

## ZOOM IN

### *The Question:*

**Is there a gap between principles and practices in using the ECHR to set limits to States' discretion in the management of migration flows?**

*Introduced by Francesca De Vittor and Cesare Pitea*

In the last few years Italy, in common with other southern European countries, has been concerned by a large flow of migrants attempting to reach European Union countries across the Mediterranean Sea. This situation raises several questions of international law (as shown by the zoom-in concerning the right to be rescued at sea) and notably of international human rights law. In fact, substantial flows of migrants and asylum seekers challenge the ability of States to comply with the high standards of human rights protection established by the European Court of Human Rights (ECtHR).

According to the ECtHR's established case-law, Contracting States have, as a matter of international law, the right to control the entry, residence and expulsion of aliens. Nevertheless, this sovereign power must be exercised in accordance with any right granted by the European Convention of Human Rights (ECHR) to any individual under the jurisdiction of the State, including any migrant or asylum seeker. During the last few decades the Court has established a certain number of principles governing these matters and promoting a high standard of protection. This includes: the absolute protection against removal of aliens to any country where they face a real risk of ill-treatment, including that stemming from non-state actors (see *H.L.R. v France*, App no 24573/94, 29 April 1997) and lack of access to health-care (see *D. v the United Kingdom*, App no 30240/96, 2 May 1997); controls in the case of transfer of asylum seekers between European Union countries according to the EU Dublin Regulation (*M.S.S. v Belgium and Greece* [GC], App no 30696/09, 21 January 2011); the recognition of

connected procedural guarantees, including the right to a remedy with suspensive effect (see *Gebremedhin [Gaberamadbien] v France*, App no 25389/05, 26 April 2007) and to an individual examination of the situation of each interested individual (*Conka v Belgium*, App no 51564/99, 5 February 2002; *Hirsi v Italy* [GC], App no 27765/09, 23 February 2012); limits as to the duration and condition of detention of migrants willing to enter the territory of a State Party, or waiting to be expelled therefrom (see *Mathloom v Greece*, App no 48883/07, 24 April 2012).

Compliance with these standards is particularly difficult when States face, as has been the case of Italy over the last few years, important flows of migrants and the need to balance the attempt to prevent irregular migration, to manage asylum requests, and to ensure public order and security with the duty to respect international obligations arising from the ECHR and other human rights treaties. Even the ECtHR, despite the principles recalled above, occasionally appears to shy away from them when faced with their application on a large scale. In doing so, the Court seems to recognise the difficulties faced by domestic authorities in dealing systematically with immigration-related issues. Precedents are sometimes applied restrictively and significant deference is given to the appreciation of States. Is there, indeed, a gap between principles found in the Court's jurisprudence and their application by the Court and Contracting States alike? Does the Court's attitude and the prevailing practices of States jeopardise the integrity, uniformity, and effectiveness of the European human rights system in migratory matters?

QIL asked Andrea Saccucci and Emanuele Nicosia to advance some answers to these questions. The two authors chose to deal with the issue from two different perspectives. Andrea Saccucci, professor of international law and advocate, proposes a review of the relevant ECtHR case-law. He questions its coherence and wonders if the progressive tendency of the Court to bypass the protection against removal of aliens to unsafe countries is not, in some ways, related to the recognition of governmental interests in immigration and asylum matters. Emanuele Nicosia, magistrate, criminal law researcher and former lawyer at the ECtHR, specifically analyses the Italian situation and discusses the adequacy of the European human rights standards of the policies and measures adopted by the Italian executive, judiciary and legislative authorities in dealing with massive flows of migrants across the Mediterranean Sea.