

# **A Gradual Relinquishment of National Sovereignty?**

## **A Comparative Analysis of Europe's Response to Boat Migrants in Search of Asylum**

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*Please note, this draft is not for mass dissemination but just for students and colleagues*

**Abstract:** The central research question of this paper is why have European states, in contrast to their counterparts in Southeast Asia, the United States and Australia, attempted to abide by the Refugee Convention's *non-refoulement* stipulation when responding to boat migrants seeking refuge in their territory in the 2000s. I first briefly discuss how this paper fits into discussions about the 'gap hypothesis' and then provide a succinct overview of how states in other areas of the world have responded to boat migrants in search of asylum since the 1970s, emphasising their disregard for the Refugee Convention. I then turn to Europe and show that in the 1990s, there was a similar reaction in Europe when dealing with boat migrants seeking protection. However, this changed in the 2000s. I spend the rest of the paper explaining why. The principal reasons I put forward relate to the growing influence of the European Court of Human Rights (ECtHR) on states' asylum policies. Since Italy has received significant numbers of boat migrants in search of asylum since the early 1990s, it features most prominently although references are also made to Spain and Greece.

### **Introduction**

Boat migrants in search of asylum in Europe have dominated debates about immigration and asylum in recent years because of their notable increase in volume. Over one million people sailed across the Mediterranean to Europe in 2015.<sup>1</sup> Prominent member states of the EU reacted by developing a deal with Turkey that led to a considerable decline in arrivals in 2016, but approximately 360,000 still came ashore that year.<sup>2</sup> Europe is not the only continent that has had to deal with boat migrants arriving so sporadically. Southeast Asian states in the 1970s and 1980s received hundreds of thousands of 'boat people' escaping Indochina, particularly Vietnam. Similarly, the United States has had to deal with hundreds of thousands of Cubans and Haitians attempting to reach its shores, especially since 1980. Australia, despite its isolated location, has also had to play host to tens of thousands of boat migrants attempting to reach its territory since the late 1990s. Migrants used boats because it was often the only way to access states that were otherwise closed off to them because of migration restrictions. Unlike other migrants and refugees travelling by plane, train, car, bus and regular shipping lines, the arrival of boat refugees was often covered extensively by various sections of the media and provoked public and political debates that touched on illegality, security and sovereignty on the one hand but also morality, compassion and humanitarianism on the other. As a result of this and the fact that the journey boat migrants made was fraught with real danger, as evidenced by the deaths of tens of thousands of boat migrants on the South China

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<sup>1</sup> International Organization for Migration (IOM), *Fatal Journeys*, Vol. 2, Geneva 2016, p. 6.

<sup>2</sup> IOM press release, 'Mediterranean Migrant Arrivals Reach 358,403; Official Deaths at Sea: 4,913', 23 December 2016. Available at <https://www.iom.int/news/mediterranean-migrant-arrivals-reach-358403-official-deaths-sea-4913> (last consulted on 5 January 2017).

Sea in the late 1970s and the Mediterranean more recently, the issue of boat migrants often garners attention in public discourse disproportionate to its size.<sup>3</sup> The response to boat migrants can take the form of a 'border spectacle'.<sup>4</sup> This takes the form of a drama in many respects that is performed before millions on television, in the press and, more recently, on social media.

Southeast Asian states, the US, and Australia deterred these boat migrants using methods that called into question their interpretation of the Refugee Convention, especially the *non-refoulement* stipulation, which holds that migrants seeking asylum cannot be returned to a state where their 'life or freedom would be threatened' on account of their 'race, religion, nationality, membership of a particular social group or political opinion'.<sup>5</sup> Certain European states where boat migrants landed in the 1990s used similarly contentious methods to deter future arrivals, most notably Italy against boat migrants from Albania. Yet during the 2000s, European states appeared to make significant efforts to uphold international refugee law when introducing policies to respond to increasing number of boat migrants seeking asylum. In doing so, they appeared to relinquish their national sovereignty. This paper seeks to discover why, in contrast to their counterparts in Southeast Asia, the United States and Australia, European states attempted to abide by the Refugee Convention's *non-refoulement* stipulation when reacting to the attempt by considerable number of boat migrants to seek refuge in their territory.

In seeking to satisfactorily answer such a research question, this paper will reference and interact with discussions about the difference that exists between the goals and results of immigration policies. The so-called 'gap hypothesis' put forward by Cornelius, Hollifield and Martin highlights the disparity 'between the *goals* of national immigration policy ... and the actual results of policies in this area'.<sup>6</sup> Soysal contends that the increasing importance of global human rights partly explains the limitations placed on states' restrictiveness.<sup>7</sup> Joppke argues instead that the gap between governments' policy objectives and their policy outcomes is due to internal rather than external constraints, most notably the imposition of liberal constitutions.<sup>8</sup> Most studies testing the 'gap hypothesis' have centred on migrants already in situ in liberal democratic states. Since boat migrants seeking asylum can be intercepted at sea, thereby potentially thwarting national and international law, the assumption is that less of a gap exists between governments' policy aspirations and policy outcomes with regard to boat migrants in search of asylum.

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<sup>3</sup> For more details about the estimated numbers of people who died at sea, see B. Wain, *The Refused: The Agony of the Indochina Refugees*, Hong Kong 1981, p. 83 and IOM, *Fatal Journeys* (Vol. 2), p. 6.

<sup>4</sup> See R. Andersson, *Illegality Inc.: Clandestine Migration and the Business of Bordering Europe*, Oakland 2014, p. 138 and N. De Genova, 'Spectacles of migrant 'illegality': the scene of exclusion, the obscene of inclusion', *Ethnic and Racial Studies* 36.7 (2013), pp. 1180-1198 for more discussion about the 'border drama'.

<sup>5</sup> Article 33.1, UN Convention Relating to the Status of Refugees (1951).

<sup>6</sup> W. Cornelius, P. Martin and J. Hollifield, *Controlling Immigration: The Limits of Government Intervention*, in: W. Cornelius, P. Martin and J. Hollifield (eds.), *Controlling Immigration. A Global Perspective*, Stanford 1994, p. 3.

<sup>7</sup> Y. Soysal, *Limits of Citizenship*, Chicago 1994, pp. 151-2.

<sup>8</sup> C. Joppke, 'Asylum and state sovereignty: a comparison of the United States, Germany, and Britain', *Comparative Political Studies* 30.3 (1997), p. 293.

Section 1 provides a short overview of how states have reacted to boat migrants seeking to apply for asylum on their territory since the 1970s. Section 2 focuses on the reaction of European states, particularly Italy, to boat migrants since the early 1990s. Section 3 tries to explain why, especially in more recent years, European states have adopted an approach that pays significant attention to international refugee law by focusing especially on the growing influence of the European Court of Human Rights (ECtHR) on national asylum policies. The paper draws occasionally on primary government documents, largely in the form of bilateral agreements between states relating to the management of boat migrants. Contemporary newspapers are sometimes referred to throughout, particularly when discussing the Italian case since the 1990s because of the absence of official archives for this period. Due to the emphasis on legal interpretations of the Refugee Convention, particularly relating to the governing of *non-refoulement* of boat migrants, various court cases will be discussed throughout.

### *1. The Global Response to Boat Migrants in search of asylum since the 1970s*

The Cold War produced significant numbers of refugees at particular times, such as during the Hungarian crisis in 1956 and the Prague Spring in 1968. What occurred in Indochina in the late 1970s involved much greater numbers than previously witnessed. After two decades of conflict, North Vietnam overcame its southern counterparts and reunited the country in 1975. Approximately 130,000 escaped from Southern Vietnam by boat in early 1975 due to its impending invasion by northern forces and the withdrawal of American troops.<sup>9</sup> The United States fleet, positioned outside Vietnamese territorial water, picked up half those fleeing and the remainder managed to sail to Malaysia or the Philippines. All were rapidly transported to the US for resettlement. Another wave of boat people began to leave Vietnam soon after but numbers remained relatively low at first. By the late 1970s, however, the amount of people involved rose substantially due to increasing tension and subsequent war between Vietnam and China. Chinese-Vietnamese made up a significant proportion of this later exodus of so-called ‘boat people’. In total, 277,000 arrived by boat in other South East Asian countries by the middle of 1979.<sup>10</sup> Tens of thousands died en route as many of the smaller boats were not designed for the open seas although large trawlers, such as the *Hai Hong*, also transported boat people.<sup>11</sup> Starvation and disease accounted for many deaths on the overcrowded boats. Additionally, pirates murdered, robbed and raped large numbers on the high seas.<sup>12</sup> Malaysia received the most, followed by Hong Kong. Boat migrants in search of asylum also arrived in Thailand, Indonesia, the Philippines, Singapore, Japan, Macau, Korea and Australia.<sup>13</sup>

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<sup>9</sup> N. Vo, *The Vietnamese boat people, 1954 and 1975-1992*, Jefferson, NC 2006, pp. 2-3.

<sup>10</sup> UN General Assembly, ‘Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and subsequent developments: Report of the Secretary-General’, 7 November 1979, A/34/627.

<sup>11</sup> UNHCR, *The state of the world’s refugees 2000: Fifty years of humanitarian action*, Oxford 2000, p. 82.

<sup>12</sup> For first-hand accounts of Vietnamese boat people’s harrowing experiences, see C. Hoang (ed.), *Boat People: Personal Stories from the Vietnamese Exodus 1975-1992*. Cloverdale 2010.

<sup>13</sup> Y. Chan, *Revisiting the Vietnamese refugee era: an Asian perspective from Hong Kong*, in: Y. Chan (ed.), *The Chinese/Vietnamese diaspora: revisiting the boat people*, London 2011, p. 5.

The swelling of Indochinese boat migrants throughout 1979 prompted several South East Asia countries to announce plans to expel existing refugees and push back any further arrivals. Malaysia, most prominently, proclaimed in June 1979 that it would ship more than 70,000 Vietnamese boat people back into international waters from the country's refugee camps and shoot on sight any further attempts to enter its waters, with the Deputy Prime Minister claiming that 'being humane has not paid off for us at all'.<sup>14</sup> Although the Malaysian Prime Minister several days later stated that the country would not shoot on site or remove those already in refugee camps in the country, he did assert that the navy would push-back any boat containing migrants to international waters.<sup>15</sup> By late July 1979, the *New York Times* reported that Malaysia had expelled approximately 35,000 boat migrants from the country's territorial waters.<sup>16</sup>

No state in South East Asia had signed international instruments such as the UN Refugee Convention (1951) or the protocol that followed in 1967 that globalised the instrument (the convention had applied only to Europe before the protocol, as discussed elsewhere in this special issue). Similarly, governments did not face strong, independent domestic judiciaries. Hence there theoretically was no noticeable gap between what these states pledged to do – force boat migrants in search of asylum out of their territory – and what they could do. It was only due to American guilt about the fallout from the Vietnam War, Britain's need for assistance with its overcrowded refugee camps in Hong Kong (it did not push back boat migrants because of the potential international outcry that it could create), and international attention for the plight of boat migrants in search of asylum that a solution emerged.

To further deter people from leaving Vietnam in such a disorganised and dangerous manner, the UNHCR, with US prompting, formed an agreement with the Vietnamese government to establish an immigration scheme that would allow people to leave in a more orderly fashion in 1979.<sup>17</sup> In an attempt to dissuade South East Asian states from pushing back boat people, western states, encouraged by the UN following a British initiative, came together on 20-21 July 1979 in Geneva to pledge that they would help resettle the boat people then stranded in various makeshift camps across the region and host Vietnamese leaving under the Orderly Departure Programme. Shortly thereafter, states commenced taking in an annual quota of refugees and migrants in need of humanitarian help. In return for major international assistance and a promise to resettle the majority of those stranded in camps throughout South East Asia, countries of first asylum in the area agreed to desist from pushing back future boat arrivals.

Just as the international conference dedicated to the Indochinese refugee crisis began to alleviate some of the problems encountered by host Southeast Asian states, another episode involving boat migrants in search of refuge began to receive much more prominence. Boat migrants from Cuba and Haiti had arrived in the United States throughout the 1970s but the

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<sup>14</sup> Reuter press report, 14 June 1979, contained in UK National Archives Prem 19/129.

<sup>15</sup> H. Kamm, Malaysia Cancels Threats to Refugees, in: *New York Times*, 19 June 1979, p. 3.

<sup>16</sup> 'U.S. Is Collecting Refugee Reports on Mistreatment by Malaysia's Navy', in: *New York Times*, 26 July 1979.

<sup>17</sup> See J. Kumin, Orderly Departure from Vietnam: Cold War Anomaly or Humanitarian Innovation?, *Refugee Survey Quarterly* 27.1 (2008), pp. 104-117 for details.

scale of arrival remained relatively low until 1980.<sup>18</sup> The American response to the different movements in the 1980s and 1990s demonstrated the political nature of the reaction of some states to boat migrants during and after the Cold War. Whereas the United States took in hundreds of thousands of Vietnamese ‘boat people’ in the 1970s and 1980s and 125,000 Cubans in the 1980 Mariel boatlift when Cuba allowed people to leave the island for the United States for several months, Haitians received a much more hostile reception because Haiti remained an American ally.<sup>19</sup> From 1981 onward, the US instigated a policy to intercept and return Haitians on the high seas – but not Cubans. Under the US-Haiti bilateral interdiction policy, US Coast Guard vessels were instructed to:

[S]top and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons [...] To make inquiries of those on board, examine documents [...] . To return the vessel and its passengers to the country from which it came, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that no person who is a refugee will be returned without his consent.<sup>20</sup>

This policy controversially continued throughout the 1980s, notwithstanding a succession of military coups affecting the country’s already unsteady stability. The main difference between the groups was that the Vietnamese and Cubans fled from communist regimes at loggerheads with the United States whereas the Haitians escaped from non-communist dictatorships allied to the United States. In a significant finding, the US District Court rejected the Haitian Refugee Center’s assertion in 1985 that the US Coastguard had ‘deprived Haitian refugees on interdicted vessels of their liberty and rights afforded them by the Refugee Act’ because ‘those acts only establish procedures guaranteed to aliens within the United States’.<sup>21</sup> The plaintiffs also alleged that interdiction violated *non-refoulement*. The judge responded by acknowledging that the US Congress had implemented the stipulation as part of the 1980 Refugee Act but that this ‘does not provide any rights to aliens outside of the United States’.<sup>22</sup>

After the overthrow of democratically elected Jean Bertrand Aristide in 1991, growing opposition from human rights groups in the US saw Haitians being interdicted at sea but instead of being returned to Haiti, the Coast Guard took them to detention camps based in the US military base at Guantanamo to process their applications for asylum. In May 1992, President Bush allowed the Coast Guard to intercept Haitian boat migrants on the high seas and return them immediately without screening them for asylum.<sup>23</sup> Non-profit organizations

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<sup>18</sup> C. Mitchell, US policy toward Haitian boat people, 1972-93, *The Annals of the American Academy of Political and Social Science* 534 (1994), pp. 69-80 and C. DeMichele, Boat People (1975-2000), in: P. J. Hayes (ed.), *The Making of Modern Immigration: An Encyclopedia of People and Ideas*, Vol. 1, Santa Barbara 2012, pp. 121-142.

<sup>19</sup> A.A. Shemak, *Asylum Speakers: Caribbean refugees and testimonial discourse*, Fordham 2011, p. 52.

<sup>20</sup> R. Reagan, Executive Order 12324—Interdiction of Illegal Aliens, September 29, 1981. Available online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=44317>.

<sup>21</sup> *Haitian Refugee Center, Inc. v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), U.S. District Court for the District of Columbia - 600 F. Supp. 1396 (D.D.C. 1985), January 10, 1985.

<sup>22</sup> *Ibid.*

<sup>23</sup> A small number of the Haitians taken to Guantanamo did eventually receive asylum in the United States but

representing Haitian boat migrants proceeded to take several legal cases against the interdiction policy, which resulted in the American Supreme Court confirming that article 33 of the Refugee Convention relating to *non-refoulement* or domestic American law did not place any limit on the president's authority to repatriate aliens interdicted as long as this occurred beyond the territorial seas of the United States.<sup>24</sup>

Following the collapse of the Soviet Union in 1991, Cuba suffered a number of economic crises. As a result, a notable increase in the amount of Cuban boat migrants sailing to the United States occurred. In 1994, Castro announced that Cubans who wanted to leave could do so to ease social tension. Fearing a repeat of the Mariel Boatlift in 1980 in August 1994, when Castro began quietly letting Cubans leave on rafts and small boats, the United States announced a new policy to intercept Cuban boat migrants on the high seas and detain them alongside the Haitians at Guantanamo.<sup>25</sup> As part of an eventual deal struck between the two countries, Cuba agreed to stop boat migrants leaving and allow for the return of those interdicted on the high seas en route to the US. In return, the US agreed to receive at least 20,000 Cubans immigrants per year as part of an official programme. The US government transferred the vast majority of the 30,000 held at Guantanamo to the American mainland after the deal's establishment but repatriated those intercepted from then onwards on the Caribbean Sea.<sup>26</sup> In an appeasement of sorts, Cubans who made it to the US mainland were not returned under the so-called 'wet foot, dry foot' policy – a practice that did not apply to Haitians who had to undergo the asylum process that often led to the issuance of deportation orders.<sup>27</sup>

It appeared that no real gap existed when it came to the United States' policy towards boat migrants seeking to reach the country. Those deemed undesirable, such as the Haitians since the 1980s, were stopped on the high seas and returned. Domestic and international law could not protect the Haitians because their interdiction took place outside the United States. Due to the ongoing political tension between Cuba and the United States, Cubans received a remarkably different reception. Nevertheless, when the Cold War ended, the United States successfully adopted a new strategy that led to an enormous drop in boat migrants and the return of those found at sea to Cuba.

Another country that amassed significant experience of receiving boat migrants in search of asylum was Australia. A small number of Vietnamese 'boat people' had made it to the state in the late 1970s but this stopped after the aforementioned 1979 international agreement. During the 1990s, more boat migrants arrived from Cambodia and China. Authorities placed them in increasingly isolated detention centres to deter future arrivals but by the late 1990s numbers

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the majority were deported following US military intervention in Haiti in 1994, which resulted in the return of President Aristide. See A.A. Shemak, *Asylum Speakers*, pp. 53-4 for more details.

<sup>24</sup> *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993).

<sup>25</sup> E. Campisi, *Escape to Miami: An Oral History of the Cuban Rafter Crisis*, New York 2016, pp. 13-15.

<sup>26</sup> F. Masud-Piloto, *From Welcome Exiles to Illegal Immigrants. Cuban Migration to the U.S.*, 1959-1995, Maryland 1996, p. 143.

<sup>27</sup> A. J. Perez, *Wet Foot, Dry Foot, No Foot: The Recurring Controversy between Cubans, Haitians, and the United States Immigration Policy*, *Nova Law Review* 28.2 (2004), p. 445.

had increased significantly. This time, the majority came from Iraq, Iran and Afghanistan. They flew first to Indonesia – no visa requirements were necessary for nationals of those countries at the time to enter – and later boarded boats organised by smugglers that attempted to reach Christmas Island, an Australian external territory located closer to Indonesia than Australia. When the number of boat migrants swelled further throughout 2001, the issue of boat migrants became a topic of major political debate. In response to growing opposition to their arrival, the government of the day promised to put a stop to the trend. The appearance of the Norwegian *Tampa* off the coast of Christmas Island in late August 2001, containing over 400 Afghan boat migrants it had rescued at sea placed the issue centre stage. The Australian government categorically denied the *Tampa* permission to land. The government took this move, according to the Prime Minister, ‘in the national interest’ because it ‘prevent[ed] beyond argument people infringing the sovereignty of this country’.<sup>28</sup>

An international standoff developed between Indonesia, Australia and Norway, where the ship that rescued the migrants was registered. Australia’s decision to prohibit the *Tampa* from landing on Christmas Island incurred the wrath of the UNHCR and provoked widespread international condemnation, but the government stood firm and introduced its Pacific Solution. The ‘Pacific Solution’ involved the transfer of the majority of the rescued migrants and future boat migrants found on route for Australia to two small Pacific islands by Australian forces. Nauru, the smallest republic in the world, with a population of approximately 10,000, became the first island to accept Australia’s offer of substantial compensation in exchange for housing the boat migrants in detention centres built with Australian money. Papua New Guinea’s Manus Island later became the second. East Timor, Tuvalu, Fiji and Kiribati had refused Australia’s requests during the *Tampa* affair.<sup>29</sup> This represented a clear form of what Guiraudon terms venue-shopping, whereby political actors ‘seek policy venues where the balance of forces is tipped in their favour’.<sup>30</sup> By exporting the processing of boat migrants’ asylum applications to two other countries, the Australian government did not face the same scrutiny from domestic judges, political opponents or organisation supporting the boat migrants. Australia’s practices bore close resemblance to the transfer of Haitians and Cubans to Guantanamo Bay in the early 1990s.<sup>31</sup>

One civil liberties organisation immediately challenged the government’s detention of boat migrants aboard the *Tampa* through the Australian Federal Court. The single judge in charge of the case agreed that Australian forces had detained the boat migrants without lawful authority and consequently ordered their release to the Australian mainland.<sup>32</sup> The Australian

<sup>28</sup> Quoted in the Australian, 30 August 2001.

<sup>29</sup> S. Kneebone, The Pacific Plan: The Provision of ‘Effective Protection’?, International Journal of Refugee Law 18.3-4 (2006), p. 708.

<sup>30</sup> V. Guiraudon, European integration and migration policy: Vertical policy ~~making~~ shopping, *Journal of Common Market Studies* 38.2 (2000): p. 253.

<sup>31</sup> J. McAdam, Migrating laws? The ‘plagiaristic dialogue’ between Europe and Australia, in H. Lambert, J. McAdam and M. Fullerton (eds.), The Global Reach of European Refugee Law, Cambridge 2013, p. 36; A. Dastyari, Refugees on Guantanamo Bay: A Blue Print for Australia's' Pacific Solution'?, AQ: Australian Quarterly 40 (2007), pp. 4-9.

<sup>32</sup> *Victorian Council for Civil Liberties Inc. v. Minister for Immigration & Multicultural Affairs (& Summary) ("Tampa Decision")*, [2001] FCA 1297, Australia: Federal Court, 11 September 2001.

government appealed to the full court of the Federal Court. A majority ruled that the government had acted within its executive power under the Australian Constitution to stop the boat migrants from entering into the country.<sup>33</sup> The Australian Constitution does not contain any Bill of Rights or the equivalent. Instead, it focuses on the structure of government. This means that most appeals brought to Australian courts act as the battleground for disputes between the Australian parliament and the courts over jurisdiction rather than any attempt to ensure the rights of boat migrants.<sup>34</sup> Australian governments frequently attempted to overturn unfavourable judgements, demonstrating how ‘politics intrudes into the legal system’ in Australia.<sup>35</sup>

In late September 2001, the Australian parliament approved several new acts to counter the arrival of boat people and legislate, retroactively, for its actions during the *Tampa* affair.<sup>36</sup> The 9-11 terrorist attacks in the United States ensured widespread public support for the new regulations. One act excised certain Australian islands from the country’s territorial waters for boat people.<sup>37</sup> This meant that any boat people who arrived on Christmas Island had not technically landed on national soil. Another privative clause ensured that a decision to reject an asylum seeker’s application for refugee status made in Nauru, Manus Island or Christmas Island could not ‘be challenged, appealed against, reviewed, quashed or called in question in any court’.<sup>38</sup> In the Australian minister for immigration’s words, this response ensured that: ‘unauthorised arrivals do not achieve their goal of reaching Australian soil; there is no automatic access to Australian residency; [and,] there is no access to the judicial system’.<sup>39</sup> One of the other legal changes allowed the Australian navy to intercept any vessel attempting to reach Australia and return it to international waters.<sup>40</sup>

The majority of boat migrants transferred to Nauru and Manus Island received refugee status and were eventually resettled in Australia.<sup>41</sup> Nevertheless, the long periods spent in harsh conditions on the islands and the uncertainty surrounding their future caused the number of arrivals to plummet. Between 1999 and 2001, over 12,000 had sought asylum in the country after arriving by boat. Between 2002 and 2005, less than 100 boat migrants reached the country.<sup>42</sup> The Australian navy transferred the limited number of boat migrants who did arrive during this time period to Nauru and Manus Island. Boat migrants in Nauru challenged their placement in detention centres on the Pacific island through the Australian courts but the High

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<sup>33</sup> *Ruddock v. Vadarlis* [2001] FCA 1329, Australia: Federal Court, 18 September 2001.

<sup>34</sup> R. Hamlin, *Let Me be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia*, New York 2014, p. 116.

<sup>35</sup> S. Kneebone, *The Australian Story: Asylum Seekers outside the Law*, in: S. Kneebone (ed.), *Refugees, Asylum Seekers and the Rule of Law Comparative Perspectives*, Cambridge 2009, p. 226.

<sup>36</sup> The Border Protection (Validation and Enforcement Powers) Act 2001.

<sup>37</sup> Migration Amendment [Excision from Migration Zone] (Consequential Provisions) Act 2001.

<sup>38</sup> Part 8, Division 1.1, The Migration Legislation Amendment (Judicial Review) Act 2001.

<sup>39</sup> P. Ruddock, in: *Australian Financial Review*, 6-7 Oct 2001.

<sup>40</sup> The Border Protection (Validation and Enforcement Powers) Act 2001.

<sup>41</sup> B. Ryan, *Extraterritorial Immigration Control: What Role For Legal Guarantees?*, in: B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges*, Leiden 2010, p. 29.

<sup>42</sup> Numbers taken from J. Phillips and H. Spinks, ‘Boat arrivals in Australia since 1976’, Background note prepared for the Australian Parliamentary Library, Canberra 2009, p. 17.

Court ruled that their confinement did not infringe the Nauru Constitution.<sup>43</sup> In other words, Australian law did not apply: only the law of the countries in which the boat migrants were detained. It appeared, therefore, that no notable gap existed between Australia's policy goals – to reduce the number of boat migrants claiming asylum in the country – and what occurred after their introduction in September 2001. By outsourcing its asylum system for boat migrants, Australia did not encounter any major constraints. Migrants could not reach Australia and those transferred to Nauru and Manus Island could not appeal to Australian courts if authorities denied their applications for asylum.

## *2. The Changing European Reaction to Boat Migrants*

Europe also experienced the arrival of boat migrants. North Africans attempted to reach Spain via the Straits of Gibraltar from the 1980s onwards, Albanians crossed the Adriatic to Italy throughout the 1990s and Kosovars followed at the end of the decade. Kurds from Turkey and Iraq, Somalis and Eritreans from the Horn of Africa followed across the Mediterranean in the late 1990s and 2000s and landed in Italy, Malta and Greece. Sub-Saharan Africans attempted to reach the Canary Islands in the early 2000s. Most recently, refugees fleeing the fallout from the Arab Spring, civil wars in Libya and especially Syria, and the rise of Islamic State have come through Turkey, Egypt, Tunisia and Libya to traverse the Mediterranean to enter the EU, predominantly via Greece and Italy.

In the 1990s, European states reacted to boat migrants in a similar way to their American and Australian counterparts. When close to 50,000 Albanians sailed across the Adriatic in 1991 following the end of the communist regime in the state and the troublesome transition to democracy, Italy had no structures in place to cope with such a mass influx because it had not experienced anything similar before. The Italian government welcomed the first contingent of Albanians who arrived in spring 1991 but the second group of boat migrants who arrived in August that same year met with a very different official response. The police and army placed the Albanians inside a stadium in the southern Italian city of Bari for several days before transporting them back across the Adriatic without allowing them to apply for asylum. Italy then took the precaution of placing its armed forces in Albanian waters – with the acquiescence of the Albanian government – to prevent any other 'invasion' from taking place; a move that the Italian minister for justice at the time admitted was 'at the limit of international law'.<sup>44</sup> Despite the Italian Constitution's assertion that foreigners had the right to attain asylum in the country, the Italian courts played only a very minor role in dictating asylum policy during this period and subsequently, thereby contradicting somewhat the assumption that European states' liberal constitutions constrained policy initiatives to restrict unwanted migration. The absence of any law implementing the constitution's article on asylum has meant that asylum seekers have to appeal through the civil procedure. Since a

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<sup>43</sup> S. Kneebone, *The Pacific Plan: The Provision of 'Effective Protection'?*, p. 711.

<sup>44</sup> See 'Cordone sanitario' in acque albanesi : le forze armate e un satellite per evitare altre 'invasioni', in *L'Unità*, 11 Aug 1991 and *Scatta l'operazione: 'blocco dei porti'*, in: *La Repubblica*, 11 Aug 1991.

standard civil trial in Italy can last up to ten years, asylum seekers have rarely taken this option.<sup>45</sup>

Opposition politicians in Albania disputed the landslide victory of the reigning president's party in 1996 and subsequently boycotted parliament. Towards the end of that same year, the state pyramid scheme in Albania, to which citizens had contributed substantially, began to collapse, eventually wiping half the country's GDP for that year as a result.<sup>46</sup> Unrest followed and by March 1997, the president had removed the prime minister and placed the head of the army under house arrest. Anarchy descended as gangs attacked and sacked police stations, army barracks, prisons, banks and public offices, leading to the widespread availability of firearms amongst the public.<sup>47</sup> The enforcement of Emergency law gave police the right to shoot on sight at stone-throwers. In response, Albanians began to leave by boat for Italy. Approximately 16,000 sailed to southern Italy in the spring of 1997.<sup>48</sup> The Italian government originally voiced its intentions to advance an asylum policy resembling its EU neighbours but shortly afterwards vowed that its navy would return any Albanian boats approaching Italy back across the Adriatic.<sup>49</sup> Italy had already presented a plan to its EU colleagues in mid-March 1997 to lead a military intervention in Albania to stem the movement, but the EU had rejected the arrangement, preferring instead some kind of civil solution.<sup>50</sup> Italy then pressed the UN for international backing, with Albanian support. In late March, the UN approved Italy's repeated requests and the country accepted responsibility to lead an international military-humanitarian mission in Albania, which included policing the country's coastline from potential migrants.<sup>51</sup> The reason for the Italian government's desire to lead such an intervention, according to Perlmutter, related to two factors. First, the negative reaction of Italians to Albanian boat migrants in 1991 meant that the public's support for a generous reception remained minimal. Second, Italy attempted to display to its EU partners that it too had an effective and trustworthy foreign policy in the run-up to a decision concerning its European Monetary Union application and, by extension, the Schengen agreement.<sup>52</sup>

In the 1990s, Italy appeared to react to boat migrants in a similar way to their counterparts in South East Asia, the United States and Australia. When Italy wanted to lower the number of boat migrants arriving, it put in place deterrent policies that generally appeared to succeed in stifling further arrivals. No salient internal or external constraints stopped successive governments intercepting boats heading towards its coast, and returned thousands to Albania. Yet in the 2000s, Italy and other European states dealing with boat migrants sailing to their shores without permission began to face growing domestic and international scrutiny.

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<sup>45</sup> H. Lambert, F. Messineo, P. Tiedemann, Comparative perspectives of constitutional asylum in France, Italy, and Germany: requiescat in pace?, *Refugee Survey Quarterly* 27.3 (2008), p. 21.

<sup>46</sup> R. King and N. Mai, 'Of Myths and Mirrors: Interpretations of Albanian Migration to Italy', *Studi Emigrazione* 39.145 (2002): pp. 167-8.

<sup>47</sup> L. Einaudi, *Le politiche dell'immigrazione in Italia dall'Unità a oggi*, Bari 2007, p. 228.

<sup>48</sup> 'Profughi', in: *La Stampa*, 20 May 1997.

<sup>49</sup> 'Il governo vara misure eccezionale', in: *La Repubblica*, 20 March 1997.

<sup>50</sup> M. Bull and M. Rhodes, *Italy-A contested polity*, London 2013, p. 253; 'Allarme profughi: 5 mila in arrivo', in: *La Stampa*, 17 March 1997.

<sup>51</sup> Security Council resolution 1101 (1997) on the situation in Albania, U.N. Doc. S/RES/1101 (1997).

<sup>52</sup> T. Perlmutter, *The Politics of Proximity: The Italian Response to the Albanian Crisis*, *International Migration Review* 32. 1 (1998), p. 204 and p. 208.

The boat migrants who came to Italy in the 1990s originated primarily from the Balkans, but by the early 2000s a shift had occurred, as those coming from Africa and the Middle East began to dominate. Many still ventured further north after reaching Italy, helped by the country's participation in Schengen, but not all succeeded due to improved international monitoring of asylum seekers under the Dublin Convention, which stipulated that asylum seekers must submit their applications in the first EU state in which they arrived. Frustrated at the arrival of growing numbers of boat migrants from North Africa and Turkey, Italy instigated bilateral agreements with Turkey, Tunisia, Egypt, and Libya to enable it to repatriate migrants coming from these countries who had no grounds for protection. The agreement with Libya, in exchange for Italian help ending the EU blockade of Libya – in place since the 1986 Lockerbie air disaster – and other unspecified rewards proved the most controversial because of the alleged mistreatment of migrants in the country, the abhorrent state of basic human rights in the country, and its failure to sign the Refugee Convention. As part of the deal, Libya agreed to accept all boat people who had disembarked from its shores, most of whom came from elsewhere in Africa or the Middle East.<sup>53</sup>

The initiation of the Italy-Libya deal took place in autumn 2004, when Italian authorities transported over 1,400 recently-arrived boat migrants from Lampedusa, a small Italian island located in-between Sicily and Tunisia, by air to Libya days after their arrival on Italian soil. This caused consternation amongst NGOs, international organisations and opposition political parties. Much of the resistance centred on Libya's continuing failure to sign the Refugee Convention and Italy's repatriation of boat people who had no clear access to proper asylum procedures. The UNHCR vehemently criticised the measure, citing the Libyan state's treatment of 75 Eritrean asylum seekers repatriated from the country at the end of August 2004 to support its stance.<sup>54</sup> The Italian government countered these criticisms by maintaining that its actions did not violate any national or international rules.<sup>55</sup> Crucially, the EU mutely supported the Italian government's measures.<sup>56</sup> Brussels only changed its attitude six months later after sustained and renewed appeals from Amnesty International and the UNHCR relating to Italy's policies of mass expulsions. The EU Commissioner for Justice, Freedom and Security, Franco Frattini, then warned that Italy must 'guarantee to all the right to present an asylum application and cannot expel these people if a decision has not yet been taken'.<sup>57</sup> Several weeks later, Italy came in for further criticism following a resolution from the European Parliament that called on Italy to 'refrain from collective expulsions of asylum seekers and 'irregular migrants' to Libya as well as to other countries and to guarantee that requests for asylum are examined individually and the principle of *non-refoulement* adhered to'. It also chided the Italians for their failure 'to meet their international obligations by not ensuring that the lives of the people expelled by them are not threatened in their countries of

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<sup>53</sup> Human Rights Watch, *Stemming the flow: Abuses Against Migrants, Asylum Seekers and Refugees*, Human Rights Watch 18.5 (2006), pp. 106-118.

<sup>54</sup> "Salvaguardare il diritto d'asilo" Boldrini: va rispettata la convenzione di Ginevra Gran parte dei Paesi nordafricani non lo fanno, in: *La Stampa*, 19 October 2004.

<sup>55</sup> L' Onu contro i rimpatri lampo. Ma il centro si svuota, in: *Corriere della Sera*, 8 October 2004.

<sup>56</sup> A Bruxelles un documento sui flussi migratori. Il commissario Ue: l'Italia ha fatto sforzi eroici «Sì ai centri d'accoglienza nei Paesi del Nord Africa, serve una strategia comune», in: *La Stampa*, 5 October 2004.

<sup>57</sup> Clandestini espulsi, interviene l' Ue Frattini richiama all' ordine Pisanu, in: *La Repubblica*, 23 March 2005.

origin'.<sup>58</sup> Despite this criticism, the return of migrants to Libya continued until 2006, when a new left-wing government led by Romano Prodi stopped the return flights established by a right-wing coalition led Berlusconi, although it never announced this departure publicly.<sup>59</sup> It is important to point out that governments with varying political persuasions in Italy in the 2000s took markedly diverging approaches to boat migrants.

During the 2000s, other southern European countries, such as Malta and Spain, also encountered increasing numbers of boat migrants arriving at their shores.<sup>60</sup> The amount of boat people arriving on Spanish soil more than quadrupled between 1999 and 2000 to over 15,000. The most popular route until then consisted of people crossing the narrow but dangerous Strait of Gibraltar from Morocco to the south of Spain. Due to improved Spanish surveillance techniques, potential migrants turned to other routes in the 2000s, with boat migrants increasingly sailing from Western Africa to the Canary Islands or from northeastern Morocco to southeastern Spain.<sup>61</sup> In 2006, almost 40,000 boat migrants successfully made the journey. Three-quarters of those landed on the Canaries. Spain reacted signing secretive patrolling and readmission agreements with Mauritania, Cape Verde and Senegal.<sup>62</sup> Significantly, it also sought EU support from Frontex, an agency set up in 2004 to manage operation cooperation at the EU's external borders. In response, Frontex established Operation Hera that involved EU members and West African countries. Thereafter, the amount of boat people arriving dropped dramatically. Ruben Andersson has noted that despite all the technological innovations introduced, the 'key to the success of Frontex's Joint Operation Hera in West African waters was providing incentives to local forces. Essentially, you had to outbid the people smugglers'.<sup>63</sup> Most of the boat migrants travelling to Spain came from West Africa and Central African countries not associated with refugee flows. Furthermore, they usually left from Senegal, Mauritania and Morocco, which had all signed the UN Convention on Refugees – unlike Libya. This meant that the efforts of Spanish forces and EU's border agency, Frontex, did not create the same controversy as Italy's agreement with Libya. Nevertheless some authors did question the legality of Spain and Frontex's actions in third states.<sup>64</sup>

Italy had for many years attempted to bring Libya back into the international fold; in part, to reduce migration flows from the North African state. As discussed above, the two countries agreed to various measures in 2004 but Libya's enforcement of such arrangements remained erratic and unreliable. The Italian prime minister, Silvio Berlusconi, made the country the destination for his first diplomatic trip abroad on his return to power in 2008. He publicly

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<sup>58</sup> European Parliament, Resolution by the European Parliament on Lampedusa, 14 April 2005.

<sup>59</sup> See E. Paoletti, *The Migration of Power and North-South Inequalities: The Case of Italy and Libya*, Basingstoke 2010, pp. 147-152.

<sup>60</sup> D. Lutterbeck, *Small frontier island: Malta and the challenge of irregular immigration*, *Mediterranean Quarterly* 20.1 (2009), p. 121.

<sup>61</sup> J. Carling, *Unauthorized migration from Africa to Spain*, *International Migration* 45.4 (2007), pp. 16-17.

<sup>62</sup> R. Andersson, *Illegality, Inc.*, p. 69.

<sup>63</sup> R. Andersson, 'Hunter and prey: patrolling clandestine migration in the Euro-African borderlands', *Anthropological Quarterly* 87.1 (2014).

<sup>64</sup> *Ibid*, p. 123.

<sup>64</sup> S. Carrera, *The EU border management strategy: FRONTEX and the challenges of irregular immigration in the Canary Islands*, CEPS Working Documents 261 (2007), p. 28.

apologized for Italy's colonial occupation of the country and pledged to provide US\$5 billion over twenty-five years in reparations as part of the conditions of a 'Friendship Treaty' struck between the two countries. In exchange, Libya agreed in February 2009 to help Italy stop the boats by signing an additional protocol intended to strengthen bilateral cooperation between the two. The agreement stipulated that:

The two countries undertake to organise maritime patrols with joint crews, made up of equal numbers of Italian and Libyan personnel having equivalent experience and skills. The patrols shall be conducted in Libyan and international waters under the supervision of Libyan personnel and with participation by Italian crew members, and in Italian and international waters under the supervision of Italian personnel and with participation by the Libyan crew members.<sup>65</sup>

The number of boat people arriving declined significantly as a result of the joint Italy-Libya operations. Whereas almost 37,000 boat migrants arrived in Italy in 2008, less than 10,000 managed to make it in 2009 and numbers continued to decline into 2010.<sup>66</sup>

When Mohamed Bouzizi set himself alight in protest at his treatment at the hands of officials within the Tunisian regime in mid-December 2010, it set in motion a series of momentous international events that had enormous consequences for the flow of boat migrants coming to Italy. Ben Ali's dictatorial regime in Tunisia was the first government to fall as a result of the 'Arab Spring'. The amount of boats leaving Tunisia to sail the short distance to Lampedusa soared. By early April 2011, over 22,000 migrants had arrived.<sup>67</sup> To reflect the circumstances from which they left, Italy bestowed the Tunisians with temporary residential permits. The number of Tunisians arriving dropped significantly thereafter due to the signing of a new agreement between Berlusconi and the caretaker coalition Tunisian government that allowed for the repatriation of new arrivals.<sup>68</sup> This did not stem Italy's problems, however, as the Arab Spring spread across North Africa and the Middle East. Huge demonstrations in Egypt began in January 2011 and ultimately led to the resignation of President Hosni Mubarak in mid-February. Days later, protests started in Libya. Unlike Mubarak, Gaddafi stood firm and a bloody civil war began. In March, a NATO-led military intervention in Libya attempted to help oust Gaddafi. The conflict sparked largescale movement from the country.<sup>69</sup> Almost 26,000 mostly non-Libyans left by boat for Italy, seemingly with the blessing of Gaddafi who wanted to punish the Italians for their support of the NATO operation.<sup>70</sup> Under such circumstances, no pushbacks took place. Nevertheless, Italy signed a new agreement in June 2011 with the National Transitional Council in Libya in which previous arrangements

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<sup>65</sup> Quoted in *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, European Court of Human Rights, 23 Feb 2012, p. 5.

<sup>66</sup> P. De Bruycker, A. Di Bartolomeo, P. Fargues, *Migrants smuggled by sea to the EU*, Migration Policy Centre Research Report 2013/09, Florence 2013.

<sup>67</sup> C. Heller, L. Pezzani and S. Studio, *Report on the "Left-To-Die Boat"*, London 2012, p. 14.

<sup>68</sup> *Ibid.*

<sup>69</sup> IOM, 'IOM response to the Libyan crisis', External Situation Report, October 2011.

<sup>70</sup> Libya accused of exploiting boat people, *Guardian*, 12 May 2011.

between the two countries were referenced, which presumably meant that pushbacks could restart in the future.<sup>71</sup>

The number of boat migrants arriving in Italy remained low throughout 2012 (less than 9,000) but increased substantially the following year because of deteriorating conditions in Syria and continuing problems in the Horn of Africa. In early October 2013, over 350 boat migrants, the vast majority from Eritrea, drowned en route from Libya to Lampedusa. It provoked an international appeal for action from the Secretary General of the UN, the Council of Europe, and Pope Francis, amongst others.<sup>72</sup> Italy reacted by establishing a military and humanitarian operation labelled 'Mare Nostrum'. Frigates, patrol boats, helicopters, drones and radars were to be deployed to help rescue boat migrants found in difficulty in international and Italian waters and bring them to Italy. The number of boat migrants in 2014 surged to over 170,000. More than 75,000 originally came from Syria and Eritrea.<sup>73</sup>

Boats have continued to arrive in Italy in huge numbers since then (over half a million from 2014 to 2016). Despite the cessation of Mare Nostrum in October 2014, Italy continued to welcome boat migrants rescued at sea to their territory in 2015 and 2016. This represented a remarkable turnaround from Italy's capture and return of boat migrants to their origin country from 1991 to 2009. The disparity between Italy and the international examples already cited represents an even more remarkable distinction. What caused Italy to act in such a humanitarian way? One difference between the United States and Australia, on the one hand, and Italy on the other, is that the former did not have to contend with the fallout from the Arab Spring, especially the outbreak of civil war and instability in Libya, which meant that's Italy would be returning boat migrants to chaos if pushed back. Another factor is that a coalition government led by the centre-left – but containing members of the centre-right – that came to power in early 2013 adopted a more humanitarian approach than those right-wing coalitions led by Silvio Berlusconi between 2001 and 2006, and again from 2008 to 2011. Nevertheless, I argue that one salient reason for such a change was the increasing impact of the European Court of Human Rights (ECtHR) on European asylum policymaking.

### *3. The Growing Influence of Strasbourg*

Founding states of the Council of Europe established its court in Strasbourg in 1959 to oversee the appliance of the European Convention of Human Rights (1950). In 1983, amended rules for the ECtHR allowed individuals to take cases before the court if they had exhausted all domestic avenues for appeal. Crucially, the bestowal of rights on 'persons' rather than 'citizens' in the European Convention of Human Rights allowed it to hear cases concerning Europeans and non-Europeans alike.<sup>74</sup> Unlike the CJEU, the majority of cases

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<sup>71</sup> Memorandum of Understanding between the Italian government and the National Transitional Council for Libya, 17 June 2011.

<sup>72</sup> Lampedusa boat tragedy is 'slaughter of innocents' says Italian president, in: Guardian, 3 October 2013; Lampedusa, centinaia le vittime. I soccorsi: "Tante donne e bambini", in: La Repubblica, 3 October 2013.

<sup>73</sup> Calculated from data produced by the Iniziative e studi sulla multietnicità (ISMU) based on Italian Minister of the Interior statistics. Available online at <http://www.ismu.org/irregolari-e-sbarchi-presenze/> (last accessed on 2 January 2017).

<sup>74</sup> D. Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship*, Baltimore 1996, p. 83.

before the ECtHR came from individuals rather than states or institutional actors. Following an extensive rise in applications to the court – applications registered increased from 404 in 1981 to 2,037 in 1993 – further reform followed.<sup>75</sup> Originally, the court comprised of a two-tier structure, comprising a Commission that filtered applications and the Court on Human Rights, which only sat a few days per month. In 1998, this was replaced by a single full-time Court. In 2000, Noll predicted that the ECtHR would become the battleground for individuals appealing against failure to attain asylum in Europe.<sup>76</sup> And so it proved, with Labayle and De Bruycker arguing that the ECtHR’s case law has become ‘the backbone of EU law on asylum’ and that the court has played ‘a decisive role in protecting the fundamental rights of aliens facing expulsion from the territory’.<sup>77</sup> Today the court receives tens of thousands of applications per year. In 2015, for instance, 40,650 were lodged.<sup>78</sup>

In the judgments delivered by the court in 2015, nearly a quarter of the violations found concerned Article 3, which related to the prohibition of torture and inhuman or degrading treatment. This is often the article under which asylum seekers appeal to the court when facing extradition, expulsion or deportation to third countries due to the reinforcement of the *non-refoulement* principle contained in the Refugee Convention by the ECtHR in the 1990s.<sup>79</sup> ECtHR case law now potentially protects those fleeing general situations of conflict and, in extreme cases, material deprivation and poverty.<sup>80</sup> The UNHCR reviews how states comply with their commitments to abide by the Refugee Convention, but it has no formal revision procedure to review a case.<sup>81</sup> By contrast, the ECtHR does have the power to challenge states’ decision to expel rejected asylum seekers.

The increasing influence of the ECtHR can be seen in relation to Italy’s response to boat migrants can be seen throughout the 2000s. In 2005, the ECtHR received an application from a group of boat migrants who Italy had returned by plane to Libya. They complained about the risk the expulsion exposed them to in Libya, the lack of any effective remedy against their deportation orders, their collective expulsion as aliens, and their denial of any right to apply to a court.<sup>82</sup> The ECtHR, in response, requested that Italy suspend the repatriation of several individuals because of the inadequate reply of Italian authorities to its queries regarding the identification, treatment and grounds under which Italy wanted to repatriate these migrants to Libya.<sup>83</sup> Italy vowed to improve its asylum and reception system in response to the court’s

<sup>75</sup> Council of Europe, Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11 May 1994.

<sup>76</sup> G. Noll, *Negotiating Asylum*, Leiden 2000, 454. Referred to in Costello, *The Human Rights of Migrants and Refugees in European Law*, p. 171.

<sup>77</sup> H. Labayle and P. De Bruycker, *The influence of ECJ and ECtHR case law on asylum and immigration*, Report requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE), 2012, p. 5 and p. 11.

<sup>78</sup> European Court of Human Rights, *Analysis of Statistics 2015*, Strasbourg 2016, p. 4.

<sup>79</sup> H. Lambert, *Protection against refoulement from Europe: Human Rights Law comes to the rescue*, *International and Comparative Law Quarterly* 48.3 (1999), p. 518 for more details.

<sup>80</sup> C. Costello, *The Human Rights of Migrants and Refugees in European Law*, p. 172.

<sup>81</sup> N. Mole and C. Meredith, *Asylum and the European Convention on Human Rights*, Strasbourg 2010, p. 17.

<sup>82</sup> *Hussun and Others v Italy* 10171/05, 10601/05, 11593/05 and 17165/05 (19 January 2010). See also M. Giuffr , *Watered-down Rights on the High Seas: Hirsi Jamaa and Others V Italy* (2012), *International and Comparative Law Quarterly* 61.03 (2012).

<sup>83</sup> *No alle espulsioni verso la Libia*, in: *La Repubblica*, 12 May 2005.

requests but maintained that the repatriation of boat people to Libya broke no national or international law.<sup>84</sup> The court eventually struck the case out because the lawyers representing the migrants had lost contact, thereby showing how difficult it could sometimes be to mobilize the law in favour of migrants on the move; yet it marked a warning for Italy.

When Italy began returning boat migrants to Libya in early 2009, it did so without screening them first for asylum despite previous criticism from various European institutions. This provoked the wrath of several international organisations, most notably the UNHCR. With the assistance of humanitarian groups operating in Libyan detention centres, which put them in contact with lawyers based in Rome (and kept them in contact with the applicants, in contrast to the earlier case just mentioned), eleven returned Somalis and thirteen Eritreans filed a case at the ECtHR against Italy in late May 2009 in a famous case that would later be referred to as *Hirsi Jamaa v. Italy*.<sup>85</sup> The applicants alleged that Italy had violated article 3 and protocol 4 (prohibition of collective expulsion of aliens) of the European Convention on Human Rights by returning them to Libya. They also alleged that they did not have the right to ‘an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity’ (article 13 of the same convention).<sup>86</sup> Despite this, Italy continued its ‘*respingimenti*’ of boats and in June 2009, Frontex controversially contributed to one such push-back.<sup>87</sup>

Frontex’s involvement triggered increased EU interest. In July 2009, the European Commissioner for Justice, Freedom and Security, Jacques Barrot, responded to a request from the European Parliament for a legal opinion on the pushbacks by asking Italy to provide it with more information about the circumstances of the returns and ‘the provisions put in place to ensure compliance with the principle of *non-refoulement* when implementing the bilateral agreement between the two countries’.<sup>88</sup> The European Parliament had acted as a thorn in the operations of Frontex by continually challenging it to abide by the EU’s human rights commitments.<sup>89</sup> In his communication, Barrot reminded Italy that the ECtHR’s interpretation of the principle of *non-refoulement*, as set out in the Refugee Convention, meant that states could not return anyone to ‘a place where he or she could face a real risk of being subjected to torture or to inhuman or degrading treatment’, which meant that:

... [An] obligation must be fulfilled when carrying out any border control in accordance with the SBC [Schengen Borders Code], including border surveillance activities on the high seas. The case-law of the European Court of Human Rights provides that acts carried out on the

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<sup>84</sup> Le rapport du Commissaire aux droits de l’homme du Conseil de l’Europe (CommDH (2005)9, du 14 décembre 2005).

<sup>85</sup> *Hirsi Jamaa and Others v. Italy*, p. 21.

<sup>86</sup> *Ibid*, p. 1.

<sup>87</sup> Human Rights Watch, *Pushed Back, Pushed Around. Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers*, New York 2009, p. 37.

<sup>88</sup> Quoted in *Hirsi Jamaa and Others v. Italy*, p. 15.

<sup>89</sup> See European Parliament D-G for External Policies, *Migrants in the Mediterranean: Protecting Human Rights*, Brussels 2015.

high seas by a State vessel constitute cases of extraterritorial jurisdiction and may engage the responsibility of the State concerned.<sup>90</sup>

In February 2012, the Grand Chamber of the ECtHR released its unanimous judgement on Italy's previous treatment of boat people in the Mediterranean. The court ruled that by pushing back the applicants to Libya in May 2009, Italy had contravened the European Convention on Human Rights.<sup>91</sup> In contrast to the US case referred to earlier concerning Haitian boat migrants, which argued that the court could not decide on whether interdiction amounted to *non-refoulement* because it took place outside the United States, the ECtHR asserted that 'Italy cannot circumvent its "jurisdiction" under the Convention by describing the events in issue as rescue operations on the high seas' since 'the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel'. As a result, the court found that 'in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities'.<sup>92</sup> In his concurring judgement, Judge Pinto de Albuquerque wrote:

If there were ever a case where concrete measures for execution should be set by the Court, this is one. The Court considers that the Italian Government must take steps to obtain assurances from the Libyan government that the applicants will not be subjected to treatment incompatible with the Convention, including indirect *refoulement*. This is not enough. The Italian Government also have a positive obligation to provide the applicants with practical and effective access to an asylum procedure in Italy.<sup>93</sup>

The European institutions moved quickly to ensure that new legislative measures relating to Frontex's operations, whose actions had also come in for considerable criticism previously by human rights advocates, adopted a more humanitarian approach than previously as a result of the *Hirsi Jamaa* judgement.<sup>94</sup> The Italian technocratic government in place at the time announced that the judgement would be respected and that Italy would rethink its policies on migration as a result. In the summer of 2012, the government assured the Council of Europe that Italy had suspended pushing back boats since trouble began in Libya in 2011 – linked to the fallout from the Arab Spring and the overthrow of Gaddafi.<sup>95</sup> The Italian government that came to power after elections in February 2013 adopted a similar approach.<sup>96</sup> Domestic factors, of course, influenced Italy's reaction to the Lampedusa tragedy in October 2013 and the establishment of the Mare Nostrum policy discussed thereafter. Due to Italy's marked

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<sup>90</sup> Ibid. This case law relating to extraterritorial jurisdiction dates back to *Amuur v. France* 1977/6/92, 25 June 1996.

<sup>91</sup> Ibid, p. 56.

<sup>92</sup> Ibid, p. 26.

<sup>93</sup> Concurring opinion of Judge Pinto de Albuquerque, *Hirsi Jamaa and Others v. Italy*, p. 78.

<sup>94</sup> See B. Stanford and S. Borelli, *Troubled Waters in the Mare Nostrum: Interception and Push-backs of Migrants in the Mediterranean and the European Convention on Human Rights*, *Uluslararası Hukuk ve Politika* – Review of International Law and Politics 9 (2014); S. Carrera and L. den Hertog, *Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean*, *CEPS Liberty and Security in Europe* No. 79 (2015), p. 10.

<sup>95</sup> 'Plan d'action du Gouvernement italien dans l'affaire *Hirsi Jamaa* et autres c. Italie', 26 July 2012.

<sup>96</sup> I. Glynn, *Asylum Policy, Boat People and Political Discourse: Boats, Votes and Asylum in Australia and Italy*. London 2016, p. 175.

political divide over immigration, it was much more likely that a government led by a centre-left party quite favourable towards boat people would adopt a humanitarian policy than an administration led a right-wing party.<sup>97</sup> Nevertheless, a right-wing led government would have found it extremely difficult to impose a policy akin to Australia's. This was not because of EU institutions restraining member states, such as Italy. Indeed, the EU's border agency, Frontex, had helped rather than hindered Italy push-back boat people in the past. Instead, it was the ECtHR that acted as a liberal external constraint to such actions.

## Conclusion

To underline Italy's uniqueness compared to the non-European case studies mentioned, one need only look at what occurred in Australia in 2013. The disappearance of boat migrants attempting to reach Australian shores in the years following the instigation of the previously discussed Pacific Solution in 2001 caused a new government to suspend the policy in 2008. When boat migrant numbers began to rise once again in the 2010s, Australia introduced an updated and even harsher version of its Pacific Solution in 2013 that enabled it to intercept boat migrants and either return them to Indonesia or transport them to Manus Island in Papua New Guinea or Nauru where they could not access the Australian legal system, thereby successfully addressing the issue. The UN Human Rights Council, among others, criticized Australia for its treatment of asylum seekers on the high seas and the conditions facing detainees in Manus Island, but this did not cause Australia to make any major changes to its approach to boat migrants.<sup>98</sup> US courts continually supported successive governments' efforts to interdict Haitian, and later Cuban, boat migrants in international waters and return them to their country of origin since US and international refugee law did not apply on the high seas. The Inter-American Human Rights Commission called for the United States to desist from interdicting Haitian boat migrants on the high seas in the 1990s but to no avail as the country never ratified the American Convention on Human Rights. In stark contrast, Italy went from pushing back boat migrants intercepted at sea to actively searching for boat migrants in trouble in Italian and international waters, rescuing them and then bringing them to Italy so they could apply for asylum. I have argued that a critical part of the explanation for such a turnaround relates to the findings of the ECtHR's *Hirsi Jamaa* case, which found that Italy bore responsibility for boat migrants intercepted at sea, even if this occurred in international waters. The ECtHR ruling that Italy's policy of expelling and pushing back boat people to Libya on the high seas without providing them with access to asylum procedures contravened the European Convention on Human Rights led to repercussions unimaginable for Southeast Asian countries, the United States or Australia.

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<sup>97</sup> For more information about the right-left divide on immigration in Italy, see T. Perlmutter, A narrowing gyre? The Lega Nord and the shifting balance of Italian immigration policy, *Ethnic and Racial Studies* 38.8 (2015), pp. 1339-1346.

<sup>98</sup> See UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 6 March 2015, pp. 7-8. For Australia's response, or lack thereof, see J. McAdam, Australia and asylum seekers, *International Journal of Refugee Law* 25.3 (2013), p. 444.