Courts or the Final Stage of 'Tribunalization' of Administrative Disputes' in Dragos, Neamtu (n 4) 209ff.

[33] This is a fundamental requirement of the principle of equal treatment, which can, by the very nature of fact, not be fulfilled to the same extent when jurisdiction is conferred upon a multitude of independent judges (see, e.g., Magdalena Pöschl, *Gleichheit vor dem Gesetz* (Springer 2008, Wien – New York).

These advantages have, however, to be outweighed against the advantages of prompt access to a court, in particular:

– Independence of the judge from political influence
– Qualification to refer to the CJEU.

3 The Horizontal Relationship

When we remember that administrative law has assumed considerable tasks belonging originally and in substance to private law (see supra section II 2), it is, at least in principle, perfectly conceivable to reverse that development. Consequently, administrative law would then require, as a precondition for administrative authority starting the core assessment from a purely public interest perspective**,** that all the private parties concerned had mutually agreed on the private law points related to the public law issue.

With regard to only these private law parts 'embedded' in the administrative law case, it would then be also perfectly conceivable to apply again the full range of private law instruments – and, among them, mediation or arbitration as well, in the full meaning of these terms – to these parts of 'Administrative Law'[34].

IV Evaluation

When we try now, after that *tour d'horizon,* to sum up, we might find that things didn't change much compared with the first, provisional assessment we started from in section 1:

ADR is indeed deeply rooted in the context of private law, and the use we can make of it in the context of administrative law as well is most appropriate when the specific structure resembles private law most closely (III 1 b and III 3).

We did, however, also find that the term 'ADR' may serve merely as an indicator of deficiencies of quite a different kind, be they of the quality of legal protection provided by administrative courts compared with the traditional efficacy of administrative supervisory authorities (III 2), or related to countries that still lack a detailed system for constitutional complaints (III 1 c and d).

My personal conclusion is, therefore, a rather sceptical one: let us resist the attempt to cure the alleged shortcomings of the implementation of administrative law by a simple transposition of well-sounding concepts of quite a different origin instead of finding tailor-made solutions for what we should really consider, after a sober and thorough analysis, to be serious deficiencies.

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[34] Cf, however, that the Austrian General Administrative Procedures Code (AVG) has always contained a provision that, in a public hearing, the authority should find a fair settlement of any dispute between private parties [paragraph 43 (5), formerly (6): 'Stehen einander zwei oder mehrere Parteien mit einander widersprechenden Ansprüchen gegenüber, so *hat der Verhandlungsleiter auf das Zustandekommen eines Ausgleichs dieser Ansprüche mit den öffentlichen und den von anderen Beteiligten geltend gemachten Interessen hinzuwirken*'].

Marc Clement*

Breach of the Right to Good Administration: So What?

The right to good administration is now enshrined in Article 41[1] of the Charter of Fundamental Rights of the European Union. It is undisputable that this right is not limited to EU institutions but covers all aspects of the European Union law: as regard the institutions, Article 41 is directly applicable to them[2] and as regard the application of EU law by Member States, the general principle of good administration is equivalent in substance to the content of article 41.[3]

As a consequence, a reference to a standard for administrative action and production of administrative decisions is clearly set by the CJEU. We would like to examine the concrete effect of these standards as regard the consequences that the national and EU courts have to draw in the event of a breach of these requirements. We submit that, according to CJEU case-law, a breach of right to good administration doesn't lead to automatic annulment of the decision that was challenged and that this position may lead to substantial legal difficulties of interpretation for national courts.

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1 Article 41 of EU Charter of Fundamental Rights: '
1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
– the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
– the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
– the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.'

2 See for instance C-141/12 and C-372/12, 17 July 2014 YS paragraph 67: 'It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (see, to that effect, the judgment in *Cicala,* C-482/10, EU:C:2011:868, paragraph 28). Consequently, an applicant for a resident permit cannot derive from Article 41(2)(b) of the Charter a right to access the national file relating to his application.'

3 See same case paragraph 68: 'It is true that the right to good administration, enshrined in that provision, reflects a general principle of EU law (judgment in *HN,* C-604/12, EU:C:2014:302, paragraph 49). However, by their questions in the present cases, the referring courts are not seeking an interpretation of that general principle, but ask whether Article 41 of the Charter may, in itself, apply to the Member States of the European Union.'

I No Automatic Annulment of Decision in the Event of Breach of the Right to Good Administration

In several recent decisions, the CJEU stated clearly that the breach of one of the various rights composing the right to good administration in the administrative procedure does not automatically makes the decision itself illegal:

> C-383/13 10 September 2013 *G. and R.*
>
> 40 To make such a finding of unlawfulness, the national court must – where it considers that a procedural irregularity affecting the right to be heard has occurred – assess whether, in the light of the factual and legal circumstances of the case, the outcome of the administrative procedure at issue could have been different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end.
>
> C-129/13 3 July 2014 *Kamino International Logistics BV*
>
> 79 According to European Union law, an infringement of the rights of the defence, in particular the right to be heard, results in the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different.

The approach of the CJEU is a pragmatic one: the right to good administration is a procedural right and a breach would only have an effect if it has a direct consequence on the outcome. This is a pure teleological reasoning, which is a legal technique of interpretation which is very frequently used by the EU Court.

It should be noticed that, in the C-129/13 judgment, the right to be heard, which is an element of the right to good administration, is explicitly linked with the rights of the defence. More precisely, the right to be heard is fully considered to be part of the rights of the defence[4] and the CJEU logically refers not only to Article 41 of the Charter but also to Article 47 and 48 of the Charter, which cover all aspects of the right to fair trial. Articles 47 and 48 are the equivalent of Article 6 and Article 13 of the European Charter of Human Rights. Therefore, given the importance of the rights of the defence, one could be surprised to see that the breach of these rights is of so little consequence. If a right is to be considered as a fundamental right, it would logically lead to the annulment of the decision in the case of breaching this right without further discussions. However, it does not seem to be so automatically. In other words,

[4] C-249/13 11 December 2014, Boudjlida, paragraph 31: 'The right to be heard in all proceedings is now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) of the Charter provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken (the judgments in Kamino International Logistics, EU:C:2014:2041, paragraph 29, and Mukarubega, EU:C:2014:2336, paragraph 43).'

does this mean that a breach of a fundamental right is not always severe enough to lead to illegality of a decision that is adopted in violation of this right?

Indeed, the position of the CJEU does not appear to be based on a general consensus and has led to different views from the Advocates General.[5] The reasoning that is opposed to the CJEU case-law is based on the question that, if the right to good administration is part of the fundamental rights and in particular is to be included in the rights of the defence, how is it possible to bargain with this fundamental right?

At this stage, an ambiguity is to be clarified. The CJEU makes a substantial difference between administrative procedure and judicial procedure. If the right to good administration is to be included in the more general set of the rights of the defence, it does not mean that the rights of defence are automatically violated in the event of breach of these rights during the administrative procedure. This could be interpreted as referring to the fact that, during the judicial procedure, the rights of the defence could potentially compensate the breach during the administrative procedure. This means that the right of the defence is to be evaluated globally, from the administrative procedure leading to a decision to the final judicial decision. A mere breach of one step in the administrative procedure does not contaminate the whole procedure if some further steps could compensate the breach. Or, to put it in different words, the lack of contradictory debates during the administrative phase has no effect on the outcome of the judicial procedure as long as the judicial procedure is based on contradictory exchanges between parties.

This differentiation between administrative and judicial procedure is most likely to be a crucial argument in favour of mitigating the effects of flaws in administrative procedures, taking into account that national procedures could be more stringent that the minimum standards proposed at EU level. It should also be stressed that, at first glance, the judge evaluates the legality of the administrative decision and does not prolong, at the judicial stage, the administrative action. It should however be acknowledged that, on this point, administrative justice cultures in Europe probably differ widely and the separation between administrative and judicial action is not always so strict. For instance, in Sweden, first instance courts are delivering environmental consent for industrial plants and are indeed on this specific point playing the role of administrator. In this specific case, there is indeed no clear border line between pure administrative procedure and judicial procedure but this situation is an exception. Countries with autonomous administrative jurisdictions (France, Germany, Italy, Sweden etc.) have historically justified the development of administrative justice by the need for specific procedures when the State's authority is involved. It is understandable that, in this context, the judicial procedure can accommodate a capacity to preserve the public

[5] See for instance Advocate General M. Wathelet in C-383/13 G. and R.: 'I propose therefore that the Court should answer the question referred to the effect that infringement by the national administrative authority of the general principle of respect for the rights of the defence (in the present case, of the right to be heard, as provided for in Article 41(2)(a) of the Charter) (...) means that the measure must be annulled and that the person concerned must be released immediately (...).'

general interest by avoiding pure procedural annulments of administrative decisions. All these cultural differences are highly important and a detailed evaluation would require an in-depth analysis of each national legal system. For the purpose of our demonstration, it suffices to note that there is no Chinese wall between administrative and judicial procedures in Europe.

However, it should also be taken into account that the arguments in favour of differentiated treatments of public authorities are less and less tolerated by citizens.

Another aspect related to the development of this flexible EU case-law is its impact with regard to decisions taken by national authorities on the basis of EU law. In this context, national courts are generally in charge of applying EU law in combination with national procedural rules, as EU law provides in most cases a framework with some possibilities of adaptation to the national context. The case-law of the CJEU states a clear position as regard an infringement of procedural rights: it does not necessary lead to the annulment of a decision. However, this clear position may also be combined with another clear option of the CJEU case-law: the Court also states explicitly that the exact effect of a breach of procedural rules is to be governed by national law as long as the effectiveness principle is not affected.[6] This approach developed in C-129/13 preliminary reference creates an additional ambiguity. What does the effectiveness of EU law mean? One could consider that the effectiveness of EU law lies in material law – such as ensuring the effectiveness of competition rules or avoiding state-aid. One could also see effectiveness as preserving the rule of law the fundamental rights and principles, such as the rights of the defence.

The CJEU approach of the breach of right to good administration is therefore not straightforward and the way to combine national and European procedural case-law is only the first issue to tackle for its implementation.

II A Pragmatic Approach Which Leads to Serious Difficulties

A serious problem in the implementation of EU case-law lies in the burden of proof. It is well-established that rules governing burden of proof are crucial in determining the outcome of a case. The current case-law of the CJEU tends to rely only on the teleological argument: would the decision be different if administrative procedural rights had not been broken? However, it is clear that, depending on who has to demonstrate the absence of effect on the administrative decision, the balance between the parties is completely different. The CJEU rightly excludes to imposing on the complainant the need to prove that the decision would have been different without the breach. Obviously, demanding that complainant prove the effect would not make sense, since the administration could always argue that, being the one who took the decision, it is certain that the decision was not affected by the breach!

[6] C-129/13 3 July 2014 Kamino International Logistics BV paragraph 77: 'None the less, while the Member States may allow the exercise of the rights of the defence under the same rules as those governing internal situations, those rules must comply with European Union law and, in particular, must not undermine the effectiveness of the Customs Code (G and R, EU:C:2013:533, paragraph 36).'

C-141/08 1 October 2005 *Foshan Shunde Yongjian Housewares & Hardwares Co. Ltd* paragraph 94

> Moreover, according to the case law of the Court of Justice, the appellant cannot be required to show that the Commission's decision would have been different in content but *simply that such a possibility cannot be totally ruled out,* since it would have been better able to defend itself had there been no procedural error (see *Thyssen Stahl v Commission,* paragraph 31 and the case law cited).

But what does it mean 'that such a possibility cannot be totally ruled out'? Taken literally, the expression leads to an impossible proof for the administration. It would only save the administrative decisions in cases where the breach is 'external' to the decision process itself or where the appellant does not indicate what information he would be able to provide to the administration. However, one should also emphasise that the wording of the Court stresses the procedural aspect by referring to the capacity for the person to defend themselves. In practice, an appellant just claiming that, by not being heard in the administrative procedure, was not in a position to try to convince the administration would potentially fall under this category.[7] This is equivalent to the hearing in courts: one can never exclude that, by pleading, the judges could change their minds!

There is obviously a remaining tension between the teleological approach, which only looks at the result of the process, and an approach that highlights the role of the procedure: the CJEU case-law does not completely forget procedure. The C-141/08 case is an illustration of this tension. One can consider that at least there is an obligation for the appellant to demonstrate that he had some arguments to present. This could be seen as dialectic reasoning in the evidential process: the appellant has to provide some indications that the hearing would be a serious opportunity to defend the case. This first step would establish a presumption of usefulness for the hearing and the administration would have to react and oppose this presumption.

However, at this stage, these observations are not fully supported by the limited case-law of the CJEU on the topic and one should only conclude that there is still a need from clarification from the Court of Justice.

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[7] See in particular the interesting discussion of the role of oral hearings in the opinion of Advocate General Wahl under case C-154/14 P.: '79. In my view, there is a difference between considering whether a party might have been able to better defend itself, on the one hand, had it been given access to the entire case file and, on the other hand, had it been granted an in camera hearing. While the significance of unlawfully withheld documents can be appraised ex post, (39) that of an in camera hearing cannot: it is impossible to be entirely certain of what actually takes place during such meetings. There is also nothing to prevent a party from submitting other relevant confidential information to the Commission during such a meeting that has not been alluded to beforehand. Hence, if there is a right to an in camera hearing before the Commission, and if an oral hearing is held only once – as in the case under consideration – then the party who was entitled yet deprived thereof, cannot be considered to have been heard at all. (40) In the interest of justice being seen to done, I am thoroughly unconvinced by the idea of validating a pre-emptive reasoning denying an in camera hearing because it could not possibly have helped that party.'

III Access to Justice and Individual Decision

More generally, the issue of access to the Court of Justice for individual decisions remains difficult. The Treaty on the Functioning of the EU in its Article 263 states that:

> 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of *direct and individual concern* to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

This wording is similar to that stated in the initial Treaty (1957) as regard individual decisions. The Lisbon Treaty has however released the condition of 'individual concern' for actions against regulatory acts. As regard administrative decisions, standing is granted only in the case of an act addressed to the person or that the act has a direct and individual effect on the person.

The EU case-law has very often referred to this condition of 'direct and individual concern' for not granting access to the Court to individuals.[8] The so-called *Plaumann* test reads the notion of individual concern in a relatively narrow way by imposing specific qualities on the applicant. Moreover, despite several attempts from many applicants, the *Plaumann* case-law has been regularly recalled by the Court, including in very recent decisions.[9]

It should be noted that this case-law is far from being easily mastered by national courts needless to say that it is complex for applicants to understand as well. For instance, a Dutch Council of State preliminary reference in 2014 reads as follows:

> (1) Must the fourth paragraph of Article 263 TFEU be interpreted as meaning that operators of installations to which, as from the beginning of 2013, the emissions-trading rules laid down in Directive 2003/87 have been applicable, with the exception of operators of the installations referred to in Article 10a(3) of that directive and of newcomers, could undoubtedly have brought an action before the General Court seeking the annulment of Decision 2013/448, in so far as the uniform cross-sectoral correction factor is determined by that decision?

This preliminary reference highlights a very technical but very important point. It is well-known that the EU court system is not limited to EU Courts but includes national judges. National judges are recognised as main instruments for the implementation of EU law. It is clear that the development of EU law in virtually all domains of law leads to the need to control its application efficiently. National judges are therefore essential components in the design of

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[8] In judgment of 15 July 1963 *Plaumann*/Commission, 25/62 the Court interprets strictly the conditions for admissibility of a case as they are stated in the Treaty: 'persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.'

[9] See for instance the opinion of Advocate General Kokott 12 November 2015 for joined cases C-191/14 and C-192/14

a comprehensive EU judicial system. The key procedural element of this dialogue between national Court and the EU Courts is the preliminary rulings mechanism.

However, an applicant does not have the choice of filing a case in the EU General Court or at national level. Action in national courts would only be admissible if no access to the EU General Court is granted.[10] The test is based on the evaluation of the absence of doubt that the applicant could challenge the decision in EU courts. In the absence of doubt, the national court should declare the application inadmissible. This absence of doubt criterion is not extremely easy to manage precisely due to the fact that the *Plaumann* test creates uncertainty as regard the admissibility: the rule seems to be 'no access to EU Courts,' with an exception in very specific cases where the decision at stake would have a side effect which was not foreseen at the time of the adoption of the act, as was the case, for instance, in the *Cordorniu* decision.[11]

This complexity leads to difficulties in the context of hybrid decisions, i.e. decisions which are a combination of national and EU decisions. For instance, decisions related to reimbursement of EU funds may find their source in a decision from the European Commission to invite the Member State to demand reimbursement of funding granted to a project, for instance in the case of ineligibility of expenses. In this hypothesis, the crucial question for challenging the decision of the Member States is to determine if there was some autonomy for the national authority[12] and if the European Commission decision could have been challenged in EU Courts. The case-law of the EU Court tends to deny the possibility to challenge the decision of the European Commission, considering it as a preparatory act and not as a full decision.[13] The EU case-law also does not easily recognise a direct effect of the decision of the European Commission, as it does not exclude a possibility for Member States to compensate the loss of the recipient of funds.[14]

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[10] See for a recent decision C-663/13 5 March 2015 *Banco Privado Português and Massa Insolvente do Banco Privado Português* paragraph 28: 'In this respect, it must be recalled that, in its judgment in *TWD Textilwerke Deggendorf* (EU:C:1994:90, paragraph 17), the Court held that it is not possible for a recipient of State aid forming the subject-matter of a Commission decision which is directly addressed solely to the Member State of that recipient, who could undoubtedly have challenged that decision and who allowed the mandatory time-limit laid down in this regard in the sixth paragraph of Article 263 TFEU to pass, effectively to call into question the lawfulness of that decision before the national courts (see, also, judgments in *Nachi Europe,* C-239/99, EU:C:2001:101, paragraph 30, and in *Lucchini,* C-119/05, EU:C:2007:434, paragraph 55). The Court has taken the view that to find otherwise would enable the recipient of the aid to overcome the definitive nature which a decision necessarily assumes, by virtue of the principle of legal certainty, once the time-limit laid down for bringing proceedings has passed (judgment in *Nachi Europe,* EU:C:2001:101, paragraph 30 and the case-law cited).'

[11] C-309/89 18 May 1994 *Codorniu SA*.

[12] According to EU case-law, no autonomy is to be granted to national authorities in this context, see arrêt C-383/06 13 March 2008 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening.*

[13] See for instance T-314/04 et T414/04 14 December 2006 *Germany v Commission* or T-29/03 13 July 2004 Comunidad Autónoma de Andalucía c. Commission.

[14] C-417/04 P 2 May 2006 *Regione Siciliana c*/Commission.

To sum up, it is far from being obvious that there is 'undoubtedly' a possibility to challenge the decision of EU institutions at EU level. This mechanism works like a trap for claimants: if they choose the EU Court path they risk being inadmissible, even in cases where *prima facie* they could are not obviously not excluded from the provisions of Article 263, and if they choose the national courts path, the courts could oppose the fact that they have not challenged the European decision.[15]

The narrow admissibility criteria of the *Plaumann* test is therefore a key factor, seriously mitigating the capacity to challenge EU decisions that have huge consequences for European citizens and companies. It should be mentioned that the Aarhus Convention Compliance Committee has explicitly indicated that this admissibility policy is not in compliance with the provisions of the Aarhus Convention.[16] The difficult discussions between the EU institutions and NGOs should be a good opportunity to reconsider access to EU justice for citizens.

This situation is most likely one of the factors explaining the lack of coherence and clarity in the EU case-law: combined with the complexity of each case, the number of cases brought to courts related to these situations, is not high enough. The contrast is huge between the very well developed case-law at national level as regard procedural rules with scarcity of these at CJEU level.

IV A Way Forward?

It could be seen as presumptuous to call for a change in the EU case-law. However, if one would take the right to good administration seriously, access to justice and judicial review of the EU administrative decision are key dimensions of the rule of law. It is not satisfactory that the main way to enforce good administrative behaviour by EU institutions is the action of the EU Ombudsman. As a matter of fact, the office of the European Ombudsman is today playing the central role for EU administrative decision review. Recommendations of the Ombudsman are not without effect and its decisions include all aspects of a case, such as financial compensation or implementation of EU Courts' decisions.

However, the Ombudsman would in any case not be able to restore legality: its role is to play the role of a mediator in order to find a friendly solution. In the complex situations which were identified above, such as reimbursement of EU funding, the ombudsman would have limited impact.

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15 See French Council of State decision 23 July 2014 Commune de Vendranges n°364466: 'Considering that it follows from the case-law of the Court of Justice of the European Union that a decision of the European Commission asking a Member State to recover Community aid unduly granted is binding on the authorities and the national courts when its validity was not disputed within the time-limits before the Union's courts by the aid recipient.' In this recent decision, the French Council of State do not discuss the potential limits of admissibility that the recipient may face.

16 See ACCC/C/2008/32 part I and part II on the website of the Aarhus Convention.

There is obviously a need to reassess the access to justice and judicial review of EU administrative decisions in the light of the substantial development of EU law. Similar standards are to be applied at national level and EU level as regard judicial review[17] and it is not possible to maintain confusion as regard the admissibility of application in EU courts.

It is also crucial to clarify the exact standards to be applied as regard breaches of rights to good administration. The current case-law of the CJEU tends to emphasise the teleological approach. It is fully understandable from a pragmatic point of view and one should avoid developing procedural complexity, which could paralyse administrative action. This is partially the approach taken in French administrative law with the famous *Danthony* case[18]. However, this case-law combines the teleological approach and an identification of procedural guarantees, which are preserved whatever the teleological approach would give. One can already see a step in this direction in the ECJ case-law with the *Altrip* case,[19] where a reference to protection of guarantees is explicitly provided. It remains to be seen if the *Altrip* case is to be understood as specifically targeting environmental law issues or is of a more general nature.

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17 It should be stressed that the CJEU is very demanding as regard access to justice in the context of Aarhus Convention in the context of Member States duties see C-240/09 8 March 2011 *Lesoochranárske zoskupenie VLK* paragraph 49: 'Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.'

18 French Council of State 23 December 2011 Danthony n°335033: 'Whereas these provisions regarding irregularities committed when an organisation is consulted, state a rule which takes inspiration from the principle according to which, although administrative measures must be taken according to the forms and in compliance with the procedures laid down by the laws and the regulations, an error affecting the course of a prior administrative procedure, followed on a mandatory or optional basis, the decision taken is only considered illegal if the evidence proves that it was likely, in this case, to have an influence on the decision taken or that it deprived the interested parties of a safeguard; whereas the application of this principle is not excluded in the case that a mandatory procedure has been overlooked, provided that such an omission does not result in the competence of the author of the measure being affected;' (translation as provided by the French Council of State website).

19 C-72/12 7 novembre 2013 Gemeinde Altrip: 'Subparagraph (b) of Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as not precluding national courts from refusing to recognise impairment of a right within the meaning of that article if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant. None the less, that will be the case only if the court of law or body hearing the action does not in any way make the burden of proof fall on the applicant and makes its ruling, where appropriate, on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of all the documents submitted to it, taking into account, inter alia, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making, in accordance with the objectives of Directive 85/337.'

Anna Simonati*

Administrative Transparency Through Access to Documents and Data in Italy: Lights and Shadows of a Principle in Transformation

I Transparency and the Italian Legislator: An Evolution Toward Polysemy

Recently, the Italian legislator has introduced new rules on the transparency of administrative action (Law No. 190/2012 and Legislative Decree No. 33/2013, reformed by Legislative Decree No. 97/2016). The main purpose of the statutes is to prevent and combat corruption. In this perspective, the duty of administration to publish documents and data has been greatly enlarged. The relationship between authorities and private people is changing, not only in practice but also in the perception of the legislator, and the fair management of information used in the public interest has become a basic value. This idea of transparency has been progressively accepted by scholars, by the administrative courts and by the rule-makers.

In the general statute on administrative procedures (Law 241/1990), transparency is clearly indicated among the basic principles of administrative action but a definition of this concept is not given; therefore, it is reasonable to think that the traditional one has been tacitly accepted. According to the traditional idea,[1] transparency compels authorities to allow private individuals to be aware of the former's activities during the procedure and to check the results when the final decision has been emitted.[2] In this vision, transparency is strictly connected to good administration and efficiency; its purpose is to ensure the correct comprehension of activities performed in the public interest.[3] It does not necessarily compel authorities to disclose all acts and documents. On the contrary, transparency could even require some 'dark zones' (in order to protect public law secrets and the private right of privacy) to be

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1 See: Filippo Turati, Atti del Parlamento Italiano. Camera dei Deputati, sess. 1904–1908: 22962. (17.6.1908); Henri Chardon, *L'administration de la France. Les fonctionnaires, du gouvernement, le ministère de la Justice.* (Perrin 1908, Paris).

2 See: Giuseppe Abbamonte, La funzione amministrativa tra riservatezza e trasparenza. Introduzione al tema (Giuffre 1989, Milano) Quad. reg.: 977–994; Gregorio Arena, 'Trasparenza amministrativa' in Sabino Cassese (ed), *Dizionario di diritto pubblico* (Giuffrè 2006, Milan) 5945–5955.

3 See: Gregorio Arena (ed), *La funzione di comunicazione nelle pubbliche amministrazioni* (Maggioli 2001, Rimini); Annamaria Bonomo, *Informazione e pubbliche amministrazioni. Dall'accesso ai documenti alla disponibilità delle informazioni* (Carocci 2012, Bari).

maintained.[4] a totally glass house may perhaps be too fragile and too expensive. As such, public knowledge of administrative documents must be the normal rule and secrets must be an exception, in order to grant real democracy and transparency: however, transparency and publicity (or total openness) are not synonyms.[5]

Nevertheless, in the latest reforms, a new legal concept of transparency was born, and it is quite different from the one previously accepted by scholars, the administrative courts and – even if implicitly – by the legislator.[6] Actually, the recent rules expressly make reference to Law 241/1990; therefore, it is reasonable to think that the traditional idea of transparency has been maintained, which is confirmed by the fact that Legislative Decree No. 33 also refers to the right of access to administrative documents as an instrument for transparency.

However, the 2013 decree offers a general notion of transparency as well, even if the specific purpose of such rules is to prevent and fight corruption in the administration and this is clearly a narrow perspective.

According to the original formulation of art. 1 (which was reformed in 2016), transparency was intended as total accessibility of information on the organisation and activities of public authorities (and of private subjects involved in the fulfilment of public interest), in order to encourage widespread checks on the pursuit of institutional duties and on the use of public resources.[7] In practice, the duty to publish documents and data was not as wide as it may seem. This 'new' principle of transparency, in fact, essentially worked only through the publication of specific groups of documents, information and data on the institutional websites.[8] Everyone had (and still has) a right to direct and immediate access to the websites, without any authentication and identification. If the duty of compulsory publication is not respected by the administration without delay, anyone may ask for it to comply with the obligation and obtain so-called civic access to elements that it is legally obliged to publish.[9]

Originally, each authority also had a discretionary power to publish on-line other documents or information not containing personal data, but this power was in practice never

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[4] See Marcello Clarich, 'Trasparenza e protezione dei dati personali nell'azione amministrativa' (2004) 3 (12) Foro amministrativo T.A.R. 3885–3897.

[5] See Massimo Occhiena, 'I principi di pubblicità e trasparenza' in Mauro Renna, Fabio Saitta (eds), *Studi sui principi del diritto amministrativo* (Giuffrè 2011, Milan) 141–148.

[6] See: Enrico Carloni, 'La "casa di vetro" e le riforme. Modelli e paradossi della trasparenza amministrativa' (2009) 3 Diritto pubblico 779–812; Benedetto Ponti et al., *Nuova trasparenza amministrativa e libertà di accesso alle informazioni* (Maggioli 2016, Santarcangelo di Romagna); Mario Savino, 'La nuova disciplina della trasparenza amministrativa' (2013) 33 Giornale di diritto amministrativo 795–805.

[7] See Marco Bombardelli, 'Fra sospetto e partecipazione: la duplice declinazione del principio di trasparenza' (2013) 3–4 Istituzioni del Federalismo 657–685.

[8] See: Antonio Contieri, 'Trasparenza e accesso civico' (2014) 9–10 May, Nuove autonomie 563–576; Esposito Vincenza et al., 'Il diritto sociale alla trasparenza tra il diritto di accesso ed il diritto civico' <http://www.filodiritto.com/articoli/2013/07/il-diritto-sociale-alla-trasparenza-tra-il-diritto-di-accesso-e-l-accesso-civico/> accessed May 2017; Diana Urania Galetta, 'Transparency and Access to Public Sector Information in Italy: a Proper Revolution?' (2014) 2 Italian Journal of Public Law 212–240; Gianluca Gardini, 'Il codice della trasparenza: un primo passo verso il diritto all'informazione amministrativa?' (2014) 8–9 Giornale di diritto amministrativo 875–891.

[9] See art. 5, Legislative Decree No. 33/2013.

used, because of the constant expense clause in the Decree.[10] Finally, it was erased in 2016, when the legislator introduced a new kind of civic access (so called 'generalised' civic access), which allows private parties to obtain disclosure beyond the borders of compulsory publication.

An interesting element of the 2013 Legislative Decree concerns the indication of promoting higher levels of transparency as a strategic area for the definition of general and specific goals. First, it is clear that publicity/publication is just one possible tool for achieving substantial transparency (as such, the two principles are not the same). Second, in this context, transparency is not only manifested in its relationship with the publication of acts and documents, but also, for instance, with simplifying the language used by the authorities in their communications with citizens.

In fact, a definition of publication has been given in Legislative Decree No. 33, since its adoption in 2013, besides the definition of transparency. Publication is intended as publication in the authorities' websites of information, documents and data regarding their organisation and activities. However, according to the decree, online publication is compulsory only for those groups of acts/documents/data which are indicated by the legislator. The result is a sort of tautological effect: only the information that is public according to the statutes must be published online on the authority's website and be accessible to anyone (not only to the stakeholders who are the authors of a request). This is interesting from the point of view of the nature of the legal position of the person who aims at obtaining the document or the information: in this case, in fact, that position is certainly strong (a full right) and there is no discretionary administrative power. However, at the same time, the rule according to which total publication is alternative to the 'traditional' right of access to documents (and when the document is public, which means that it has been published, the right is assumed to have been granted automatically) stays alive in law 241/1990.

As already pointed out, Legislative Decree No. 33/2013 was reformed by Legislative Decree No. 97/2016. An important change has to do with the legal notion of transparency.[11] At present, it not only requires public action to be made available to citizens according to the rules in force, but is also explicitly connected with the protection of the rights of individuals and with promoting participation by private parties in the administrative procedures.[12] Today more than ever, transparency is becoming a polysemic notion in Italy.[13] There are at least two notions of administrative transparency, which are different from the point of view of their

[10] In fact, the Decree compelled – and still compels – the administration to implement it without incurring new expenses; this rule was materially incompatible with actions requiring complicated evaluations of the need for partial anonymisation of personal data, which of course requires time and money to be spent in order to obtain the desired result. See Savino (n 6) 795–805.

[11] See Mario R. Spasiano, Riflessioni in tema di trasparenza anche alla luce del diritto di accesso civico' (2015) 1 Nuove Autonomie 63–80.

[12] See art. 1, Legislative Decree No. 33/2013, as emended in 2016.

[13] See Anna Simonati, La trasparenza amministrativa e il legislatore: un caso di entropia normativa? (2013) 21 (4) Diritto amministrativo 749–788.

content and from the point of view of their purpose. The 'new' concept is defined after the 2013 and the 2016 reforms in general terms, but the legislator expressly keeps the 'traditional' concept alive.

II The Right(s) of Administrative Access

1 Preliminary Remarks

The 'traditional' right of access to administrative documents ruled in Law No. 241/1990 allows private parties to read or take a copy of administrative documents, in order to defend their own legal position; as a consequence of the aim of self-protection, the request must give reasons and, when the documents contains secret information or confidential/sensitive data on third subjects, the reason given in the application is the basis for the competent authority to make a comparison between the counter-interests.

After the 2013 and the 2016 reforms, such a right of access survived. Now, it works together with the two kinds of civic access.[14] The first, introduced by Legislative Decree No. 33/2013 in its original formulation, allows everyone to know directly, without being compelled to give reasons for the request, documents, data and information that must be published in the websites of authorities.[15] According to the second, besides the *ex lege* publication of documents, data and information, anyone has a right to know the content of administrative documents and data (without being compelled to give reasons for the request), with the exception of those containing secrets to be kept in the public interest or to defend private and highly confidential data.

Even if the case law in principle does not put in doubt that the three rights of access have different characteristics,[16] the distinction between them is not simple[17] and the boundaries have to be indicated very carefully.

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[14] See art. 5 and art. 5 bis, Legislative Decree No. 33/2013, as emended in 2016.

[15] See: Marina Binda, 'Accesso civico e accesso disciplinato dalla legge n. 241 del 1990. Commento a d.lg. 14 marzo 2013, n. 33; l. 7 agosto 1990, n. 241' (2014) 4 Temi romana 47–56; Valerio Torano, 'Il diritto di accesso civico come azione popolare' (2013) Vol. (4) Diritto ammministrativo 789–840; Stefano Toschei, 'Accesso civico e accesso ai documenti amministrativi: due volti del nuovo sistema amministrativo' (2013) 3 Comuni d'Italia 9–23.

[16] See for example: Cons. St., VI, 20.11.2013, No. 5515, TAR Lombardia, Milan, IV, 30.10.2014, No. 2587; TAR Lombardia, Milan, IV, 11.12.2014, No. 3027; TAR Campania, Naples, VI, 3.3.2016, No. 1165; TAR Abruzzo, L'Aquila, I, 30.7.2015, No. 597. See also Toschei (n 15) 9. However, sometimes the courts held that the statutory introduction of the 2013 right of civic access has materially strengthened the traditional access to documents: see, for instance, TAR Piedmont, Turin, I, 8.1.2014, No. 9. See also TAR Umbria, I, 16.2.2015, No. 69 and TAR Abruzzo, I, 16.4.2015, No. 288; TAR Lombardia, Brescia, I, 4.3.2015, No. 360, and TAR Abruzzo, I, 16.4.2015, No. 288. The text of all the case-law mentioned in the paper is available (unfortunately, in Italian), in https://www.giustizia-amministrativa.it.

[17] In fact, the applicant for access sometimes prefers not to make clear which kind of access he/she aims at obtaining, by expressing the request in a very broad way. However, according to the most correct line, an application that does not make clear what kind of access it refers to should be considered (both by the administration and, later, by the courts) as inadmissible. See so, for instance: TAR Lazio, Latina, I, 9.12.2014, No. 1046; Cons. St., V, 12.5.2016,

The comparison is further complicated in light of the peculiar role given in this field to administrative courts. In fact, according to the Code of Administrative Judicial Review (Legislative Decree 2.7.2010, No. 104), the same judicial remedy works with reference to the breach of the duties of on-line publication and to overcome an administrative denial of 'traditional' access to documents.[18] The judicial procedure is special and it is based on short deadlines for the private parties to act during the procedure and for the court to issue its decision and on the wide powers of the administrative court. In fact, the courts may order documents to be presented to the applicant (for the 'traditional' access) or to be published (in the case of civic access), also indicating how specifically to do that (art. 116.4, Legislative Decree No. 104/2010). This legislative choice does not take into account the numerous differences between the three kinds of right of access; besides, it gives the administrative courts an efficient tool for the protection of the applicant's interest, while the position of the parties with opposing interests is, in the perspective of judicial review, much weaker (which is partially compensated by the provision for the possibility, open to them too, to apply to an ADR authority).

2 The Recipients and the Authors of the Request

The first basis of comparison between the various kinds of access concerns the subjects involved.

From the point of view of indicating the recipients of the request, the situation is quite similar in the three cases, because in all of them not only public authorities, in strict sense, but also private subjects acting in the fulfilment of public interest may be the interlocutors of the applicant. However, this is the result of a normative evolution.

In fact, in the case of the right of access to documents, the legislator has progressively adapted the rules in force[19] in light of the case law, which had clearly gone in an extensive direction from a substantive point of view. According to such a perspective, the request for access may be directed to formally private subjects whose mission is (at least partially) to

No. 1876; Cons. St., V, 12.5.2016, No. 1877; Cons. St., V, 12.5.2016, No. 1878; Cons. St., V, 12.5.2016, No. 1881; Cons. St., V, 12.5.2016, No. 1891. It also true that, sometimes, a sort of osmotic relationship between 'traditional' and civic access was indicated. In such cases, when there was a pertinent rule in Decree No. 33/2013, the courts ordered the administration to publish the document on-line on the website, even if the applicant had asked for 'traditional' access to it: see so, for instance, Cons. St., VI, 24.02.2014, No. 865 and Idem, V, 11.2.2014, No. 64. This is quite dangerous, because the result obtained by the applicant is different from the one that he/she aimed at and there could be no correspondence between what was asked for and the answer given by the court in the decision; besides, when the compulsory on-line publication of data is not complete, such a decision may not be totally satisfactory for the applicant, who aimed at knowing (through the 'traditional' access) the full content of the document.

18 See art. 5.5, Legislative Decree No. 33/2013 in its original formulation; after the reform in 2016, the same rule is contained in art. 5.7. of the Decree.

19 Which was done by Law No. 265/1999 and by Law No. 15/2005.

pursue a public interest.[20] A similar change happened with reference to the rights of civic access: after having assumed a restrictive formulation in the original text of Legislative Decree No. 33, art. 2 bis (reformed in 2016) it now comprises all public authorities,[21] the great majority of public companies and (formally) private bodies with an economic dimension larger than a minimum size, the activities of which are financed or controlled by public authorities or are connected with the pursuit of public (national or E.U.) interests.

Authors of the request for access are always private parties, even if the conditions required are different: the protection of an individual interest in light of Law No. 241/1990; a breach by administration of its duty to publish on line in the case of civic access; and just the exercise of the right to know in the case of 'generalised' access.

Public authorities, in their mutual relationship, are presumed to act in compliance with the principle of loyal cooperation, which means that they are supposed to exchange the data and information they possess in a fair manner. However, sometimes this principle does not actually work and an authority simply refuses to send the requested data or information to the other authority. Consequently, a narrow but interesting case law[22] has developed an opinion, according to which public subjects may also ask for access to documents following the ordinary rules contained in Law No. 241/1990. This is an evident effort to allow public subjects to use the judicial protection tools which are at the disposal of private parties as well whenever the principle of fairness in mutual relationships between authorities has been concretely breached.

3 Object and Purpose of the Right(s) of Access

The differences between the three kinds of access are evident with reference to the object of the right.

The object of the 'traditional' right of access is existing documents,[23] and not directly data or information. Consequently, the recipient of the request must not produce *ad hoc* documents in answer to the applicant. This is of course an effect of the principle of efficiency of administrative action, the corollary of which is economy.

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[20] In the recent case law, see for instance *ex multis:* Cons. St., AP, 28.6.2016, No. 13; Cons. Stato, IV, 28.1.2016, No. 326; Cons. Stato, V, 26.6.2015, No. 3226; Cons. Stato, IV, 11.4.2014, No. 1768; Cons. St., V, 15.7.2013, No. 3852; Cons. St., III, 27.5.2013, No. 2894, Cons. St., VI, 10.52013, No. 2566; Cons. Stato, VI, 2.5.2012, No. 2516; Cons. Stato, VI, 12.3.2012, No. 1403; Cons. St., VI, 17.1.2011, No. 235; Cons. Stato, IV, 27.1.2011, No. 619; Cons. Stato, VI, 9.8.2011, No. 4741; Cons. St., IV, 12.3.2010, No. 1470; Cons. Stato, VI, 19.1.2010, No. 189.

[21] In the perspective of practical implementation, it is interesting to note that, in the 2016 reform, the importance of the specific characteristics of the different kinds of public subjects was carefully taken into account. The consequence of such sensitivity is particularly evident for local entities (primarily the numerous small Italian municipalities), which often have weak financial and structural resources. Hence, on line disclosure works for them in a simplified way (art. 3.1 *ter,* Legislative Decree No. 33/2013) and such obligation became legally binding not immediately but after one year since the entry into force of Decree No. 97/2016 (art. 42.2).

[22] See especially Cons. Stato, V, 27.5.2011, No. 3190, Cons. Stato, VI, 9.3.2011, No. 1492 and Cons. Stato, VI, 15.3.2007, No. 1257.

[23] See art. 22.4, Law No. 241/1990.

Civic access was introduced in 2013 with a much wider scope, documents, data and information. The acceptance of broad openness was not seen as an excessive complication because the field of implementing this kind of access is rather narrow, comprising only compulsory public elements (which tend to exclude discretional evaluations by the competent authority).[24]

Things have become less simple with the entrance into force of the 2016 reform. According to the current formulation of art. 5.2 of Legislative Decree No. 33/2013, the 'new' civic access seems to concern only documents and data, apart from those that are legally to be published in the institutional websites. Consequently, information (that is 'elaborated' data) seems not to be part of the implementation area of the new civic access. However, the same art. 5 continues by explaining that all the kinds of civic access may be requested with reference to documents, data or information. In my opinion, this rule makes the narrower formulation of the definition indicated immediately before to be not legally binding; therefore, in practice information could also be the object of a request for 'generalised' civic access.

Another important difference relates to the purpose of the various kinds of access.

The 'traditional' right of access to documents is a tool for the protection of individual interests; hence, applications made with the aim of generally monitoring administrative behaviour are not admissible.[25] The common aim of both forms of civic access, instead, is facilitating a general check by citizens on administrative action.[26] The applicant for access to documents must give reasons and indicate the specific legal interest that, through such access, he/she wants to defend,[27] while the request for civic access must never give reasons.[28]

4 Limitations to the Right(s) of Access

Things are particularly intricate with reference to limitations to access.

In this field, there is no substantive problem with the right of civic access introduced in 2013. In fact, such right of access concerns a 'closed' list of administrative acts, the total or partial disclosure of which – by publication in the institutional website – is directly imposed by a rule in force. It is actually implementation that makes things more complicated, especially when personal data is involved in the compulsorily public document or information, which

[24] Traditionally, the case law follows a restrictive interpretation of the rules providing for cases of compulsory publication (TAR Emilia Romagna, Parma, I, 23.102014, No. 377, and TAR Puglia, Bari, III, 16.9.2016, No. 1253) and they may not be extensively interpreted and implemented (TAR Emilia Romagna, Parma, I, 23.10.2014, No. 377), even if it makes clear that they are expression of a general principle of transparency of administrative action (TAR Lombardia, Brescia, I, 4.3.2015, No. 360). In the doctrine, see Francesco Manganaro, 'Trasparenza e obblighi di pubblicazione' (2014) 3 Nuove Autonomie 553–562; Paola Marsocci, 'Gli obblighi di diffusione delle informazioni e il d. lgs. 33/2013 nell'interpretazione del modello costituzionale di amministrazione' (2013) 2–3 Istituzioni del Federalismo 687–724.

[25] See art. 24.3, Law No. 241/1990.

[26] See art. 5.2, Legislative Decree No. 33/2013.

[27] See art. 25.2, Law No. 241/1990.

[28] See art. 5.3, Legislative Decree No. 33/2013.

requires a careful evaluation by the competent subject. Of course, in light of the statutes in force, disclosure of sensitive data is always forbidden and, according to the principle of necessity of data processing, administration should never publish confidential personal data when it is not strictly needed. Therefore, case-by-case decisions must be made often.

Exceptions are instead expressly listed for both access to documents and generalised access. At first sight, they are quite similar: some of them are in the public interest, other aim at defending the right of privacy of third parties. Limitations in the public national interest substantially coincide: security, combating crime, international relationships, economic and financial stability. These interests are often protected by legal secrecy; hence, administrative power in this field is not strong.

The rules are significantly different however when the purpose is the protection of private rights.

According to Law No. 241/1990,[29] the right of privacy of third private parties has to be compared with the personal position to be defended through access, and access prevails when it is strictly necessary in order to defend the applicant's individual position. According to Legislative Decree No. 33, civic access may be denied when it is justified to comply with the statute on personal data processing, or else to grant freedom and secrecy of correspondence and economic private interests; hence, civic access is not allowed if disclosure is concretely harmful.[30]

The different perspective is evident and so is the inversion of the point of view. In the case of access to documents, when sensitive or highly confidential information of third parties is involved, the applicant must give reasons for the request, in order to show that his/her interest may be satisfied only through the knowledge of the requested documents. In the case of generalised access, access is instead presumed to be allowed, but it must be excluded when disclosure is probably materially harmful for the owner of the information. Decision-making in this field is particularly difficult, especially because (as already noted) the request for generalised access itself must not give reasons and consequently making a comparison between the private interests is almost impossible for the administration. As such, the circulation of joint guidelines by the National Anti-Corruption Authority and the National Data Protection Authority is going to be extremely useful.

Anyway, on the basis of method (so to say) the same solution may also help in managing both the 'traditional' and generalised rights of access properly: it is partial disclosure, which allows the applicant to know just some data, without disclosure of the information, the communication or publication of which would be harmful to a protected interest.

[29] See art. 24.6.d), Law No. 241/1990.

[30] See art. 5 bis, Legislative Decree No. 33/2013.

5 The Procedural Rules: Some Relevant Elements

From the point of view of procedure, management of the 'ordinary' civic access is quite simple. In fact, it is nothing more than the consequence of the breach of rules compelling the total or partial on-line publication of documents, information or data.

Once more, similarities are especially evident in the rules on the right of access to documents and the generalised access.

The first common element is the administrative duty to give reasons for the decision on the request, especially when it is negative. However, this rule works a little differently in the two cases. In fact, Law No. 241/1990[31] provides for a hypothesis of tacit denial, which of course reduces the strength of the motivational duty. No similar exceptions to the duty are admitted in the Legislative Decree No. 33/2013, which, on the contrary, requires administrative decisions on civic access to be expressed in every case.[32]

The second common element is the compulsory involvement in the procedure of the owners of confidential data, who must be put in the position of expressing their view on disclosure. The intensity of their role is however different in the two cases. In the system of the right of access to administrative documents, they can produce a written contribution, which the administration must consider before taking its decision.[33] According to Decree No. 33, their legal position is stronger because, if faced with their opposition, access by the third party is postposed, in order to allow them to activate an administrative appeal or an application for judicial review without delay.[34] The deeper attention to parties with opposing interests is clear also in light of the rules on ADR tools: while in the system of the right of access to administrative documents such instruments may be activated only by the applicant who has been denied, they are available to all parties involved in the controversies on generalised access.[35]

III The Right(s) of Access and the 'Digital First' Principle: Open Issues

An element of administrative action that directly impacts the management of the rights of access has to do with digitalisation. The use of informatic tools should be a source of simplification and so it is generally considered in the national and the supra-national systems. Hence,

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31 See art. 25.3, Law No. 241/1990.

32 See art. 5.6, Legislative Decree No. 33/2013. However, see also *infra*, 4., where it is pointed out that, in its, 2016 guidelines, the Anti-Corruption Authority hold that the duty to give reasons for denial of generalised access does not work when secrecy relates even to the existence of the required information.

33 This rule is contained not directly in Law No. 241/1990, but in the executive regulation: see art. 3, Decree of the President of the Republic No. 184/2006.

34 See art. 5.5, Legislative Decree No. 33/2013.

35 See art. 5.5-9, Legislative Decree No. 33/2013.

in Italy the strong attention to the contribution of technology to grant more effective administrative transparency[36] has been recently expressed in Law 7.8.2015, No. 124. This statute refers to a general principle – *digital first* – to be implemented by specific legislation as a key rule for administrative action.[37] According to this principle, in order to assure transparency in the public interest, the administrative action should primarily take place through digital procedures. Digitalisation is presumed to improve the quality of governance and to make participation by private parties easier. The same idea is clearly shared in the 2013 and 2016 reforms on civic access, which is intended as a strong communication tool between administration and the citizens through institutional websites and the electronic disclosure of documents, information and data.

Nonetheless, such an approach opens new questions, especially about the link between transparency, efficiency and public ethics. It is necessary to keep in mind, in fact, that in Italy there is a low level of digital literacy. At present, it would be anachronistic to require that the whole population owns the technical tools and is able to use them properly in order to participate in the administrative procedures.[38]

As was already pointed out, in its traditional physiognomy, transparency is a fundamental element of public performance and it goes beyond publicity; moreover, it must be granted with the same intensity to all citizens, intended in its widest sense. In light of all these elements, one could infer that, to really implement transparency through access, the administrative authorities should not only create an accessible institutional website, but also put free internet terminals (with a printer) at the disposal of their citizens. Besides, public servants, to assist and provide technical guidance to them, should continuously attend the terminals. Such a duty seems to be the direct consequence of the introduction of the *digital first* rule as a basic principle for administrative action and it corresponds to public ethics taken seriously. Nonetheless, as economy of administrative action must also be taken seriously, this proposal is of course just rhetorical.

Anyway, the implementation problems connected with the *digital first* principle may perhaps be reduced by proposing that the rules in force be interpreted in a way that partially contrasts with their current text but is at the same time compatible with the 'spirit' of the principle of good and fair administration. The issue relates to the possible right of citizens to

[36] See: Fiammetta Borgia, 'Riflessioni sull'accesso ad Internet come diritto umano' (2010) 65 (3) La comunità internazionale 395–414; Pasquale Costanzo, 'Miti e realtà dell'accesso ad internet (una prospettiva costituzionalistica)' (2012) 8 November, Consulta online 14; Lorenzo Cuocolo, 'La qualificazione giuridica dell'accesso a Internet, tra retoriche globali e dimensione sociale' (2012) 2–3 Politica del diritto 263–287; Tommaso E. Frosini, 'The internet access as a fundamental right' (2013) 25 Federalismi.it 7; P. Passaglia, 'Diritto di accesso ad internet e giustizia costituzionale. Una (preliminare) indagine comparata' (2011) Consulta online 37.

[37] See: Enrico Carloni, 'Tendenze recenti e nuovi principi della digitalizzazione pubblica' (2015) 2 Giornale di diritto amministrativo 148–157; Carmela Leone, 'Il principio 'digital first': obblighi e diritti in capo all'amministrazione e a tutela del cittadino. Note a margine dell'art. 1 della legge 124 del 2015' (2016) 6 GiustAmm.it 8.

[38] Of course, the scientific debate about the nature of the right to the internet as a personal fundamental right has also a basic role in a legal discourse on this issue: see Borgia (n 36) 395–414 and Frosini (n 36) 7.

request, at the same time and with reference to the same documents, 'traditional' and civic access. The rules in force suggest a negative answer, at least when the compulsory on-line publication concerns the whole content of the act. In fact, according to art. 26.3 of Law No. 241/1990, if a document has been completely published, the right of access by citizens is fully satisfied and it cannot be asked for again.[39] The case law is now instead oriented to a positive answer, whenever the applicant has a relevant legal interest in light of both the 1990 Law and the 2013 Decree.[40] This solution may help at the moment, as a sort of interim 'positive action' measure, in overcoming the problems connected with the implementation of the *digital first* principle, which may have counterproductive results in systems such as the Italian one, where the general level of digital literacy is still low.[41]

Moreover, a possible danger connected with a widespread implementation of the *digital first* principle has to do with openness of administrative action. In fact, if administrative procedures are primarily conducted on-line, the low level of digital literacy will probably discourage participation by an important segment of the stakeholders. This may cause a lack of possibly useful inputs for the competent authority, with consequent serious damage to the public interest.

Another link between the *digital first* principle and public ethics concerns the relationship with open data. According to Legislative Decree No. 33/2013, on-line publication of documents and information in the websites of the authorities is compatible with the possibility of free use of data, with the only duty to indicate the official source. Notwithstanding this, the Italian Data Protection Authority has held that personal data may be 'open' only if it is not confidential (or even sensitive, of course) and its use does not cause damage to the right of privacy of the person to whom it refers. Therefore, an *ex ante* careful choice among the various kinds of documents and data to be published in the institutional website is necessary.

IV The Right(s) of Access and the Guidelines of the National Data Protection Authority and Anti-Corruption Authority

The Italian legal system may be integrated with guidelines issued by independent authorities, which are an answer to the need for quick and flexible rules. The various kinds of guidelines are quite different from one another and discussion is open regarding their definition, either as a new sort of normative act (globally indicated as secondary level sources of law) or as administrative acts with general content, addressed to the group of stakeholders in the specific

[39] In the administrative case law, this rule is constantly implemented. See, for instance: Cons. St., IV, 10.1.2012, No. 25; Idem, VI, 16.12.1998, No. 1683; TAR Puglia, Lecce, II, 17.09.2009, No. 2121; TAR Basilicata, Potenza, I, 25.6.2008, No. 315; TAR Liguria, Genova, I, 14.12.2007, No. 2063; TAR Lazio, Rome, I, 08.2.1996, No. 177.

[40] See, for instance, TAR Campania, Naples, VI, 5.11.2014, No. 5671.

[41] From this point of view, the case law, according to which it is a duty of the private party to prove that the digital link indicated by the authority to reach the desired information did not work at that moment (which is often very hard), is certainly not 'citizen-friendly'. See, for instance, TAR Sardinia, II, 23,4.2015, No. 719.

field. In both cases, they may be considered as the most advanced paradigm of administrative lawfulness, which in Italy has become much more flexible in recent years than it used to be. At the same time, they must be very carefully considered, because they allow public authorities – which are not democratically legitimated and are often linked to groups of private subjects, who have economically and socially strong interests – to create generally binding rules. This could be in contrast with the basic corollaries of the principle of good administration, such as impartiality.

In the field of the right(s) of access, the Data Protection Authority and the National Anti-Corruption Authority are requested to indicate, after a participatory procedure, the groups of information that must be just partially published, in compliance with the principles of proportionality and simplification.[42] The same authorities issue guidelines, to make clear the borders of the limitations to civic access.[43] The Anti-Corruption Authority, with the strong cooperation of the Data Protection Authority, therefore, produced Act No. 1309 of 28.12.2016.[44] This is, in the field of transparency and administrative access, the latest (and probably the most important) example of guidelines.

However, other guidelines on similar subjects had been produced before.

In 2011, the Data Protection Authority[45] produced its guidelines for the Processing of Personal Data Contained in Documents and Records by Public Bodies in Connection with Web-Based Communication and Dissemination.[46] In the 2011 guidelines, definitions of *transparency*, *publicity* and *access* are proposed. In particular, according to the guidelines, *transparency* means the availability of administrative records and documents containing personal data on institutional websites, in order to ensure widespread knowledge so as to enable the public supervision of administrative action; *publicity* means online availability, intended to inform about administrative actions as related to fairness and legitimacy principles, as well as to ensure that administrative decisions are legally enforced where necessary; *access* means availability of administrative records and documents on institutional websites for specific entities, so as to facilitate participation in administrative action. Such definitions are expressly proposed 'without prejudice to specific definitions set out in special rules' and only in the perspective of 'the appropriate implementation' of the guidelines themselves. This shows

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42 See art. 3, Legislative Decree No. 33/2013, as reformed in 2016.

43 See art. 5 bis.6, Legislative Decree No. 33/2013, as reformed in 2016.

44 The guidelines are published (unfortunately, in Italian), in <http://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Attivita/Atti/determinazioni/2016/1309/del.1309.2016.det.LNfoia.pdf> accessed 5th April 2019 – Among the scholars, see: E. Furiosi, 'L'accesso civico „generalizzato", alla luce delle Linee Guida ANAC' (2017) 4 GiustAmm.it 21; M. Lucca, 'Il diritto di accesso civico, generalizzato e documentale alla luce delle Linee guida ANAC n. 1309/2016' (2016) 1–3 Comuni d'Italia 26–40.

45 See G. Di Cosimo, Sul ricorso alle linee guida da parte del Garante per la privacy (About the use of Guidelines by the Italian data Protection Authority)' (2016) 31 Giornale di storia costituzionale 169–172.

46 The guidelines (Act. No. 88, 2.3.2011) are published in Italian in <http://www.garanteprivacy.it/web/guest/ home/docweb/-/docweb-display/docweb/1793203>; the highlights in English are available in <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1803707> accessed 5th April 2019.

a strong awareness, first, of the polysemy of the legal terms[47] and, second, of the difficult relationship between the guidelines and the (other) legal sources. In the same guidelines, then, great attention is paid also to addressing the exercise of discretionary power. When, in the rules in force, there is no indication of the specific elements of publication (such as, for instance, the length of the mandatory disclosure period), each authority decides in light of the principles of proportionality and indispensability of data processing.

Another interesting interpretative contribution was given by the guidelines issued by the Data Protection Authority in 2014 (Act No. 243, 15.5.2014), about on-line processing by public subjects for publicity and transparency purposes.[48] The Authority states that a deep discretionary evaluation is requested, in order to decide whether non-aggregated data is to be published on each website. Such on-line publication is allowed only if strictly necessary (according to the general rules)[49] and excluding personal data regarding sex and health. A relevant specification contained in the guidelines has to do with the aim of the rules requiring the data publication. The specific rules contained in Legislative Decree No. 33 (for instance, with reference to the term of the obligation to on line publication), in this view, can only be applied if the purpose of legislative publication is the protection of administrative transparency, not if the legal purpose is anything else.[50] This is very interesting, because such a distinction is not mentioned at all in the primary sources of law. The 2014 guidelines therefore show an effort to interpret the rules beyond their original scope as well. Of course, such a tendency opens the problem of the possible binding force of the guidelines themselves. In my opinion, the guidelines work as an interpretative contribution and they can 'fill in the blanks' of the statute with which they are connected, only if the statute itself so provides and the interpretative contribution in the guidelines is compatible with the content of the rules.

In the 2016 guidelines, the National Anti-Corruption Authority, together with the Data Protection Authority, followed what one might call a cautious approach. Faced with significant doubts about the implementation of the 'new' generalised access, the Authorities often just address the open questions and offer general references for their proper solution, without directly indicating them. For instance, there is an effort to guide the administration in implementing the various kinds of access, by proposing a complex terminology. The 'traditional' right of access ruled in Law No. 241/1990 is called *documental access;* access to compulsorily public documents, provided for since 2013, is called *civic access,* while the 'new' civic access introduced by Legislative Decree No. 97/2016 is referred to as *generalised access.* It is made clear that civic access has a narrower scope than generalised access, while documental access

47 See: Bombardelli (n 7) 657–685; Simonati (n 13) 749–788.

48 The guidelines are published (unfortunately, in Italian), in <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/3134436> accessed 5 April 2019.

49 See art. 8 and art. 11.1.d, Legislative Decree No 196/2003.

50 An interesting example contained in the Guidelines (see pp. 10–11 and 13) concerns wedding banns, the publication of which clearly aims primarily at combatting polygamy and has nothing to do with administrative transparency.

has the narrowest object but allows a deeper knowledge of the content of the documents. Moreover, the guidelines invite the individual authorities to issue specific regulations, and to explain the rules in force and indicate best practices.

About the possible effect of an administrative decision to accept a request for the 'new' civic access, some general suggestions aim at helping to solve the deepest doubts. Considering the legislative text,[51] one could infer that, when the request for generalised civic access is accepted the knowledge of the document or information must be open to anyone. These rules, which seem to be very auspicious for a widespread implementation of administrative transparency, will on the contrary perhaps induce authorities to be severely restrictive in allowing the 'new' civic access or at least to limit it to applicants only. In the guidelines, it is made clear that the administration may always protect the (public) interest in the economy of its action, in accordance with the relevant E.U. case law.[52] The necessary balance of all the relevant (public and private) interests allows the competent authorities to choose the best solution in light of the characteristics of the single case, in order to implement as widely as possible the principle of administrative transparency. Besides, the guidelines note that the rules, according to which the administrative decision on the request for generalised access must be expressed and it must give reasons, may be clearly dangerous and counterproductive. This can happen whenever access is denied in order to prevent the disclosure of secret or confidential data, especially when even their existence is unknown to the public. Therefore, an important exception to the administrative duty to give reasons for the decision is indicated, whenever giving reasons would reveal confidential information on public activity or on the counter-interested parties.

The third example of the 'indirect approach' of the 2016 guidelines in solving the open problems connected with the implementation of the rights of access relates to the limits to the 'new' civic access. Also from this point of view, the guidelines do not contain specific indications, but they offer some useful explanations. In particular, they distinguish between absolute and relative exceptions to generalised access. The former work when a rule of law strictly prohibits access to protect fundamental public interests (let's think of state secrets and other secrets, as provided for in specific pieces of legislation) or private rights (let's think of the right of privacy regarding sensitive data). The latter work when a specific evaluation by the administration, in light of the characteristics of the single case, shows that disclosure of documents, data or information could be concretely harmful to fundamental public interests (public security and defence; international relations; monetary and current policies; public

[51] According to art. 3, Legislative Decree No. 33/2013 (as amended in 2016, all the documents and data which are the object of civic access are public (which means *must* be made public), here comprised the ones which are compulsorily to be published. Moreover, art. 7 of the 2013 Decree holds that all the documents, information and data that have been the object of civic access (in both its forms, one could infer considering the text in force) must be published online in open access and can be re-used with no broader limitations than the duty to mention their source and to use them properly.

[52] In fact, in the guidelines, Court of first instance, First chamber, extended composition, Judgment of 13.4.2005, Verein für Konsumenteninformation/Commission is mentioned (see 4.2.).

order, prevention of and combating crime) or private interests (protection of personal data, freedom and secrecy of correspondence and protection of economic and commercial interests). In such cases, a careful decision-making process by the competent authority is necessary, in light of the specificities of the single case; it seems to be very similar to the exercise of discretionary power. In particular, when private confidential data is concerned, generalised access should probably be forbidden when the data is sensitive or concerns the fundamental rights of individuals (such as genetic data or detailed economic information). The expressed legislative reference to *concrete* damage is important, because it requires the administration to choose a proportionate solution in any event, which also means that postposed or partial disclosure must be normally preferred to total denial. Partial disclosure in particular may be the proper solution, whenever personal confidential (but not sensitive) data is concerned.

It is also useful to point out that, according to the 2016 guidelines, there are important differences between groups of counter-interested parties. Individuals tend to be wholly protected, in light both of the rules on personal data processing and of the rules on the defense of the right of privacy. The rules contained in Legislative Decree No. 196/2003 on personal data processing do not concern, however, subjects other than private individuals. Therefore, legal persons and associations are surely protected, but only in relation to their right to freedom and secrecy of correspondence and in relation to their economic and commercial interests.

The guidelines analysed represent the starting point for other interpretative acts, which show the effort by administrations to solve the problems arising from the coexistence of the various kinds of access. In particular, a circular was released in 2017 by the Department of Public Service,[53] in order to help the individual authorities in their practical activities. In the circular, the principle of reasonabless seems to be key concept. Generalised access is indicated as the expression of a general right of information; therefore, administration is required to reduce as much as possible the exercise of the power of denial. Hence, when access is requested without any specification of its legal title, it should be considered as generalised access; besides, the request should be considered inadmissible only if it does not make clear its fundamental elements. In a practical perspective, the circular contains some suggestions about so called 'pro-active' access: according to it, administration should publish in the institutional websites those documents and data that (at least) three different subjects have asked for them to be published during the latest year. At the same time, however, denial of access is possible whenever satisfying the request would compel the administration to an excessive effort (which happens, for instance, if the same request is repeatedly presented by the same subject).

[53] See Ministero per la semplificazione e la pubblica amministrazione, Accesso civico generalizzato (FOIA). Circolare applicativa, 30.5.2017, No. 2, in <http://www.funzionepubblica.gov.it/articolo/dipartimento/01-06-2017/circolare-n-2-2017-attuazione-delle-norme-sull%E2%80%99accesso-civico> accessed 5 April 2019.

V Final Remarks

A synthetic analysis of the contemporary Italian legal system shows that pluralism is the main characteristic of both the principle of transparency and administrative access as a tool to grant transparency. The reasons for this phenomenon are to be found primarily in the progressive complication of administrative action, which depends on the multiplication of its tasks and field of intervention and on the introduction of technological instruments to fulfil its competencies.

From one point of view, this clearly could be a positive side of the system, because it determines a multiplication of the legal tools for administrative transparency at the disposal of citizens. However, in practice, the same factor is a point of weakness: the coexistence of the right of access to administrative documents and the 2013 civic access had already created serious implementation problems, which are quite evident in the recent case law; the addition of generalised access has complicated things further, especially in light of the statutory indication of limitations to it, that it is not really exhaustive and leaves a wide space for discretionary power. As practitioners often point out, at present the citizens are rather confused and they don't know exactly which kind of access they have to ask for.

The concept of transparency has been changing in recent years, especially when it has been legally connected with the need for accountability and to reveal corruption. Nevertheless, polysemy is maybe unavoidable, because it is also an effect of the influence of supra-national law,[54] where there is not just one accepted notion of the right of access, or at least the accepted notions have different nuances.

In the EU system, both in art. 15 TFEU and in art. 41-42 of the Charter of Fundamental Rights, access is provided for not only as a fundamental right of European citizens but also as an executive tool of the principle of transparency, which is intended as an instrument to allow democratic control of administrative action. Hence, the conceptual basis of access primarily lays on the aim of protecting the public interest.[55] At the same time, in the ECHR case law, the right of access to administrative activities is often considered as an expression of freedom of information, protected in art. 10 of the European Convention for the protection of human rights and fundamental freedoms.[56] This shows that, in the view of the European Court, even

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[54] See Mario Savino, 'The Right to Open Public Administrations in Europe: Emerging Legal Standards (2010)' <http://www.oecd-ilibrary.org/fr/governance/sigma-papers20786581> accessed May 2017.

[55] See: D. Curtin, P. Leino-Sandberg, *Openness, Transparency and the Right of Access to Documents in the EU. In-depth analysis for the PETI committee* (European University Institute 2016, Badia Fiesolana); D. Curtin, J. Mendes, 'Art. 42 – Right of Access to Documents' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward, *The EU Charter of Fundamental Rights* (Nomos 2014, Baden-Baden) 1142–1163.

[56] For instance, in the recent ECHR case law, see: *Társaság a Szabadságjogokért v Hungary,* 14.4.2009; *Youth Initiative for Human Rights v Serbia,* 25.6.2013; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria,* 28.11.2013; *Roşiianu v Romania,* 24.6.2014; Grand Chamber, 8.11.2016. Among the scholars, see Lucy Maxwell, 'Access to Information in Order to Speak Freely: is this a right under the European Convention?' (19.1.2017) <http://ohrh.law.ox.ac.uk/access-to-information-in-order-to-speak-freely-is-this-a-right-under-the-european-convention> accessed 28 August 2017.

if the involvement of public interest is clear as well, access primarily still works as the expression of individual interests, with a direct link to fundamental rights. Furthermore, Italian Law No. 190/2012 (which, as already indicated, is the origin of the acceptance of the 'modern' idea of transparency in the national system) is itself the effect of compliance with the supranational rules. In fact, it is the implementation act at the national level, among other things, of the UN Convention against corruption (31.10.2003)[57]. Therefore, one could infer that, in the supranational legal orders, the accepted concepts of administrative access are quite different and tend to aim at different priorities. While in the EU attention is paid in particular to the public interest in fair administration, the Court for the Protection of Fundamental Freedoms rather takes the exercise of access into the field of individual rights protection; at the UN level, the link between transparency and highlighting corruption (which is at the heart of the recent introduction in Italy of civic access and of generalised access rights) is strongly perceived.

Moreover, it is clear that not only are publicity and transparency not synonyms, but also openness/publicity (even on-line publicity) is not able in itself to assure real transparency.

It is maybe a challenge for the administrative law scholars to show that the 'traditional' idea of transparency is different from the 'new' one, not only because of its content, but also because of its fundamental nature. The 'new' principle of transparency is satisfied when documents, information or data are published or communicated to the interested parties; the 'traditional' principle of transparency not necessarily has to do with the results of administrative action, but properly with administrative action (procedures and final measures) as a whole. This specificity is perhaps not useless and must be maintained, because administrative action has peculiar characteristics, which are often different from those of the other public law activities (the rule-making and the judicial ones). So, we could say that transparency may work at two different levels: as a 'concrete' rule of law according with the legislator's will, but also (and maybe primarily) as a general principle of good governance, even apart from the production of specific statutes.

The original perception of the concept of transparency allows some elements that are not included in the modern legislative notion to be kept in mind. A basic factor concerns the quality of public communication, as even a document that has been fully published is not really transparent if it is written using language that is not comprehensible to the citizens. Replacing the 'traditional' principle of transparency as an expression of good governance with the 'new' one would be simplistic and wrong; it would produce a severe loss of significance and legal implications. Legislative reforms may effectively change the borders of specific legal tools, but it should not be assumed that, so doing, they are also able to affect basic concepts and principles. Despite the normative definition in force, one may infer that transparency in Italy still is what it used to be: the sum of comprehensibility and checkability of administrative

[57] In the text of the Convention (which was ratified in Italy with Law No. 116/2009), there is a clear and direct link between administrative transparency and contrast of corruption: see art. 5.1., art. 7.1(a) and 7.4, art. 9, art. 10.1, art. 13.1(a). About the right of access, see art. 10 and art. 13 of the Convention.

action. The core of such a principle should therefore be in clarity and accountability; disclosure of documents, data and information certainly is an element of the mechanism of transparency, but they do not necessarily overlap with it. The co-existence of the three rights of access is blatant proof of this. In the contemporary transforming society, seeking a balance between the various souls of administrative access is a challenge for scholars and practitioners.

Bruno Reynaud de Sousa*

Migration, the Sahel and the Mediterranean Basin: Which Scenario for the EU27 by 2025?**

Abstract

In choosing to focus on the situation in the Mediterranean region over the past four years, the present paper aims to assess how the Commission's White Paper on the 'Future of Europe' confronts the reality of economic migration in the wider context of the Sahel region and the Mediterranean basin. Taking the shortcomings of the EU engagement in the Mediterranean embodied by Operation Sophia/EUNAVFOR Med as an example, the present paper debates the value of a scenario 4½, based on the White Paper's scenario 4 and 5 regarding *Schengen, migration & security* and *foreign policy & defence*. Most especially, the present paper reaffirms that economic migration is a *global issue* providing an opportunity for the EU to play a decisive role in the development of global administration, thus enriching the discussion on Global Administrative Law in connection with the origins and impact of global governance. In this regard, unilateral actions by key EU Member-States pose a serious risk of undermining the relevance of EU Law and Public International Law toward the management of economic migration. Looking at the foreseen impact for Administrative Law, the paper advocates the need to perhaps revisit the distinct types of barriers to external influences that national Administrative Law regimes have, for example when applying International Law instruments, and to consider the increasing influence that International Law has upon the way in which competences are exercised by public administrations in EU Member-States – especially as States resort to national Constitutional Law as a last line of defence against ECJ rulings.

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I Introduction

In the beginning of the 19th century, Katsushika Hokusai, a Japanese artist, created the world-famous work – 'The Great Wave off Kanawaga' – depicting an overwhelming wave menacing small, helpless boats. Such is the way the current migration trends towards Europe are often depicted, the degree of helplessness of EU Member States' national administrations varying from country to country.

The world today is one of paradox and volatility. At a time of great technological innovation and economic prosperity, the scale of human tragedy is equally staggering. The year 2017 has been record-setting for the world economy: the Dow Jones grew from 19,735 points in January to over 24,750 points by year end, registering a drop to around 23,900 points in the first three months of 2018.

Conversely, we witness some of the biggest humanitarian tragedies of all time: the UNHCR registered the highest levels of displacement on record with an unprecedented 65.6 million displaced people around the world, 22.5 million refugees (5.5 million from Syria alone) of whom only 189.300 were resettled in 2016.[1] Crucially, estimates point to 465,000 people killed during the 6 years of armed conflict in Syria.[2] Although the world is not black and white, these circumstances are perceived as coming together to create a very clear division; a World of Order and a World of Disorder.[3]

Europe has traditionally been perceived around the World as a value-based community of law. For the thousands of migrants travelling thousands of kilometres on foot and by sea, Europe is a beacon, a symbol of hope in the World of Order. At a time when the US government moved forward with several restrictions on the entry of third country nationals, the EU can be said to represent, at least for those migrants, the 'shining city upon on a hill' that US President Ronald Regan once spoke about.

Nonetheless, *migration* is a contentious topic within the EU and the debate is characterised by at least two main points. The first concerns ascertaining the way in which EU Law is imperilled by EU Member States' individual actions and/or collective actions (or lack of them). A second point is that EU Member States share a set of reasons behind the adoption of such actions: the assertion of national sovereignty (and the securitization[4]

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1 UNHCR, *Figures at a glance,* available at <http://www.unhcr.org/figures-at-a-glance.html> accessed 1 June 2017.

2 Reuters, *Syrian war monitor says 465,000 killed in six years of fighting,* available at <https://www.reuters.com/article/us-mideast-crisis-syria-casualties/syrian-war-monitor-says-465000-killed-in-six-years-of-fighting-idUSKBN16K1Q1> accessed 4 April 2019.

3 T. L. Friedman, *Thank you for being late: an optimist's guide to thriving in the age of accelerations* (Farrar, Straus and Giroux 2016, New York).

4 By securitization I refer to the process whereby 'issues become securitized when leaders (whether political, societal, or intellectual) begin to talk about them – and to gain the ear of the public and the state – in terms of existential threats against some valued referent object […] the issue [raises] above normal politics and into the realm of 'panic politics' where departures from the rules of normal politics justify secrecy, additional executive powers, and activities that would otherwise be illegal.' See B. Buzan, 'Rethinking Security after the Cold War' (1997) 32 (1) Cooperation and Conflict, 5–28, 13-14. A more recent critique of the concept sees securitization as a process of translation of

thereof), economic protectionism and fragmentation of social/national cohesion. Such actions have the potential to imperil the perception of the EU as a rule-based community committed to the respect of International Law.

Critical security studies theory underlines, *inter alia,* a very important idea: security hinges upon perceptions.[5] Presently, the migration debate is still intertwined with the wider debate on EU Member State solidarity, being framed as the prime example of an impending cohesion crisis in the EU. The fact that the current migration discourse or rhetoric resorts to different hydraulic engineering concepts skews public perceptions of the other ('the migrant') as a harbinger or a messenger of misfortune – 'den Boten des Unglücks' in the words of Bertolt Brecht in the poem 'Die Landschaft des Exils'[6].

For the past four years, the world has seen how the Mediterranean Sea was transformed into a mass grave for almost 16,000 anonymous individuals – men, women and children – who lost their lives between 2014 and 2018 in an escape from scenes of either misery or violence – sometimes both. Notwithstanding the most recent efforts by the UN's High Commissioner for Refugees (UNHCR), the international community has experienced increasing difficulties in dealing with the current challenges posed by human mobility in the context of globalisation in regions of Africa and the Middle.[7]

As regards the role of Public International Law, the present paper will consider two aspects. On the one hand, it is evident that the *individual* has gained increased relevance in international relations, especially since 2001. However, it is equally certain that the individual still appears as a partial passive subject of International Law, in some cases dependent upon the State or mediated by the State. On the other hand, regarding the *State,* a double tendency needs to be considered: an increasing number of Southern and Northern States that objectively present (i) an inadequate correlation between internal demands and internal resources, while at the same time (ii) being overwhelmed by increasing pressures of varying nature (e. g., social, economic)[8]. In addition, most States have been increasingly confronted with the consequences of events that are externally caused – extreme weather events or globalisation-linked economic tribulations – placing additional pressure on decreasing State resources. More poignantly we may conclude that we have been for a while alternating between *'a globalization of crises and a globalization of powerlessness'*[9].

In brief, there is an increasing number of States that are lacking in resources and, at the same time, that are exogenous as to the impacts they suffer. Different authors employ different

so-called 'pre-existing narratives' (or threat images) to the local context of a particular State. See H. Stritzel, *Security in translation: securitization theory and the localization of threat* (Palgrave Macmillan 2014, Basingstoke).

5 K. Krause, M. C. Williams, *Critical security studies: concepts and cases* (University of Minnesota Press 1997, Minneapolis).

6 B. Brecht, J. Willett, R. Manheim, E. Fried, *Poems, 1913–1956* (Methuen 1987, London – New York).

7 S. Ali, D. Hartmann, *Migration, incorporation, and change in an interconnected world* (Routledge 2015, New York).

8 A. Moreira, *Memórias do Outono Ocidental: um século sem bússola* (Almedina 2013, Coimbra).

9 P. Lamy, N. Gnesotto, *Où va le monde?* (Odile Jacob 2017, Paris).

concepts to describe States displaying such an imbalance: 'failing State'[10]; 'collapsed State'[11]; State displaying a 'lack of effective government'[12]; 'failed State'[13]; *'gescheiterter Staat'*[14]; *'État défaillant'*[15]; *'Estados fallidos'*[16]; or even 'fragile States'[17].

A few States of the Sahel and the central Mediterranean region currently display the severe imbalances as described – especially Libya.[18] The current circumstances in the wider Sahel region are a cause of great concern at EU and NATO levels. EU Member States' actions to address the challenges posed by state fragility in the region and the way in which these actions intersect with the human mobility (migrant) challenge in the Mediterranean lead to one striking conclusion: EU borders no longer *end* at Ceuta, Melilla and the coast lines of Lampedusa or the Greek Islands; EU borders have *de facto* extended further South and East, well beyond the historical limits of the Roman Empire's *Limes Africanus* and *Limes Arabicus* (as until 395 A.D.).

In the past, EU Member States could afford the luxury of not cooperating in migration management matters, mainly due to the physical distance from the migrants' countries of origin. Nowadays, the phenomenon of globalisation has increased opportunities for human mobility – specifically since organized crime harnesses the 'power of flows' that Friedman describes[19] – in essence eliminating the physical distance that existed in the past: arrivals via the central Mediterranean route in the period from January 2014 to November 2017 total almost 600,000 men, women and children.[20]

The evident absence of an effective government in Libya, the dire situation in Syria in the wake of the internal conflict and the wider insecurity context in the Sahel region (mainly in Mali and the Central African Republic), have led EU Member States multilaterally, bilaterally and directly into the Sahel region and the Mediterranean Sea.

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10 G. B. Helman, S. R. Ratner, 'Saving Failed States' (1992–1993) 89 (Winter), Foreign Policy 3–20.

11 I. W. Zartman, 'Introduction: Posing the problem of state collapse' in I. W. Zartman (ed), *Collapsed states: the disintegration and restoration of legitimate authority* (L. Rienner Publishers 1995, Boulder).

12 D. Thürer, M. Herdegen, G. Hohloch – Deutsche Gesellschaft Für Völkerrecht Tagung, *Der Wegfall effektiver Staatsgewalt: The Failed State = The breakdown of effective government* (C.F. Müller 1996, Heidelberg).

13 R. I. Rotberg, 'The Failure and Collapse of Nation-States: Breakdown, Prevention, and Repair' in R. I. Rotberg (ed), *When states fail: causes and consequences* (Princeton University Press 2004, Princeton, N. J.).

14 R. Geiß, *'Failed States' Die normative Erfassung gescheiterter Staaten* (Duncker & Humblot 2005, Berlin).

15 G. Cahin, 'L'État défaillant en droit international: quel régime pour quelle notion?' in O. Corten (ed), *Droit du Pouvoir, Pouvoir du Droit: Mélanges offerts à Jean Salmon* (Bruylant 2007, Bruxelles).

16 M. Pérez-Gonzalez, 'Conflictos armados y posconflicto' in W. Brito, J. P. Losa (eds), *Conflitos armados, gestão pós-conflitual e reconstrução* (Scientia Iuridica – Andavira Editorial 2011, Santiago de Compostela).

17 L. Brock, H.-H. Holm, G. Sørensen, M. Stohl, *Fragile states: violence and the failure of intervention* (Polity 2012, Cambridge).

18 'Libyan state weakness has been a key factor underlying the exceptional rate of irregular migration on the central Mediterranean route in recent years.' – see, UK, House of Lords, European Union Committee, 14th Report of Session 2015–16, *Operation Sophia, the EU's naval mission in the Mediterranean: an impossible challenge,* §101.

19 Friedman (n 3).

20 UNHCR, <https://data2.unhcr.org/en/documents/download/61295> accessed 4 April 2019.

II The EU and Migration: Encampment, Cooperation and Outsourcing

At EU and State-level, the number and the simultaneous nature of current crises require an ability to look at multiple sets of problems simultaneously in a context where (i) what is a priority today may cease to be one six months later, and (ii) public perceptions are very volatile.

Human mobility has increased in the 21st century due to a confluence of different factors:[21] 1) increased connectivity and access to information; 2) increased State fragility; 3) increased opportunities for mobility as transnational criminal networks harness the power of 21st century information and capital flows; 4) pressured EU States are no longer able to rely on natural borders and distance to avoid taking fundamental decisions regarding the effectiveness of existing International Law instruments to address the issue of economic migrants, while at the same time the number of forcibly displaced persons worldwide is at an all-time high of 65.6 million and the number of refugees has increased exponentially in the wake of the protracted armed conflict in Syria (5.5 million refugees). According to Betts and Collier this context exposes clearly all the shortcomings of what they call a 'dysfunctional refugee system'[22].

Setting aside the period that followed WWII, migration is not a new topic for Europe. Since the 1960s, several European States have authorized temporary migration for labour-related reasons, however without granting migrants the right to seek naturalisation.[23] In addition, this practice gained a different relevance following the emergence of the Schengen area in 1985.[24] Nonetheless, such practice relates mainly to intra-EU migration.

No one would dispute the fact that, in recent years, the EU has been dealing with increasing challenges linked to the wider phenomena of human mobility and urbanisation. In global terms, human mobility has one defining characteristic: it is directed from the global South to the global North: further to what is happening at Mediterranean latitudes, increasing human mobility is also happening in the Americas, originating in States located in South and Central America.[25] Here the people moving from South to North are either escaping situations of economic collapse (e.g. Venezuela), or rampant violence perpetrated by organised crime groups that the sovereign State is unable to contain.

In the past decade, the EU has seen increased internal migration mainly due to the economic and financial crisis of 2007-2008, as southern EU citizens sought jobs in northern EU countries.[26] These renewed Southern European migration flows (coupled with central

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21 A. Betts, P. Collier, *Refuge: transforming a broken refugee system* (Allen Lane, an imprint of Penguin Books 2017, London).

22 Ibid.

23 M. H. Fisher, *Migration: a world history* (Oxford University Press 2014, Oxford – New York, USA).

24 A. Razin, E. Sadka, *Migration states and welfare states: why is America different from Europe?* (Palgrave Macmillan 2014, New York, NY).

25 J. E. Domínguez-Mujica, *Global change and human mobility* (Springer 2016, Berlin – Heidelberg – New York, NY).

26 J.-M. Lafleur, *South-North migration of EU citizens in times of crisis* (Springer 2016, New York, NY – Berlin – Heidelberg).

European migration flows) have, most recently, fuelled the questioning of some aspects of the freedom of movement within the EU – a right of every EU citizen – and the wider debate on European solidarity. At the same time, arrivals to the EU of third country nationals have soared in a context of tribulations in the EU's neighbourhood, focusing attention on the Canary Islands, the central Mediterranean and the Aegean Sea regions.[27]

Regional systems, such as the Dublin Regulation,[28] are being placed under additional pressure due to new factors influencing human mobility: there are environmental disturbances and violence below the level of armed conflict, coupled with a double tendency of increasingly fragile States at a time of increased opportunities for human mobility fuelled by technology that increases human interactions. Overwhelming numbers of arrivals and of deaths, such as those registered in 2016 (390,432 arrivals and 5,143 deaths)[29] coupled with additional conflicting pressures from civil society – towards welcoming or rejecting migrants – removed the political margin for long-term or even debate on solutions that might address the root cause(s).

When considering the present topic, there are two interrelated concepts: State (and regional) security and State fragility. The points of origin of most migrants in the Central Mediterranean route are States displaying fragility at distinct levels; governmental; economic and societal'. Whereas the notion of 'failed States' is disputed in International Law, there is wide acceptance of the fact that certain States display a varying degree of 'fragility'. Paraphrasing Tolstoy, *all strong States are alike, each fragile State is fragile in its own way:* massive disorganised violence, pandemics or endemic diseases with high mortality rates or that leave many disabled, crystalized intra-state conflict, famine, prolonged droughts, the 'breakdown of effective government'[30] – among other factors, the combination of which contributes to a circumstance of *State fragility*.

In the post-WWII world, armed violence had an organised character that is no longer identifiable in the 21st century. From the beginning of the 1990s onwards, armed violence started occurring more frequently in a horizontal context of *individual against individual,* going beyond the phenomenon of violence by the State against the individual – what Mary Kaldor called 'new wars'[31]. The changing character of violence – part of the wider question of the international subjectivity of the individual – required the international community to

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27 P. Bevelander, B. Petersson, *Crisis and migration: implications of the Eurozone for perceptions, politics, and policies of migration* (Nordic Academic Press 2014, Lund, Sweden).

28 See, Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, repealed by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, JO L 180 de 29.6.2013, p. 31–59.

29 IOM, *Migration Flows – Europe* <http://migration.iom.int/europe/> accessed 4 April 2019.

30 Thürer, Herdegen, Hohloch (n 12).

31 M. Kaldor, *New & old wars* (Polity 2006, Cambridge).

devise ways to engage in scenarios where several non-state actors had violent interactions in the framework of a new type of armed conflict, of an internal or intra-State character (e.g. the 1992 UN intervention in Somalia).

As stated above, although there are many internal and external factors contributing to State fragility, little doubt remains that, for economic migrants, this is the main driver, whereas for refugees, it will be armed conflict. Wider contexts resulting from a combination of violence and misery therefore trigger what Betts and Collier identify as a 'flight-for-survival' need, as the only possible response to a 'forced displacement challenge' faced by many individuals living in the fragile States of the Sahel and beyond.[32] Upon assuming a new role as a migrant, the individual thus becomes trapped in a continuous cycle of retention and escape, from which death frequently represents the only way out – fleeing one place and risking life to arrive at another, from where to flee again.

Crucially, time runs slowly between phases and all migrants experience a long hiatus at some point when moving: encampment. The average time spent by individuals at a UNHCR camp currently stands at 17 years.[33] In fact, encampment has been the main response by the international community to massive displacements of individuals in the Middle East going back sixty years– only recently has the UNHCR started the debate on alternatives to 'camps'[34] – at a time when an entire service industry has been building up around encampments (from telecommunications to biometric scanners[35]).

Recourse to legal mechanisms directed at outsourcing migrant management, both at EU and State level and independently of each other, has had a visible outcome despite undermining the application of International Law. Statistics point towards a significant decrease in arrivals in Europe during 2017. With sea arrivals totalling 362,753 in 2016, following an astonishing 2015, when over one million arrivals were recorded, this year is on track to registering less than 170,000 arrivals – the lowest number recorded since 2014.

In the legal and judicial fields, EU action in the framework of the internal management of migration takes place essentially on three fronts:[36] prevention (e.g., immigration controls); criminalisation (at EU level and at State level); and risk management after entry into EU territory (expulsion of aliens and transfer of migrants, pursuant to Directive 2001/40/EC and Regulation 343/2003, respectively[37]). Encampment has thus also become one of the main

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32 Betts, Collier (n 21).

33 UNHCR, *Resolve conflicts or face surge in life-long refugees worldwide, warns UNHCR Special Envoy*, 20 June 2014, available at <http://www.unhcr.org/afr/news/press/2014/6/53a42f6d9/resolve-conflicts-face-surge-life-long-refugees-worldwide-warns-unhcr-special.html> accessed 4 April 2019.

34 UNHCR, <http://www.unhcr.org/alternatives-to-camps.html> accessed 4 April 2019.

35 See, UN, *WFP Introduces Iris Scan Technology To Provide Food Assistance To Syrian Refugees In Zaatari*, 06 October 2016, available at <https://www.wfp.org/news/news-release/wfp-introduces-innovative-iris-scan-technology-provide-food-assistance-syrian-refu> accessed 4 April 2019.

36 V. Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Springer 2015, Londres).

37 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member

elements of the strategy directed at controlling the migrant influx. Predicated on public administration and administrative law, diverse types of migration detention facilities[38] have been established in some EU Member States.

Overwhelmed by the high number of individuals seeking access to administrative justice, the risk is already there of public administration promoting the use of detention beyond the limits imposed by general principles of law. For an example, one may turn to France's *centres de rétention administrative* (administrative retention centres) and the conclusions of recent report by the French Senate stating that administrative retention should be applied only when other coercive measures (confinement to residence or placement in an open centre) are not possible ('Preposition n°10' of the report), while dedicating the entire chapter III to the improvement of living conditions of those in administrative retention centres.[39]

Besides encampment, EU Member States have adopted other responses. First, at EU-level, EU Member States have launched several ESDP operations, namely EUNAVFOR MED (later named Operation Sophia), coupled with an increased presence by Frontex and the European Border and Coast Guard.[40] Second, at individual EU Member State level, different countries have reasserted their sovereignty by: building border fences (Hungary, 2015); linking migrant admission into the country with proof of financial self-sufficiency (Denmark, 2016); introducing restrictions to fundamental rights and freedoms on grounds of national security

States by a third-country national, repealed by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, JO L 180 de 29.6.2013, p. 31–59. Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. Commission Implementing Regulation (EU) N° 118/2014 of 30 January 2014 amending Regulation (EC) N° 1560/2003 laying down detailed rules for the application of Council Regulation (EC) N° 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece. Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

38 'Whether a place where those held in the course of migration proceedings is a place of detention depends on whether the individuals held there are free to leave it at will or not. If not, irrespective of whether the facilities are labelled "shelters", "guest houses", "transit centres", "migrant stations" or anything else, these constitute places of deprivation of liberty and all the safeguards applicable to those held in detention must be fully respected.' – see, UN, Doc. A/HRC/39/45, *Report of the Working Group on Arbitrary Detention*, par. 45.

39 On the need to restrict the administrative retention practice, see French Republic, *Sénat, Rapport d'Information fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) sur les centres de rétention administrative, Par Mme Éliane ASSASSI et M. François-Noël BUFFET, Sénateurs*, n.º 773.

40 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

(Germany, 2017); and enhancing cooperation in civilian-military training and migration controls with an encampment component (Italy–Libya agreement of 2017).

When looking at EU cooperation with Africa in the field of peace, security and development, the EU has a proven track record. First, regarding humanitarian aid policies, the EU acts, for example, through the European Commission's Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO), which for 2016 had a total budget of EUR 1.889 billion[41] – moreover, 'during 2016, the EU and its Member States remained the world's largest provider of development funding, contributing more than half of the official development assistance (ODA) globally […] the European Commission alone disbursed over EUR 10.3 billion in ODA on behalf of the EU (…)'[42].

Second, looking at more direct or kinetic EU actions, several civilian and military operations have been launched during the past fifteen years: operation 'Artemis1 (2003); the operations in the Democratic Republic of Congo, namely 'EUSEC'[43] (2005), 'EUFOR Congo' (2006), 'EUPOL Kinshasa' (2005), and 'EUPOL'[44] (2007); the civilian-military mission in support of the African Union mission 'AMIS II', in Darfur[45] (2005); 'EU SSR' in Guinea-Bissau[46] (2008); 'EUFOR', in Chad and the Central African Republic[47] (2008); operation 'Atalanta'[48] (2008); and, finally, 'EUTM Somalia' (2010) – to name a few.

From all the missions referenced, the 'EUFOR' military operation in Chad and the Central African Republic is an example of the operational complementarity between the EU and the UN. In effect, launching this 'transition operation' enabled the UN's mission (MINURCAT) to be implemented, while the European Council's authorisation preceded by Resolution 1778 (2007) of the UN Security Council, making specific reference to previous contacts between the EU and the UN.[49]

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41 COM(2017) 662 final.

42 EU, *2017 Annual report on the implementation of the European Union's instruments for financing external actions in 2016*, available at: <https://ec.europa.eu/europeaid/2017-annual-report-implementation-european-unions-instruments-financing-external-actions-2016_en>, accessed 4 April 2019.

43 Council Joint Action 2006/303/CFSP of 25 April 2006 amending and extending Joint Action 2005/355/CFSP on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (DRC).

44 Council Joint Action 2007/405/CFSP of 12 June 2007 on the European Union police mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo).

45 Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan.

46 Council Joint Action 2008/112/CFSP of 12 February 2008 on the European Union mission in support of security sector reform in the Republic of Guinea-Bissau (EU SSR GUINEA-BISSAU).

47 Council Joint Action 2009/795/CFSP of 19 October 2009 repealing Joint Action 2007/677/CFSP on the European Union military operation in the Republic of Chad and in the Central African Republic; UN, S/RES/1778 (25SET2007).

48 Council Decision (CFSP) 2016/2082 of 28 November 2016 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.

49 UN, S/RES/1778 (25SET2007) 1–3.

Half-way through 2012, the EU was managing twelve active missions in the framework of the CFSP, three military missions and nine civilian missions. However, it is worth noting that, further to the missions indicated, the EU had already foreseen the launch of three additional CFSP missions in Africa.

The EUAVSEC South Sudan[50] civilian mission of 2012 focused on training and support with the objective of improving the security at Juba airport against external threats. It had a training and advisory component, consisting of work between EU experts, local airport authorities and the Sudanese Ministry of Transport toward preparing legislation in the field of airport security.

The 'EUCAP Nestor' mission (2012)[51] is also worth highlighting given the number of countries it encompassed and the wide scope of the mission's mandate. The main objective was reinforcing the maritime security capabilities of a group of countries in the Horn of Africa region: Djibouti (where the mission's HQ was located), Kenya, Seychelles, Somalia and Tanzania. Fitting into the EU's comprehensive approach, the mission had a training component (mainly for judges, civilian police and coast-guards), as well as a judicial system support component.

Also noteworthy from 2012 was 'EUCAP Sahel Niger'[52], a civilian mission aimed at reinforcing national capabilities for fighting terrorism and organised crime in the Sahel region through training and advising security forces.

Finally, one should mention two additional CFSP engagements in Africa prepared in 2012. The first was 'EUBAM Libya' (2013)[53], an assistance mission in the fields of security and border management, launched in coordination with the UN's mission ('UNSMIL'[54]); The second was 'EUTM Mali' (2013)[55], a mission aimed at training Mali's armed forces and linked with the presence of 'AFISMA', a stabilisation force in that state (2012) led by ECOWAS, the Economic Community of West African States, under a UNSC mandate.[56]

In assessing one of the busiest years for EU engagement in Africa, one of the main conclusions was that launching multiple missions with similar objectives requires strong internal coordination efforts at EU level, especially to avoid instances of duplication. Hence,

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50 Council Decision 2012/312/CFSP of 18 June 2012 on the European Union Aviation Security CSDP Mission in South Sudan (EUAVSEC-South Sudan).

51 Council Decision 2012/389/CFSP of 16 July 2012 on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP NESTOR).

52 EU Council Conclusions (23JUL2012).

53 Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya).

54 UN, S/RES/2040 (12MAR2012).

55 Council Decision (EU) 2017/971 of 8 June 2017 determining the planning and conduct arrangements for EU non-executive military CSDP missions and amending Decisions 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces, 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian armed forces (EUTM Mali) and (CFSP) 2016/610 on a European Union CSDP military training mission in the Central African Republic (EUTM RCA).

56 UN, S/RES/2056 (5JUL2012), S/RES/2085, (20DEC2012), S/RES/2100, (25APR2013).

irrespective of the aforementioned all being EU 'crisis management' missions, there were issues present regarding overlapping tasks (for example in the field of fighting terrorism). Following the amazing year of 2012, the EU launched EUCAP SAHEL Mali in 2014 and then, in 2015, the EU launched EUNAVFOR MED – these engagements run in parallel with initiatives such as the 'G5 Sahel'[57].

Further to these efforts, another trend has emerged: outsourcing or externalization. Much like the Roman Empire's treaties of friendship, the EU is now engaging bilaterally selected States – namely countries of transit – for migration management objectives, such as redirecting and/or retaining migrants in facilities or locations in third-countries. The main example of this externalization practice is the EU-Turkey Statement of 18 March 2016, preceded by the launch in 2015 of the EU Emergency Trust Fund for Africa (with an initial allocation of EUR 1.88 billion) and followed in June 2016 by the establishment of a new Partnership Framework with third countries under the European Agenda on Migration.[58]

These developments beckon a comparison with the Roman Empire's borders, where we see that the EU's borders have *de facto* extended further South and East, beyond the limits of the Roman Empire's *Limes Africanus* and *Limes Arabicus* (as until 395 A.D.). Furthermore, what used to be the *Limes Tripolitanus* can now be said to have largely become a failed space where lawlessness enables trading in human beings, among other atrocities; a space where entire states can become so-called 'borderlands'[59].

Therefore, to better consider the scenarios proposed by the Commission's White Paper on the future of Europe, one should be mindful that the EU seems to be pursuing a three-pronged strategy: first, outsourcing or externalisation, often supporting third countries' public administrations with the management of migrants, with consequences at the level of the effective application of International Law;[60] second, and in close connection with the former, we have cooperation, (i) at the technical-military level or technical-police level, with training missions aimed at building up the security sectors of selected states, and (ii) maintaining a leading role in the disbursement of development aid; third, encampment, both in selected transit countries and within EU Member States, coupled with elements of deterrence, nonetheless on a smaller scale than actors such as the UN (namely the UNHCR[61]).

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[57] This is a group encompassing Niger, Burkina Faso, Chad, Mali and Mauritania that envisaged EU support for a multinational battalion-scale force operating in the Sahel region.

[58] COM/2016/0385 final.

[59] M. Ambrosini, *Irregular immigration in southern Europe: actors, dynamics and governance* (Springer 2017, New York, NY – Berlin – Heidelberg).

[60] Bill Frelick, Ian M. Kysel, J. Podkul, 'Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 Journal on Migration and Human Security 190–220.

[61] For a solid analysis of how encampment is used as a strategy around the world see Betts, Collier (n 21).

III The EU's Naval Engagement in the Central Mediterranean: EUNAVFOR MED/Operation Sophia

Pursuant to the Conclusions of the EU Council special meeting in April 23, 2015, four priorities were established to deal with the situation in the Mediterranean at the time: fighting traffickers; strengthening the EU's presence at sea; preventing illegal migration flows; and reinforcing solidarity and responsibility within the EU. In addition, there was the possibility of launching an operation in the framework of CFSP.[62]

In the framework of Council Decision (CFSP) 2015/778, of 18 May 2015, the decision was made to launch an EU military operation in the south of the Mediterranean (EUNAVFOR MED) to contribute toward 'the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean'[63] to be carried out in 'in sequential phases, and in accordance with the requirements of International Law'[64], namely taking into account the positions adopted by the UN Security Council and the Libyan internationally recognized governmental authorities.

From the onset, the mandate of EUNAVFOR MED was framed in law enforcement terms, taking aim at human smuggling and trafficking. To this end, article 1 of Council Decision (CFSP) 2015/778 of 18 May states: 'The Union shall conduct a military crisis management operation contributing to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean (EUNAVFOR MED), achieved by undertaking systematic efforts to identify, capture and dispose of vessels and assets used or suspected of being used by smugglers or traffickers, in accordance with applicable International Law, including UNCLOS and any UN Security Council Resolution.'[65].

To this end, the mandate of EUNAVFOR MED (later renamed Operation Sophia) foresaw three sequential phases (see article 2 of the mandate) described as: '(1) In Phase 1, the mission will "support the detection and monitoring of migration networks through information gathering and patrolling on the high seas in accordance with International Law'. (2) In Phase 2, Operation Sophia is tasked to 'conduct boarding, search, seizure and diversion of vessels suspected of being used for human smuggling or trafficking'. Phase 2 has two stages: Phase 2A, when the mission acts on the high seas; and Phase 2B, when the mission acts on the 'high seas or in the territorial and internal waters' of the coastal state. Phase 2B will be conducted 'in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned', which in this case is Libya. (3) In Phase 3, the mission – again in accordance with any applicable UN Security Council (UNSC) Resolution or consent by the Libyan government – will: 'take all necessary measures against a vessel and related assets, including

62 EU, Press Release, n. 204/15 of 23/04/2015.

63 Art. 1, n. 1, Council Decision (CFSP) 2015/778.

64 Art. 2, n. 2, Council Decision (CFSP) 2015/778.

65 EU, Council Decision 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) (OJ L122, 19 May 2015).

through disposing of them or rendering them inoperable, which are suspected of being used for human smuggling or trafficking, in the territory of that State, under the conditions set out in that Resolution or consent.'

One of the main problems with this engagement relates to conducting maritime interception missions in waters under Libyan sovereignty. While the applicable UNCLOS regime establishes the principle of exclusion of jurisdiction in favour of the coastal state in relation with the territorial sea and inner waters, and in favour of a vessel's flag State – this in addition to UN Charter article 2/4 – it is true that Libya has displayed an absence of effective government. In this regard, there is only one successful example of a military naval operation aimed at fighting lawlessness at sea in the absence of effective government in the coastal state, Operation Atalanta in Somalia.

At the onset of EUNAVFOR MED the legal challenges were manifold and differed in scope. In the field of Public International Law, doubts were there regarding the UN Security Council resolutions and whether or not a formal request for intervention formulated by the (recognized) Libyan Government (the Government of National Accord as per UNSC Resolution 2259 of 23DEC2015) existed. However, Resolution 2259 did not allow for actions within the waters under Libyan sovereignty and did not alter the terms of previous Resolutions (mainly UNSC Resolution 2240). Drawing a parallel with the case of Somalia, it is worth noting that UNSC Resolutions adopted under Chapter VII of the UN Charter were all preceded by a manifestation of will (a written letter) of the Transitional Federal Government. Specifically looking at phase 3 of the mandate, the use of 'all necessary measures' could possibly translate into the use of force in Libyan territory, thus increasing the overall risk of the engagement. As with combating Somalian pirates, the adaptability of non-state actors' tactics increases the overall uncertainty and volatility of the engagement: more pressure on one route (e.g., the Eastern route in part due to the EU-Turkey Agreement) might result in more crossings using another route (e.g., the central Mediterranean route, which in 2015 registered 150,000 people, the majority departing from Libya).

In the field of Criminal Law, uncertainty was there regarding the arrest, prosecution and proceedings against individuals taking part in human trafficking or smuggling activities, given that the Libyan judicial system was inoperative at the time. Further legal challenges would emerge regarding a decision by the Libyan government to waive its right to prosecute/act against national citizens suspected of crimes, and with regard to ensuring respect for the ECHR. Additional questions concerned evidence collection on criminal activity in a theatre of operations where non-state actors operated freely, coupled with the uncertainty surrounding the Libyan justice system[66].

How then to assess the impact of EUNAVFOR MED/Operation Sophia? The UK House of Lords 2016 report on EUNAVFOR MED/Operation Sophia provides a striking conclusion: 'The intentions and objectives set out for Operation Sophia exceed what can realistically be

[66] UK, House of Lords, cit., §80-82.

achieved. A mission acting only on the high seas is not able to disrupt smuggling networks, which thrive on the political and security vacuum in Libya and extend through Africa'[67]. This is to say that, as a denial-of-business-model operation, Sophia turned out to be a very good search and rescue mission – which was not its initial mandate – ending up 'doing more or less the same thing that previous operations by Italy and Europe did prior to its establishment'[68], mainly Italy's operation *Mare Nostrum* and Frontex's *Operation Triton*.

To sum up, on the one hand, there was a decrease in the number of fatalities at sea, as the traffickers' freedom to act was restricted. However, the tactics changed: as (safer) wooden boats were destroyed, the use of rubber dinghies increased;[69] crucially, although arrests were made in connection with human trafficking networks, the suspects were mostly low-level facilitators.[70]

In addition, a few key questions remain unanswered from the onset of the engagement. First, although there was a visible short-term added value, what would have been the long-term value of this EU engagement? The fact that the mission was focused on the sea led to the (erroneous) perception by other actors (mainly NGOs) and the EU citizens of EUNAVFOR MED as a search and rescue operation[71] (much more so following the name change, aimed at echoing the birth of a child from a rescued mother aboard the German frigate 'Schleswig-Holstein'). This perception contributed to – in part – focusing the legal discussion on the Law of the Sea, specifically on territorial waters, maritime search and rescue duties, and sovereignty under International Law. In this way, the real problem of a 'broken refugee system' was deprived of much-needed attention.

In addition, the desired end state by the EU is not yet clearly defined: while some countries are clearly concerned with stemming the migrant flow, other seem equally or more concerned with the long-term objective of securing the Sahel. In these terms, the objective of making the central Mediterranean route less appealing for traffickers seemed, with hindsight, insufficient.

To conclude, the continued engagement of the EU in Africa had a boost in 2016 with the launch of EUTM RCA in the Central African Republic. As of May 2018, there are eight active EU missions in Africa, the majority of which deployed in the Sahel region and the central Mediterranean region: EUCAP SOMALIA, EUTM SOMALIA, EUNAVFOR Atalanta, EUBAM Libya, EUTM RCA, EUCAP SAHEL Niger, EUCAP Sahel Mali, EUTM Mali, and EUNAVFOR MED. These EU engagements provide a welcome overlap and complementarity with the EU Member States' engagements. One EU Member State is worthy of recognition and praise for strong efforts in this regard: France (together with Portugal) has ensured a much needed and effective presence in the Central African Republic (launching the military operation *Sangaris*, 2013–2016) and in Mali, Niger and Chad in the framework of the on-going

67 UK, House of Lords, cit., §67.
68 UK, House of Lords, cit., §63.
69 UK, House of Lords, cit., §63-64.
70 UK, House of Lords, cit., p. 23.
71 UK, House of Lords, cit., p. 23.

military operation *Barkhane*[72] launched 2014. This operation followed operation *Serval* that was launched in mid-2013 at the request of the Malian government.

IV The EU as a Rule-based Community: What Role for Public International Law?

Is International Law relevant to the management of the influx of EU-bound economic migrants departing from the Western and Central Mediterranean routes? The simple short answer is yes. However, in this section I will argue that (i) fundamental Public International Law instruments are less relevant than they could be, and (ii) that fundamental Public International Law instruments risk becoming increasingly less relevant toward the management of economic migrants.

One recent characterisation of the International Law regime and the system affording protection to refugees argues that individuals are offered 'a false choice between three dismal options: encampment, urban destitution, or perilous journeys', this being a key characteristic of the 'dysfunctional refugee system'[73] in place today.

On the one hand, this is in part because the admission and expulsion of third country nationals is still under the purview of the State. On the other hand, so-called economic migrants are not considered in the framework of the 1951 Refugee Convention. Notwithstanding the many advances in International Law regarding the international subjectivity of the individual – such as in the fields of human rights or international responsibility – when the individual is an economic migrant then he is chiefly at the mercy of the sovereign State's policies regarding immigration and the way they translate into law.

The 1951 Convention follows the premise of Article 14 of the 1948 Universal Declaration on Human Rights that 'everyone has the right to seek and enjoy in other countries asylum from persecution.' Therefore the 1951 Convention predicates the circumstance of persecution as the justification for granting admission to a specific category of individual – the refugee – into a given State where he/she is entitled to a special set of rights and enjoys special protection under International Law.

Other relevant Articles of the 1951 Convention are: Article 31, regarding the non-application of criminal sanctions to refugees by reason of irregular entry or stay, and non-application of restrictions to refugees' freedom of movement beyond necessary; Article 32, limiting the right of expulsion of the host State to reasons of national security and public order; and, Article 33, regarding *non-refoulement*.

The 1967 Protocol Relating to the Status of Refugees (Article I, § 2) widens the application of the 1951 Convention to situations other than post-WWII. Regarding the Eastern Mediterranean route, it is worth pointing out that while Turkey is part of both the 1951

[72] See <https://www.defense.gouv.fr/english/operations/barkhane/dispositif> accessed 4 April 2019.
[73] Betts, Collier (n 21) 56.

Convention and the 1967 Protocol, this State limits the scope of applicability of the legal regime (i) to persons who have become refugees as a result of events occurring in Europe, and (ii) by the introduction of a reservation clause 'to the effect that no provision of this Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey'[74]. In effect, rejecting the application of an international minimum standard, and thus raising the issue of the full application of the 'safe third country' criteria (see below).

A sizeable number of migrant deaths occur at sea along the central Mediterranean route. For the period from 2014 to 2018 (May 2018)[75], data from the International Organization for Migrations (IOM) sets the total number of deaths in the three main routes (Western, Central and Eastern Mediterranean) at about 15,984 anonymous individuals – men, women and children – out of which 13,860 deaths occurred along the central Mediterranean route.[76]

Different international legal instruments foresee and refer to a *duty to render assistance*. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) foresees on Article 98 the duty to 'render assistance to any person found at sea in danger of being lost' and the duty of every coastal State to 'promote the establishment, operation and maintenance of an adequate and effective search and rescue service'. Previously, Regulation 33 of the 1974 International Convention for the Safety of Life at Sea (SOLAS) referred to obligations and procedures in distress situations, whereas the 1979 International Convention on Maritime Search and Rescue (SAR) referred to the establishment of search and rescue regions and the development of national search and rescue services to support efficient search and rescue operations. Hence, even though the large majority of accident victims in the central Mediterranean are risking their lives by sailing in ships without nationality (unregistered and not flying any State flag, in accordance with UNCLOS article 91), and in some instances not even seaworthy (engine or wind powered) craft, every other State – as per UNCLOS article 98 – has the obligation to 'require the master of a ship flying its flag, in so far as he can do so without danger to the ship, crew or the passengers' to render assistance to persons in need of it.

Further legal questions that intersect the issue chiefly concern the fact that legal concepts (mainly *refugee, asylum seeker, returned refugee, internally displaced person, returned IDP, stateless person*) intersect with non-legal concepts (mainly *economic migrant*, but also *ecological migrant*)[77]. The essential distinction for the purposes of the present paper is between the concept of *refugee* (and *asylum seeker*) and the concept of (economic) *migrant*. Whereas the first one is escaping a circumstance of total insecurity characterised by

[74] 1967 Protocol to the 1951 Convention, *Declarations and Reservations*, Turkey, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-5&chapter=5&lang=en#EndDec> accessed 4 April 2019.

[75] IOM, *Deaths by Route*, available at: <https://missingmigrants.iom.int/region/mediterranean> accessed 4 April 2019.

[76] IOM, *ibid.*

[77] R. Plender, *Issues in international migration law* (Brill – Nijhoff 2015, Leiden).

immediate or constant threats to life, the economic migrant is moving on from a wider insecurity circumstance, better understandable with reference to the concept of human security.[78] In other terms, although both individuals see the EU as a beacon light of hope, the refugee's primary objective is safety, whereas the economic migrant's primary objective is certainty and stability. This distinction, in turn, is crucial for public perceptions of migration and the way in which national governments and public administrations act.

In considering the broad topic of human mobility,[79] Article 13 of UN General Assembly Resolution 217 A (III) (Universal Declaration of Human Rights) of 10 December 1948, affirms every individual's right to 'leave any country, including his own, and to return to his country', while Article 14 states that 'everyone has the right to seek and enjoy in other countries asylum from persecution'. Conversely, the admission and expulsion of third country nationals remains, overall, a matter under the purview of the State. So, although the 1948 UN Universal Declaration of Human Rights refers an individual's 'right to leave any country, including his own, and to return to his country' (Article 13), and whereas the freedom of movement of workers is enshrined in Article 45 TFEU, the fact of the matter is that International Law does not foresee a right to entry for immigration purposes.

State powers in matters of admission and expulsion of third country nationals are derived directly from State sovereignty and not from any rule of International Law. In other words, the admission of third country nationals is an internal jurisdiction matter for the State, and national public authorities may exercise a discretionary choice essentially between three options (i) not to admit the entry of aliens, or (ii) to admit certain aliens and not others, and/or (iii) to impose conditions for entry of aliens into the territory of the State. Furthermore, legal restrictions to the economic activity of third country nationals may flow from a State's national economic policies: for example, as to the acquisition of real or movable property or undertaking certain professional activities.

In similar terms, the State has discretionary powers regarding the expulsion of third country nationals, as the right to expel is an inherent State right flowing directly from State sovereignty. Nevertheless, there are limitations flowing from International Law: (i) the State must exercise the power to expel a third country national in accordance with the principle of good faith; and (ii) resorting to the concept of 'public order'[80] as a basis for expulsion must be in line with human rights standards.

The treatment of third country nationals is a contentious International Law topic, intersecting the economic migrant issue. The controversy stems largely from a difference in State posture: while some States support the argument that an international minimum standard exists, other States accept only the existence of a national standard regarding the

78 Betts, Collier (n 21).

79 G. C. Bruno, I. Caruso, B. Venditto, *Human mobility: migration from a European and African viewpoint* (Rubbettino 2013, Soveria Mannelli).

80 C. Eagleton, 'International Law and „Public Order"' (1939) 33 The American Journal of International Law 545–549.

treatment of third country nationals by a State. The support given to both positions presents a main difficulty to ascertaining the rules of International Law in this matter.

Irrespective of the position adhered to, there is general agreement that International Law is not the Alpha and Omega as regards the oversight of the treatment of aliens by national public administrations. On the one hand, according to both standards, there is the acceptance of limitations regarding the expropriation of third country nationals. On the other hand, concerning other areas, national public administrations may make use of power at their exclusive discretion.

The 2014 ILC Draft Articles on Expulsion of Aliens are a further element to consider in this section. Whereas the right of a State to expel a third country national is recognised, Article 3 of the Draft Articles clearly points to limitations flowing from human rights norms and other International Law norms. Looking at related concepts, while 'constructive expulsion'[81] seems of doubtful relevance for the issue of economic migrants, the concept of 'disguised expulsion' is worth pointing out. Prohibited by Article 10 of the 2014 ILC Draft Articles, 'disguised expulsion' is defined as 'the forcible departure of an alien from a State resulting indirectly from an action or omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intending to provoke the departure of aliens from its territory other than in accordance with the law'. The departure must therefore be the intended outcome of an omission or an action by the State.

Overall, there are, of course, limitations to the use a State may make of the inherent right to admit and to expel third country nationals, mainly the general principle of good faith in International Law, and International Law rules relating to human rights.

Recalling the conclusion that the current refugee regime is 'dysfunctional'[82], the relevance of International Law towards managing the wider *economic migrants'* phenomenon is displayed by a recent trend, individuals resorting to regional protection mechanisms such as the ECHR. Juxtaposing the 1948 Declaration to the regional protection afforded by the 1950 ECHR, it is worth noting the 1948 Declaration's overall degree of general abstraction characterising the articles' wording, allowing at times for contradictory interpretations of it. In other terms, the 1950 ECHR regime foresees a mechanism for applying and implementing the respective legal norms, thus allowing diverse interpretations of them to be apparent in practice by means of ECtHR case law. The fact that an individual was able to, ultimately, resort to the ECtHR in search of redress was an extraordinary innovation introduced by the ECHR.

Focusing on economic migrants, it seems that the ECHR has been gaining relevance as the case law is on *non-refoulement* and the prohibition of collective expulsion is increasing. Convictions of EU Member States by the ECtHR on grounds of violation of the prohibition of collective expulsion (ECHR, Protocol n. 4)[83] symbolise a trend by individuals towards

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81 *International Technical Products Corp. v Iran* (1985) or *Yeager v Iran* (1987) 17 Iran – U.S.C.T.R. 92 at 106.

82 Betts, Collier (n 21).

83 ECtHR, *Hirsi Jamaa and Other v Italy* (Application no. 27765/09) [ECHR Article 3 of the Convention and Article 4 of Protocol No. 4]; *N.D. v Spain* and *N.T. v Spain* (nos. 8675/15 and 8697/1), where the Court held, unanimously, that there had been a violation of Article 4 of Protocol No. 4.

seeking regional human rights protection mechanisms, as *economic migrants* not protected by traditional International Law mechanisms such as the 1951 Refugee Convention and the 1967 Protocol. Finally, recalling the considerations above on administrative retention centres, the relevance of International Law is further evidenced in ECtHR case law based on violations of Article 3 of ECHR: in five different cases the ECtHR considered that national detention practices do, in certain circumstances, violate the ECHR, convicting France in cases relating to the detention of children for purposes of deportation.[84]

How should the EU then position itself, looking forward to 2025? First, EU Member States should be mindful that International Law should be understood as being in continuous mutation, resulting not only from the interaction between diverse sources, but also from small actions by great powers. A recent blow to the international system was the decision by the United States to end participation in the Global Compact on Migration on the grounds that there are 'numerous provisions that are inconsistent with U.S. immigration policy and the Trump Administration's immigration principles'[85]. This is most unfortunate, especially given that the New York Declaration for Refugees and Migrants is a political declaration aiming at achieving international consensus in 2018 towards a global compact on refugees, and, a global compact for safe, orderly and regular migration,[86] therefore aiming to reinforce the existing International Law framework.

Perhaps in a move toward reinforcing International Law, there are scholars who wonder in what way the responsibility to protect doctrine might be applied to render assistance to overwhelmed EU Member States.[87] At present time, short-term solutions – chiefly, enlisting the cooperation of State and non-State actors – are having a significant short-term impact: migrant arrivals to the EU have decreased from 390,432 in 2016 and 186,768 in 2017, to an impressive number of 33,205 in 2018 (updated as of 23 May 2018)[88]. Worryingly, as EU Member States are no longer severely pressured by overwhelming numbers of arrivals, emboldened unilateral actions by key EU transit countries risk undermining the international legal framework and the Union's cohesion.

The argument can, thus, be made that externalising the management of migration seems to contribute toward a wider trend of weakening belief in International Law regarding State practice in certain domains (mainly the use of force and human rights). More specifically,

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84 ECtHR cases: *A.B. and Others v France* (Application no. 11593/12) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016; *A.M. and Others v France* (Application no. 24587/12) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016; *R.C. and V.C. v France* (Application no. 76491/14) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016; *R.K. and Others v France* (Application no. 68264/14) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016; and, *R.M. and Others v France* (Application no. 33201/11) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016.

85 US Mission to the UN, *United States Ends Participation in Global Compact on Migration,* December 2, 2017. <https://usun.state.gov/remarks/8197> accessed 4 April 2019.

86 UN, A/RES/71/1, § 21.

87 A. Balthasar, 'Internationaler Schutz im Wandel – vom II. Weltkrieg über den Ost-West-Konflikt zum Nord-Süd-Konflikt' (2017) 24 Journal für Rechtspolitik 214–239.

88 IOM, *Migration Flows – Europe,* available at <http://migration.iom.int/europe/> accessed 4 April 2019.

policy options such as the EU-Turkey agreement or bilateral engagements by EU Member-States with countries in the Sahel region coupled with other legal and policy options, 'including stricter definitions of refugee, interdictions to entrance, interceptions, offshore processing, and application of "safe third country" rules'[89], in part result in a weakening of the protection provided by International Law (specifically, refugee status). With explicit reference to the safe third country criteria,[90] some authors speak of a 'nominal adherence to these criteria has often been deemed sufficient, even when there are evident gaps between formal acceptance of principles and their realization in practice'[91].

Finally, the migration challenge summons a revision of the distinct types of barriers to external influences that national Administrative Law regimes have; for example, when applying International Law instruments. Here this quote by Paul Craig is especially poignant:

> It is the increased vertical interaction between the national, EU and global levels that prompts courts to react and think hard about the terms on which they are willing to accept 'external' norms. To be sure, there is a sense in which courts have been doing this for hundreds of years, as attested to by the developed jurisprudence concerning the relationship between national and International Law. There is nonetheless little doubt that sensibilities have been heightened by the creation of the EU and the ECHR, both of which demand of contracting states a degree of acceptance over and beyond what is demanded by most international treaties. There is equally little doubt that the tensions have become more acute because of increased globalization, which has the consequence that many rules that bind at national level de jure or de facto emanate from international and transnational bodies.[92]

From a wider perspective, the humanisation of International Law[93] seems to be at odds with the sovereign State. Faced with globalisation and a fundamental threat to its internal affairs posed by overwhelming numbers of individuals – whose hopeful expectations no Western State is capable of confounding in a globalised world – the State is reverting to its traditional role as the most relevant International Law subject, characterised by assertions of national sovereignty.

Looking to 2025, the question then becomes how should the EU27 seek to address the migration challenge at a time when – for national governments of exogenous States – sovereignty is most effectively displayed by controlling who and what may enter the territory of the State?

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89 Ambrosini (n 59) 67.

90 This concept was foreseen in Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, repealed by Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, JO L 180 de 29.6.2013, p. 60–95.

91 B. Frelick, I. M. Kysel, J. Podkul, 'Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 Journal on Migration and Human Security 190–220, p. 196.

92 P. P. Craig, *UK, EU and global administrative law: foundations and challenges* (Cambridge University Press 2015, Cambridge, UK) 9.

93 A. Peters, *Beyond human rights: the legal status of the individual in international law* (Cambridge University Press 2016, Cambridge, UK).

V Conclusion: Which Scenario for the EU27 by 2025?

International Law instruments, much like the fairy in J. M. Barrie's *Peter Pan,* depend upon belief translated into State practice – or *death*. Should International Law increasingly be perceived as less effective, divisions caused by unilateral action are sure to undermine the European Union, which is beset by the exit of the United Kingdom and the isolationism of the United States.

Looking towards the medium-term, there is a chance of a 'Tinkerbell syndrome' befalling International Law regimes relevant towards the management of (economic) migrants. As the previous section attempts to demonstrate, a new light is being cast on the larger issue of the international subjectivity of the individual. In this regard, it is worth noting a series of unilateral actions taken by certain key States, mainly the US withdrawal from the Global Compact on Migration; Italy's active cooperation with non-State actors in Libya; and a number of EU Member States' hostile posture towards external migrants (e. g. denouncing the refugee quota system), as well as intra-EU migrants (questioning the pillar of EU integration that is the freedom of movement of workers).

In briefly assessing the contemporary international order, three defining characteristics seem to set the period ranging from end of 2010 (marking the beginning of the so-called *Arab Spring*) until the end of 2017 apart from other periods in modern history: (i) the number of crises in the world has never been so high; (ii) current crises take place simultaneously, and (iii) the duration of such crises extending throughout years (v. g., the situation in Syria goes back to 2011, or the Ebola outbreak in West Africa of 2014–2016). Consequently, it is not only the State, but also the sub-State level that suffers impacts to different degrees of events to which they did not give cause to. Importantly, climate change will constitute a major security and development challenge, as '[e]nvironmental degradation will continue to provoke humanitarian disasters, including desertification and floods of increasing magnitude' affecting the Sahel, as '[h]umanitarian crises due to water scarcity and related food and health emergencies, some affecting millions of people, may become recurrent, particularly in some parts of Africa'[94].

The sense that State is increasingly unable to control the flows of globalisation[95] emerges a trend broadly identified by the European Commission's White Paper. To increase societal resilience, distinct levels of EU Member States' public administrations (at central level and local level) will be forced to deal with the impact of events originating in other regions of the world. Tellingly, the topic of economic migrants confirms how different cities of EU Member States are confronted with complex situations that strain local resources, clearly demonstrating

94 EUISS, *Global trends 2030 – Citizens in an interconnected and polycentric world* (European Union Institute for Security Studies 2011, Paris) 6.

95 J. Bergé, 'La circulation totale au-delà du contrôle : hypothèse de risque invisible' (2017) 2 Risques Études et Observations 40–54.

the current phenomenon of *glocalization*[96] – i. e., an intersection of the global level with the local level.

The short-term effects of the EU's short-term strategy of engaging with countries of origin and countries of transit in the Sahel region and beyond will not last – especially concerning the central Mediterranean region. The European Strategy and Policy Analysis System (ESPAS) report entitled 'Global Trends to 2030' highlights turbulence and chaos in the EU's neighbourhoods as a main challenge for the Union, while identifying that 'Europe will continue to be a destination country for migrants from the neighbourhood'[97].

Most interestingly, in similar terms to Betts and Collier, the report stresses that the 'global humanitarian system shows signs of reaching a breaking point'[98], thus increasing the likelihood of further migration pressures. Looking at the consequences of globalisation in Africa, the report further highlights that: '[t]he tendency of globalisation to shut out some countries (such as Congo), and even some large regions (such as the Sahel), is a major threat and a source of weakness for the international system'[99]. Another key trend analysis document estimates the world's population of migrants to approach 300 million by 2030, while also predicting that migration patterns will 'become increasingly "circular", so that migrants will maintain ties with their countries of origin, while strengthening transnational movements'[100].

Therefore, while scenario 5 of the Commission's White Paper would seem the most appropriate, one must conclude that it is, currently, unfeasible. No one would dispute the fact that great benefits would come from implementing part of scenario 5, namely cooperation on border management, asylum policies and counterterrorism. However, looking at the other policy options, 'speaking with one voice on all foreign policy issues' seems out of reach, while 'creating a European Defence Union' – PESCO, if successfully implemented, is limited to military capability conservation and development – seems to have a lower added value towards the management of economic migrants. Even if we limit the policy issues to the 'management of economic migrants', and even if limiting analysis to a group of Mediterranean basin EU Member States, devising a common approach seems an increasingly difficult challenge in the wake of the Italian elections and the uncertainty regarding a future government.

So, in order to successfully manage economic migrants, the EU cannot do *more with less*. Recalling the assessment of Operation Sophia, the House of Lords Report stated that: 'While Operation Sophia plays a role in gathering intelligence and in search and rescue, this is not sufficient to justify a Common Security and Defence Policy mission.'[101] Crucially, to guarantee

96 G. Ritze, Z. Atalay, *Readings in globalization: key concepts and major debates* (Wiley-Blackwell 2010, Chichester, West Sussex, U.K. – Malden, MA).

97 ESPAS, *Global Trends to 2030: Can the EU meet the challenges ahead?* (ESPAS 2014, Brussels) 16.

98 Ibid., 69.

99 Ibid., 42.

100 EUISS (n 94) p. 45.

101 UK, House of Lords, cit., §100.

an acceptable level of security in the Sahel region and the central Mediterranean region, the EU will be required to do *more with more*.

In this regard, recalling the way in which the 2030 trends document do not seem really reflected in the Commission's White Paper, the case is there for a Scenario 4 ½ – for Schengen, migration & security, and foreign policy & defence – that would have the EU cooperating more on border management and counterterrorism and engaging further on ESDP operations aimed at supporting EUMS efforts already underway, thus downgrading the two most difficult policy measures. Crucially, the EU 27 would have to agree to maintain the leading role in development aid, too.

Another important aspect of a Scenario 4½ is the continued pursuit of the Commission's policy of working toward forging agreements with weakly secure states in the Sahel region. EU Member States should then move towards granting more financial support destined to improving the implementation of such agreements on the ground.

Development aid policy is essential for a successful implementation of Scenario 4½ and the EU should continue to play the leading role in ODA disbursement. As a comparison, the UNHCR's budget for 2017 was US 3.9 billion,[102] a number far below the financial requirement for 2019 of US 7.3 billion, 40% of which is set to be absorbed by UNHCR's five largest operations in 2018 (in order Iraq, Lebanon, Turkey, Syria and Uganda)[103]. In 2017, only Denmark, Luxembourg, Norway, Sweden and Britain met the United Nations' target of official development assistance (ODA) spending of 0.7% of national income on development aid.[104]

Finally, looking at Administrative Law, it seems clear that, irrespective of the Commission's White Paper scenario for the EU27 by 2025, further transfers of powers from national public administration to EU authorities are on the horizon. The management of economic migrants being a global topic, one might consider what impacts it should have on International Law in order to address the phenomenon of global governance. If one considers that the flows of globalisation often and increasingly clash with public authority controls, the problems posed by the growing ineffectiveness of State control might perhaps be debated with recourse to Global Administrative Law theory – and *international public law*.[105]

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102 UN, *Contributions to UNHCR – 2017 as at 14 February 2018, in US dollar,* available at <http://www.unhcr.org/partners/donors/5954c4257/contributions-unhcr-budget-year-2017.html> accessed 4 April 2019.

103 UN, *UNHCR's 2018-2019 Financial Requirements*, <http://reporting.unhcr.org/sites/default/files/ga2018/pdf/Chapter_Financial.pdf> accessed 4 April 2019.

104 OECD, *Development finance data*, available at <http://www.oecd.org/dac/financing-sustainable-development/development-finance-data/> accessed 4 April 2019.

105 A. v. Bogdandy, M. Goldman, I. Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 European Journal of International Law 115–145.

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