



PABLO CERIANI CERNADAS

Lawyer (University of Buenos Aires). PhD student in Fundamental Rights, University of Valencia. Legal Expert on International Migration, Immigration and Transnational People in Motion (European University of Madrid, 2003-2004). Professor for the Masters in Human Rights, National University of Lanús (UNLa). Researcher, Center for Human Rights UNLa where he coordinates research on children, migration and human rights commissioned by UNICEF. Since 2000, he has been involved at the Center of Legal and Social

Studies (Centro de Estudios Legales y Sociales, or CELS), which is on the Steering Committee of Migrants Rights International (MRI), and where he was Director of the Program on Economic, Social and Cultural Rights and Legal Clinic Coordinator for Immigrant and Refugee Studies (CELS-CAREF-UBA). Migration and Human Rights Consultant for the Americas Program of the International Federation of Human Rights (FIDH). Member of the Institute of Human Rights, University of Valencia, and the Criminal System and Human Rights, University of Barcelona. Legal Project Coordinator of Justice Without Borders (2009-2010), sponsored by the Open Society Initiative for West Africa (OSIWA), on human rights and access to justice in cases of deportation of African migrants from throughout Europe. He has written several papers and has given numerous seminars and courses on human rights, largely on migrant rights. Co-editor (with Ricardo Fava) the book "Immigration Policy and Human Rights, National University of Lanus, Buenos Aires, 2009.

Email: pablo.ceriani@uv.es, pceriani@unla.edu.ar

ABSTRACT

The legal instruments adopted by the European Union (EU) to ensure free movement within the territory of the Member States are closely linked to the control of the external borders. Over the past ten years, EU member states have created various mechanisms to prevent, control, and punish irregular immigration to the European community, whose migration model is characterized by an instrumental vision that cheapens the value of fundamental rights and reduces the low-skilled labor migration needed by the labor market. From there, EU states derive laws that recognize rights according to the person's nationality and immigration status. In this context, this paper will analyze, with a focus on human rights and from physical, symbolic, political, and legal points of view, what is supposedly a radical "advance" of this process of externalization: the operations created to impede migration of people in "canoes" or "boats" to Europe from the coasts of countries like Morocco, Algeria, Senegal or Mauritania.

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EUROPEAN MIGRATION CONTROL IN THE AFRICAN TERRITORY: THE OMISSION OF THE EXTRATERRITORIAL CHARACTER OF HUMAN RIGHTS OBLIGATIONS

Pablo Ceriani Cernadas

1. Introduction

The Schengen Agreement and other legal instruments adopted by the European Union (EU) to ensure free movement within the territory of the Member States are closely linked to the other side of this process: the control of external borders. In the last ten years, EU member states have developed various means to prevent, control and punish illegal immigration into the European community. The rules relating to visas, carrier liability, and joint return operations of migrants (UE. EUROPEAN COUNCIL, Regulation No. 574/1999, Directive No. 51/2001 and Decision No. 573/2004a) or information systems and surveillance at borders (the Schengen Information System - SIS, and the European Agency for the Management of Operational Cooperation at the External Borders - FRONTEX¹), are some of those devices. The priorities of the Hague Program for 2005-2010 included the strengthening of border control policy and the “fight against illegal immigration”².

According to a logic of control, security, and fear (GIL ARAUJO, 2002; SOLANES, 2005), the migratory model of the EU is characterized by an instrumental vision: a unilateral and limited view that cheapens the value of fundamental rights and reduces low-skilled labor migration needed by the labor market (DE LUCAS, 2002, p. 32). From there, EU member states derive laws that recognize rights according to the person’s nationality and immigration status. This inequality assumes an exclusion of such magnitude that it has been associated with a system of apartheid (BALIBAR, 2003, p. 191-192). The directive on family reunification is a prime example of this inequality of rights – fixed in a double standard – with respect to the right to family life for immigrants from outside of the EU (EU. EUROPEAN COUNSEL, Directive No.

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86/2003)³. More recently, the directive relating to the return of persons who migrated through irregular channels (EU EUROPEAN PARLIAMENT AND EUROPEAN COUNSEL, Directive No. 115/2008) is a clear setback for human rights standards, especially on issues such as deportation, deprivation of freedom, the detention of children, and the guarantees of due process (DE LUCAS, 2009).

Through monitoring mechanisms, visa issues, and the FRONTEX agency, countries have designed new instruments to increase the efficiency of migratory controls: bilateral readmission agreements between Spain and Italy with African countries; Euro-African initiatives regarding migration and development; the European neighborhood policy (PEV); the EURODAC fingerprint identification system; strengthening land borders (Ceuta and Melilla); the actions of the European Patrol Network (EPN) in the Mediterranean and the Atlantic since 2007; the Rapid Border Intervention Teams (RABIT); etc.⁴. Some of these programs have shaped the process of externalization of migration control⁵.

In this context, this paper will analyze, with a focus on human rights and from physical, symbolic, political, and legal points of view, what is supposedly a radical “advance” in this process of externalization. The paper concerns the operations created to impede migration of people in “canoes” or “boats” to Europe from the coasts of countries like Morocco, Algeria, Senegal, and Mauritania⁶. These actions consist of intercepting boats and “returning” migrants to the place from which they exited, or to some other country that will admit them, according to the agreements that exist with the European authorities⁷. Of the many levels impacted by these initiatives, this paper will focus on their legal implications, concretely in terms of the rights of the people who are captured on these boats and the obligations of the states that engage in such actions.

To this end, it is necessary to identify why the European authorities that create and execute these initiatives must assume the responsibility that every State has with respect to any person “under its jurisdiction,” an obligation that goes beyond the physical territory of the State. That is to say, the extraterritorial application of human rights obligations. Later, the paper will examine which rights come into play – or are threatened – when these interception and return measures are taken within the African territory. The rights to life, physical integrity, asylum, and freedom of movement, like the guarantees of due process, are not properly considered during these operations. The final reflections of this paper will address how these control mechanisms represent a new challenge for an overdue debate on: the scope and importance of the right to freedom of movement, which includes the right to leave one’s country (of origin) and the right to enter into another.

2. The concept of “persons under the jurisdiction” of a state

Before analyzing the rights at stake in the migration control measures introduced above, it is appropriate to comment on a legal principle: the notion of state “jurisdiction” under human rights treaties. As many already know, the obligations assumed by States in these agreements must ensure respect for all people found “under their jurisdiction.”

In this regard, it should first be noted that the term “jurisdiction” is not

synonymous with the “territory” of a State. As such, human rights obligations do not refer only to actions taken by the State within its own territory, but rather include the responsibility of the State in question to ensure the rights of a person with regard to any conduct its agents effectuate in exercise of their functions, without prejudice to the place where the conduct takes place. In this sense, the – now extinct – European Commission for Human Rights stated that the duty of ensuring all rights contained in the European Convention, to any person under the jurisdiction of a member State is not limited to the territory of the member State, but extends to all people under the State’s authority and responsibility, whether such authority is being exercised within the State’s territory or beyond. Therefore, not only is the concept of jurisdiction meant for authorized agents performing functions abroad, but it also extends to the people over which these functions are exercised. If an agent’s acts or omissions infringe on the rights of these people, then the responsibility of the State has been compromised⁸.

By the same token, for the United Nations Human Rights Council (UNHRC), the term “individuals subject to its jurisdiction” does not refer to the State where the violation of rights occurs, but rather to the relationship between the person and the State. A State may be responsible for violations committed by its agents in the territory of another State, independent of whether such violation occurred with the acquiescence of the host State’s government. For the Council, pursuant to Article 5.1 of the ICCPR, no element of an agreement can be understood to allow a State to commit acts that would be prohibited on the State’s own soil, in the territory of another State (UNHRC, 1981, § 12.2, 12.3). A similar conclusion was reached by the Committee on Economic, Social and Cultural Rights (UNCESCR) (2003, § 31) and the International Court of Justice (ICJ)⁹. These standards are evidence that the link established between State jurisdiction (in regards to human rights) is not territorial, but rather relates to the relationship between an individual and the representatives of said State (GIL-BAZO, 2006, p. 593-595). The concept of “jurisdiction” highlights the effective control that state authority has over a person, without prejudice to whether such a person is located within the territory of the State (UN-HRC, 2004a, § 10; De Schutter, 2005, p. 10; RIJPMMA, Cremona, 2007, p. 17).

In applying the standards to the case under analysis, it is noted that there is no doubt about the control exercised by the European representatives in their operations in African territory. The presence of one or more persons from the government of Senegal or Mauritania in the European patrol boats does not constitute the replacement of authority. In any such case, the jurisdiction (and responsibility) will be shared, according to the authorities involved in each action, but there is no denying the decisive role of the European authorities in monitoring and locating the canoes and providing for their subsequent interception and return.

Existing data supports this assertion. At least based on the data available, researchers have found that certain bilateral agreements remain secret (CARRERA, 2007, p. 22; MIR, 2007, p. 4), contrary to the principles of legality and in regards to the universal application and publication of laws. The case of measures developed by Spain provides a good example of this. The resources destined for these operations

implicate Spain's formal, material, human, and, ultimately, political involvement, in these operations. As indicated by the Pro-Rights Association of Andalusia (APDH),

Spain has sent four Civil Guard ships... to monitor the waters of Mauritania and Senegal... In only three African countries (Mauritania, Senegal and Cape Verde), there are a total of 64 officers, 14 boats, two aircraft and two helicopters [...]there is African police oversight for the Spanish ships that are traveling in Mauritania and Senegal, but only in a purely testimonial sense[...] In fact, each patrol boat carries eight Civil Guard officers and two Mauritanian and Senegalese police guards. (APDHA, 2008, p. 40-41).

Additionally, jurisdiction can also be verified in these cases according to the flag flown by the boat effectuating the interception of the canoes (WEINZIERL, 2007, p. 40-42).

This circumstance is further evidenced by the measures taken by Spain itself. With the government decision creating an administrative authority charged with centralizing the initiatives meant to control migration to the Canary Islands¹⁰, it can be noted that actions in African waters constitute the application of Spanish (as well as European) public policy, as stated:

the actions initiated by the Government in countries where migratory flows originate, such as joint land, air, and naval police operations... , constitute the basic tools used to confront illegal immigration by sea and conform to the planning of operations that, under the EU-funded Rapid Response Projects and Mechanisms (RRM), intend to decisively stem the flow of boat migration from the coasts of Mauritania...and Senegal (Operation Goree²²). In said bilateral projects, in addition to including naval and air resources from the Civil Guard, they integrate other resources of the National Police Body and DAVA¹³ (Department of Customs Monitoring). (CANARY ISLANDS, PRE/3108 Presidential Order, 2006).

It is important to note one aspect that we will return to in the next section: the prohibition of non-refoulement is neither dispensed of when the security forces of one State act by "invitation" of another (in whose territory the acts take place), nor when the actions of the first State take place with the consent of the other (expressed, for example, in a bilateral agreement) (BORELLI, 2005, p. 39-68, p. 57-58). Also, it must be reaffirmed that in this case, even though consent exists, the initiative, the economic resources, the boats that effectuate the patrols, the recent installation of satellites to monitor the African coast,¹⁴ and, finally, the decisions and political interests flow from the States of the EU.

In short, the migrant return operations effectuated in African waters clearly demonstrate the point made by Gondek, in the sense that in the current context, marked by globalization and the rise in State activities outside their own borders, the extraterritorial application of human rights agreements has become increasingly important (GONDEK, 2005, p. 351). The standards relating to "jurisdiction" in human rights treaties expressly endorse extraterritorial application in such circumstances. Accordingly, in the following section, we will observe which fundamental rights come into play when analyzing migration control operations designed and implemented by European authorities in African lands and waters.

3. migration control, the right to life and the right to physical integrity

3.1 *The principle of non-refoulement: the inattention to a key principle of international law.*

One of the most serious inquiries that can be made concerning the migration control operations effectuated by European authorities in the territory of African countries relates to the *principle of non-refoulement*. This principle, recognized explicitly and implicitly in various treaties¹⁵, is an absolute and non-derogable obligation, a preemptory norm of customary international law (*Jus Cogens*)¹⁶, and, as such, cannot be violated in any way (either by act or omission). According to the International Court of Justice, non-compliance does not weaken, but rather strengthens its character (ALLAIN, 2001, p. 540-541).

The guarantee of non-refoulement prohibits a State from returning a person to another State where there is evidence that he or she may suffer threats to their life or physical integrity in the place to which they will be returned. To determine whether evidence exists that a person is in such circumstances, an individual examination must be conducted in each case. However, according to all informational sources (official or otherwise) that have been identified concerning the mechanisms of interception and return in African waters and on the African coast, there is no evidence that points to the existence of any process that examines the individual circumstances of each person being forcibly returned. Thus, it is impossible to be sure that people returned to the countries from which they came (not necessarily the countries of origin¹⁷) will not suffer a threat to their lives or physical integrity.

The non-refoulement principle not only applies to cases of asylum seekers, but, being closely linked to the protection of the right to life and physical integrity, also applies to any person who, for whatever reason, would see those basic rights threatened upon being returned to their country of origin. In turn, this principle has no geographical limitations and must be respected by the authorities of a State wherever such State exercises jurisdiction, regardless of the territory in which the actions are executed¹⁸. The principle of non-refoulement not only applies extraterritorially, but the formal characterizations of the acts of such transfer are also irrelevant (e.g., the extradition of persons accused of crime, expulsion of immigrants, return, etc.). (Borelli, 2005, p. 64).

This position was expressly assumed by the Inter-American Commission on Human Rights (IACHR) in a case that presents several similarities with the current controls on the African coast. In the so-called “Case of Haitians,” referring to the interdiction and return measures undertaken by United States (U.S.) authorities in international waters and the waters (and coast) of the Republic of Haiti, which were intended to prevent the outflow of people from Haiti bound for the U.S. or other countries. The U.S. claimed that the principle of non-refoulement did not apply because the actions occurred outside its territory. The Commission rejected this position and indicated that it shared the view of the UNHCR, which said the principle “does not recognize geographical limitations”¹⁹.

Moreover, the principle of non-refoulement may not be infringed upon indirectly. This applies not only if a State returns a person to another in which the person's life and physical integrity may be endangered, but also if a State sends the person to a third country (his or her country of nationality) in which such rights may also be violated. Therefore, the legal obligation of a State that sends a person to another country (of which such person is a non-national) includes the duty to assess whether the receiving State also respects the principle of non-refoulement. Otherwise, the two States in question are considered responsible for a violation, through their so-called "indirect removal" (LAUTERPACHT, BETHLEHEM, 2003, p. 115).

On this subject, there are various international human rights protections, which set an important standard. The Committee against Torture, in a case against Sweden concerning the expulsion of an alien that constituted an alleged violation of the non-refoulement principle, challenged the State's action in the sense that the immigration authorities, to resolve the expulsion of an Iraqi person to Jordan, failed to assess the risk that Jordanian authorities would then deport her to Iraq (Committee against Torture, 1998, § 6.5 and 7). At the European level, the European Convention on Human Rights (ECHR) also endorsed the hypothesis of indirect refoulement, although in that case it found no violation because the intermediate State was part of the European Convention and therefore could not violate the prohibition of Article 3^{19,20}.

In the immigration enforcement actions under analysis, there is no information that allows us to affirm – with any degree of certainty – that authorities in countries such as Senegal, Mauritania, and Gambia comply with the prohibition on non-refoulement, once the people intercepted by European authorities are returned. What is relevant is the absence of information which would demonstrate the State's investigation of these issues during the detention and return processes. Spanish social organizations have provided evidence concerning this situation²¹.

The initiatives of the EU itself confirm this absence. In December of 2006, the European Commission said it was necessary to evaluate the possibility of extending the international protection obligations of States, such as the non-refoulement principle, to the situations in which a State's boats implement interception measures. In particular, the Commission said it would be appropriate to analyze the circumstances under which a State is obliged to assume responsibility for examining an asylum application, as a result of the application of international refugee law, during the operations taking place in the waters pertaining to another State or in international waters (European Commission, 2006, § 36). The words of the Commission are sufficiently clear: States should consider whether they are obliged to respect their international obligations in the context of policies and measures carried out in African waters aimed at preventing illegal migration. The answer is very simple and requires no deep inquiry. International norms, standards, and basic principles of international human rights (such as non-refoulement), indicate quite clearly that States must meet these duties, without exception, under any circumstances and in any place where a person falls under its jurisdiction.

This scenario gives rise to a reflection: if borders are "an absolutely undemocratic or discriminatory condition of democratic institutions" (Balibar, 2003, p. 176), a diffuse, ambiguous, and shifting border area constitutes an extreme situation where States do

not apply basic rights normally recognized by the laws governing their own borders (to analyze the guarantees – which are included in these operations, we will see how this perception of a “no-law zone” has been consolidated). Contrary to the position we have taken, if one understands that the responsibility for a possible violation of the principle of non-refoulement falls on the African State in whose territory the acts occur, we would have to ask whether the European States participating in these activities, providing the assistance required for implementation and taking charge of oversight (policy, operational, material, and financial) for these initiatives also share some responsibility.

3.2 The right to life and migrant deaths at sea

Year after year, in the waters of the Atlantic Ocean and the Mediterranean, there are thousands of deaths of people seeking to migrate from Africa to Europe. It is difficult to ascertain exactly how many die in the attempt to migrate to another country, and it is equally or more complex to assign legal responsibility to States in these circumstances. Obviously, this difficulty vanishes when a causal link between certain behaviors and an outcome of death is demonstrated, as in the case where death occurs during return or deportation operations where the person is in the custody of public authorities. But, for those who die in the sea crossing, the issue is more complicated.

At this point, criminal responsibility must be distinguished from responsibilities relating to human rights. The obstacles inherent in the identification of persons responsible from a criminal perspective do not prevent us from making some observations from a human rights perspective, focusing on the behavior of States. As with other fundamental rights, States must respect and fulfill the right to life. In the context of immigration control policies, this obligation translates into the duty to refrain from taking any measures that could lead, directly or indirectly, to the violation of this right.

In response, it is noteworthy that there are several reports that show two narrow connections relevant to this analysis. On the one hand, we have the EU’s increasingly restrictive immigration policies and the increase in irregular migration and trafficking networks (a crime whose main victims are the people, not the States). On the other hand, there is the increase and diversity of the mechanisms of control of irregular migration in the Mediterranean and from the Atlantic coasts of Morocco, as well as the departure of canoes from further south (Mauritania and Senegal), which have demonstrated a notable increase not only in the distance traveled, but also in the danger of the journey²². This link between the tightening of immigration policies, greater control of irregular migration, and the increase of people dying at sea, requires us, at a bare minimum, to reflect and debate on the responsibility of European States in adopting measures that may contribute (along with other factors) to the loss of the lives of thousands of people.

Moreover, the obligation to respect human rights includes the duty to establish the necessary policies and measures to ensure that people can actually enjoy such rights. In this sense, one could say that, because the objectives announced by the FRONTEX Agency and by States patrolling international, African, and European waters to prevent irregular migration, include the desire to prevent the deaths of migrants or reduce risk of these trips, their actions constitute an attempt to guarantee the right to life. This

would not be incorrect. In either case, it must be stated that rescue at sea is an obligation under international law (CONVENTION ON THE LAW OF THE SEA, art. 98.1; INTERNATIONAL CONVENTION ON MARITIME SEARCH AND RESCUE, para. 2.1.10; AMENDMENT 2004 of the International Convention for the Safety of Life at Sea, and UNHCR and International Maritime Organization - IMO, 2006) and that the central purpose and priority of the presence of ships and aircraft in these areas is to promote security and, within it, migration control. The results, actions, and other remedies would be irrefutably different if the principle aim was to secure the right to life²³. In turn, this obligation includes the duty to conduct a serious investigation into the circumstances of the thousands of deaths that occur annually, and, consequently, to modify the policies and mechanisms that could strengthen the protection of this right.

Migration, even if irregular (or rather, especially if irregular) is an extreme decision which is directed precisely at trying to effectively exercise the right to a dignified life, the right to free movement, and the right to leave one's country²⁴. Deprivation of component rights that are interdependent with the right to life (health, work, and housing), and on the right to an adequate standard of living, is just one of the leading causes of irregular migration, which is by its nature risky and makes a person vulnerable. Therefore, States should make a concerted effort to refrain from continuing to enact policies that can increase these risks and vulnerabilities, which contribute to the deaths of people seeking to enjoy a better life for themselves and for their families. We face dire circumstances and consequences as a result of the hierarchization of global mobility (Bauman, 1999, p. 93-123). As stated by De Lucas, the right to movement cannot be "a fatal decision, a dangerous and degrading enterprise that appears to be the only option to [...] escape misery, a lack of freedom, or a lack of opportunities in life." (DE LUCAS, 2006, p. 40).

4. Apprehension and return of migrants: the impact on the right to freedom of movement

The control of migration in Northwestern Africa also presents a challenge in terms of the personal liberty of migrants who are returned, on two levels: (1) in the arrest immediately after interception, and (2) in the establishment of a punishment for attempting to migrate illegally.

(1). As part of interdiction efforts, one consequence may be the deprivation of freedom upon returning to the coast. Spain and other EU countries have contributed (materially and politically) to the creation of Detention Centers for migrants in countries like Morocco and Mauritania. These centers, as Nair points out, are a new phenomenon that is spreading outside the European area, namely through implementation of the policy of containment and selection assigned by the EU to neighboring countries. Such centers are characterized, Nair says, by the indeterminacy of the legal status of detainees and the period of detention, as well as by the lack of statistics and basic information about the centers²⁵.

Non-governmental organizations and media sources have repeatedly described how, after the interception of boats or canoes near the coasts of these countries, people

were detained in these types of centers (APDH, 2007, p. 19-20). In some cases, the situation was more serious. In February 2007, the Marine I boat was intercepted off the coast of Mauritania, with 372 people on board (300 from India and Pakistan and the rest from other countries like Myanmar, Sri Lanka, Sierra Leone, and Liberia). The Spanish authorities at the port of Nouadhibou, following an agreement with Mauritania, divided the people according to the destinations determined for them²⁶. Twenty people were deprived of their liberty at Nouadhibou. According to the information not denied by the governments involved, these people were detained in a “fish warehouse” for over two months. One can imagine that the conditions of detention there could not meet the requirements of laws and core principles (like the set of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN, cf. UN - GA Resolution 43/173, 1988). In addition, in contravention of international standards²⁷, there was no intervention by any judicial authority (Mauritanian or Spanish) during that period to review the legality of such administrative detention or the conditions of detention.

As a result of this, and due to the fact that the detention of these persons had been imposed after the intervention of Spanish authorities and that hangar migrants would have been in the custody of security agents of Spanish nationality, the Spanish Center for Assistance to Refugees, Doctors of the World (Medicos del Mundo), and Amnesty International made a legal complaint against the Spanish State for violations of the rights to liberty, physical integrity, and effective judicial protection²⁸. The National Court (2007a²⁹) rejected the demand, arguing that there had been no human rights violations and that the events occurred under Mauritanian jurisdiction. This argument is remarkable because, according to documents submitted to the court by the State (an agreement between Mauritania and Spain), the security forces of both countries would be in charge of operations performed³⁰. The ruling also noted that the Spanish intervention was limited to compliance with humanitarian and rescue obligations. While in part this is true, it ignores the political and regulatory framework of the State's presence in these waters, whose primary purpose is not of a humanitarian nature, but rather to control immigration and “fight against illegal immigration.”

(2) This scenario of controlling migration from Africa to Europe has also resulted in legislative changes (and changes in enforcement) in African countries, much to the detriment of the right to personal liberty of those who migrate or try to migrate. In this regard, the UN Special Rapporteur on migrants' rights – although admitting that reducing irregular migration can be a legitimate objective – said the EU policies have contributed to the criminalization of irregular migration by treating such migration as a criminal offense (UNHRC, 2008, § 19). Indeed, in recent years, countries like Morocco and Senegal have changed their laws or practices regarding migration control, establishing prison terms for those who emigrate irregularly. Thus, immigration law No. 02-03 (adopted in Morocco in 2003) imposes fines and imprisonment from one to six months (art. 50) for persons who leave Moroccan territory illegally or enter the country through places other than those established for such purpose.

Moroccan investigators agree on the causes of these changes. For Khachani (2006, p. 48-50), this legislation seems to be a response to external pressures relating to security,

involving in the State in action that prioritizes regional and international security at the expense of human rights and places Morocco where the EU wants it, in order to control migration. The role assigned by the EU to Morocco, according to Belguendouz (2002, p. 42), is that of a “safety belt or quarantine line” of Europe. In developing the project that later would become law, Khachani stated that this was a “capitulation” to the Spanish and European interests, a response to “blackmail” and “pressure” that “Schengen-ized” Moroccan politics and criminalized those who immigrated to Morocco and the EU (BELGUENDOZ, 2003, p. 33-35).

Another issue that exacerbates the regressive nature and size of change is the fact that, ten years before the new law, Morocco made a significant gesture in the opposite direction. In June 2003, Morocco ratified, unlike any of the EU States, the Convention for the Protection of the Rights of All Migrant Workers and their Families, whose text, according to the Committee that verifies compliance, prevents the sanction of irregular migration with custodial sentences³¹.

Since 2006, this turn in Moroccan policy has progressively taken place in other countries on the West African coast as well. In this sense, it has been emphasized that Spain has convinced Senegal and Mauritania to arrest potential migrants on their respective coasts, and readmit those who managed to enter illegally (in this case, through readmission agreements). Consequently, Senegal has disclosed its intention of arresting 15 thousand people ready to depart for the Canary Islands, while 116 people have already been sentenced to two years of imprisonment (SPIJKERBOER, 2007, p. 130). The media has reported similar cases, both in Senegal³² and in Algeria³³.

In this manner, European pressure to control and sanction irregular migration has contributed to increased use of the term “illegal emigration.” Thus, EU states are supporting a trend that would criminalize the exercise of the right to leave a country and, in many cases, punish the victims of such crime. In this regard, Bauman presents the paradox of this scenario, in which the “rational” world faces the challenge of having to deny others (in a situation of total vulnerability) the right to freedom of movement, a right that is exalted “as the maximum achievement of the globalized world” (Bauman 1999, p. 102). In this regard it is noteworthy that the IACHR, in the Haitian case cited above, concluded “that the act of intercepting Haitians at sea in ships is a violation of the right to freedom”³⁴. The right to freedom is unlawfully restricted not only by imprisonment but also by the mere act of interception.

5. The right to asylum: returns without the possibility of soliciting international protection

Interceptions carried out on African territory by authorities of European countries (e.g., the Spanish Civil Guard in the Cassamance River, south of Senegal) are carried out without the adoption of an individualized procedure to establish the steps to be taken for each person found in a canoe. This results in harm to those seeking asylum. The European Commission itself (2006, § 10) questioned whether it would be necessary to take steps to verify if any such people required international protection.

Currently, any completion of an application for examining whether any of the

intercepted persons needs asylum is effectuated, once the operation of the European security officials has been finalized, by officials of the respective African country, under the rules and procedures applicable in each case. It is noteworthy that in several of these countries there is no legislation or official procedure for the recognition of refugee status (Conseil consultatif des droits de l'homme, 2008, AMNESTY INTERNATIONAL, 2008).

But, the problem that we want to stress is that, within the framework of procedures for interception and return designed and implemented by European authorities, it is not possible to invoke the right of asylum and to request the initiation of a proceeding to analyze the request. If the interception were effectuated a few miles further north (in European or international waters), everything indicates that those same authorities would be forced to initiate the process for determining the granting of refugee status or other protection. But, further south, this obligation vanishes. In this regard, the United Nations Rapporteur on the rights of migrants stressed the novelty and gravity of these actions on the African coast, and noted the importance of

states taking measures so that cases of persons intercepted and rescued at sea are dealt with on an individual basis and assured judicial guarantees, and that people who claim international protection can have access to the national procedure for asylum. (UN. HUMAN RIGHTS COUNCIL, 2008, § 38-40).

The international refugee law does not seem to legitimize these practices, even if interceptions are carried out within the framework of an action of rescue at sea. The IOM (2001, Annex, § 5) has indicated that any action taken at such times must be in accordance with the Law of the Sea and other international instruments such as the 1951 Convention on Refugee Status. On the other hand, UNHCR has stated that the

interception measures should not result in the denial of access to international protection for asylum seekers and refugees, or in the return of those who need international protection, directly or indirectly, to the frontiers of territories where their lives or freedom would be threatened on account of the grounds enumerated in the Convention, or where the person has other grounds for protection based on international law. (UNHCR, 2003, § IV)³⁵.

Similarly, the ECHR has ruled that States' actions meant to control attempts to violate immigration rules cannot result in depriving people of the right to asylum guaranteed by various treaties³⁶. The IACHR, in assessing practices significantly similar to European operations in African territory, stated that the U.S. controls in Haitian waters constituted a violation of the right to asylum protected by the American Declaration, by failing to provide a procedure that could determine the need for such protection³⁷.

However, because the EU and its members are aware of their obligations under these circumstances, current practices in North Africa over the past few years seem to justify the criticism that characterizes this outsourcing process as an attempt to control and select immigrants, thus delegating to other States the eventual fulfillment of human rights obligations.

6. The absence of due process guarantees in the european controls in africa

The implementation of return measures contrary to the principles of due process and the minimum components of the right to effective judicial protection is being developed with particular intensity and magnitude in the control operations carried out off the North African coast. It is the “southern front,” explains Nair (2006, p. 60-65), where policies of “combating illegal immigration” are carried out by Spain, Italy, and other European countries, as well as some “subcontracted” African States. In these operations, there is no procedure available to substantiate – and justify – return procedures (i.e., the “punishment” for an alleged infringement of the regulations upon entry to and exit from the corresponding country).

There is no formal procedure. These “ways of doing things” are prohibited by international standards, as they involve the forcible detention of persons and, depending on the location of the acts (sea, coast), their transfer. It is true that measures of return (in cases of attempted illegal entry) are implemented based on the content of bilateral agreements or general agreements on the subject, or on an ad hoc basis in particular situations (as in the pact between Spain and Mauritania in the case of the *Marine I* ship). But, these agreements do not include or contemplate due process. Additionally, their “secret” character must be emphasized (CARRERA, 2006, p. 21-22, 25-28). This situation seems to correspond to what Mezzadra (2005, p. 107) describes as an “eruption of administrative criteria in areas of constitutional significance, with the burden of uncertainty and arbitrariness that this entails.”

The act of overlooking the guarantees established by human rights treaties, even considering the restrictive case law of the ECHR with respect to the procedural safeguards applicable to immigration control processes³⁸, extends to EU law itself. Article 13.3 of the so-called “Schengen Borders Code” provides that persons denied entry have the right to appeal such decision and are required to receive, in writing, instructions on how to obtain information necessary for this purpose (EU. EUROPEAN PARLIAMENT AND EUROPEAN COUNCIL. Regulation No. 562/2006).

In the case mentioned on the interdiction of the Haitian boat people by the U.S., the IACHR concluded that these operations constituted a violation of the right of access to the courts to defend their rights³⁹ and dismissed the allegation of the U.S. government that such operators sought to reduce deaths at sea⁴⁰.

In the present context of migration control into southern Europe, a sort of virtual fence has been established along the African coasts and African waters, so that by materially moving away from the EU’s external borders, the limited guarantees established by the immigration legislation of those States no longer apply. If the legislation of EU countries demonstrates inconsistencies with regard to due process and in the provision of an effective remedy against expulsion or return measures, the present situation goes even further (geographically and legally) to omit even the implementation of the few remaining guarantees (such as to legal assistance, administrative action, or at the very least, the right to submit an application!). While border controls and coercive mechanisms have spread hundreds of miles to the south, this externalization

is not complete, since the fundamental guarantees have not been “forgotten” across the European territory. With such guarantees, the principles of universality of human rights and the extraterritorial nature of their obligations remain.

Moreover, this type of operation jeopardizes the principle that prohibits collective expulsions, as recognized in Protocol 4 to the ECHR (art. 4), the American Convention (art. 22.9), the African Charter for Human and Peoples’ Rights (art. 12.5), and the CHARTER OF FUNDAMENTAL RIGHTS OF THE EU (art. 19.1). As defined by the European Court in various judgments, collective expulsion is a measure requiring foreigners, as a group, to leave a country except when such measure is taken as a result of and based on a reasonable and objective examination of the particular situation of each person. For the ECHR, a number of foreigners receiving a similar case disposition would not necessarily constitute a collective expulsion, if everyone had the opportunity of individually presenting his or her case against deportation before the competent authorities⁴¹.

This prohibition is inseparably associated with the right to due process and judicial protection since the purpose of prohibition is precisely so that a person can only be deported from a country as a result of a legal process related to his or her particular situation and based on the facts and evidence of each case. This process would include the possibility of knowing the reasons for deportation, the evidence on which the decision is based, and the right to challenge the order with an effective remedy. Therefore, the prohibition serves as a guarantee against arbitrariness and enables the questioning of actions when they are considered illegitimate based on due process guarantees.

To determine whether a case is in compliance with the prohibition, not only should there be a reasonable, objective, and individualized examination for each action of return, but the circumstances surrounding the execution of the decision must also be considered, as noted by the ECHR⁴². In control operations in African waters and on its coasts, there is no evidence that situations are evaluated individually. Thus, this principle, which has been most explicitly guaranteed by the European Court and its equivalent agencies in African and American contexts⁴³, is now facing a serious threat from immigration control policies that, under certain circumstances, prioritize the “efficiency” and “speed” of enforcement over the fundamental rights of thousands of people.

As a corollary, these multiple restrictions on rights and guarantees also reveal discriminatory treatment. Being “illegal immigrants” before people, migrants are dispossessed of the minimum level of protection. Without consideration for whether or not the ultimate result in each case was the return of people to their country of origin, such treatment does not legitimize the removal of basic rights. After committing a simple administrative offense, migrants receive differential treatment based on their immigration status and, ultimately, even if often hidden or implicit, because of their identity. The result is a profound degradation of the notion of person as holder of rights. Behind these mechanisms, or in their justification, policies and practices are fraught with phrases like “public order, fighting, emergency, invasion or threat,” as if to substantiate (as a state of emergency) the cancellation of guarantees, which would not even be allowed in such circumstances. Faced with the message of emergency disorder and insecurity, a premium is placed on a police response (DE LUCAS, 1994,

p. 156) and, as we have seen, without the safeguards that guide even the policies of “punishment” in a democratic society.

This treatment is consistent with the doctrine of the “penal law exception,” in which, according to Ferrajoli, one element consists of the infraction being defined based on a certain status rather than a particular act, that is to say, from the subjectivity of a person or a social group rather than his or her or their conduct. Therefore, in these circumstances, the policy – that derives from a friend/enemy framework – is defined as a “fight against...” (Ferrajoli, 1995, p. 820-822). Likewise, in the field of migration control policies and restrictions imposed on rights, Zamora (2005, p. 60-61) believes that the dichotomy of good immigrant or suspect immigrant is the consequence of a process of “producing a social emergency,” from which the justifications for a policy based on exceptional measures stem.

The Return Directive approved by the EU is the latest and clearest example of the denial of the most basic safeguards for people who are apprehended in their attempt to enter the European territory through irregular means (CERIANI CERNADAS, 2009b). What is remarkable is that the problem consists, not only of the fact that rights are restricted and few guarantees are recognized, but also of the fact that a directive (Article 2) states that such limited guarantees could “not” apply with respect to persons apprehended while trying to cross the EU external borders illegally.

7. Final reflections: migration control, human rights, and the right to freedom of movement

The current international political and economic context, its impact in each country – and particularly on migration flows within and between regions of the planet – as well as the many difficulties faced by those who seek to enter or reside in another country and exercise their rights there, have increasingly formed part of the discussion on the issue of right to freedom of movement. Obstacles to the exercise of freedom of movement are far reaching and intimately connected with the inequalities between countries and regions, the maintenance of restrictive notions of State sovereignty and citizenship, and, ultimately, the denial of the universality of fundamental rights.

According to Carens, citizenship and border control policy act to effectuate stratification, and refer us to the liberal criticism of feudal institutions, in which the birth was the basis of privilege or misery (now the place of origin, or nationality, which largely determines the rights, opportunities, and needs of each person). If the practices of the “old regimes” were contrary to the freedom and equality of individuals, how are they justified today? (Carens, 1992, p. 26). Therefore, many authors have stressed the need and duty to review the scope of the right to freedom of movement in order to include recognition of the right “to immigrate” (DE LUCAS, 2006, p. 37-44; AGUELO, CHUECA SANCHO, 2004, p. 291-292) when amending the policies governing the admission of foreigners and the degree of “openness or porosity” of borders (Benhabib, 2005, p. 151-156; Wihtol de Wenden, 2000, p. 49), due to the human rights violations effectuated during border control, or due to the structural inequalities of the current global model (Pecoud, 2007, p. 10-11).

The common policy concerning the right to free movement, Article 13 of the Universal Declaration, is wholly or partially ignored by State policies, being associated only with the right to emigrate, and not with the right to immigrate. However, given the progressive restrictions of immigration control policies, which are more pronounced by their outsourcing, as in the case analyzed in this article, this position has become so contradictory that it is now paradoxical. Sixty years ago, the right to leave one's country had much to do with the strong pressure exerted by "Western" countries. Even later, in the Act adopted at the European Conference on Security and Cooperation in Helsinki (1975)⁴⁴, the right to emigrate was the main concern of the "Western" states, who stressed the need to enforce that law through various measures, including by ensuring family reunification (Hannum, 1987, p. 48). Undoubtedly, an interpretation of the right to free movement (and the right to family life) is substantially different from the present approach of various European States and the EU itself.

In contrast, control measures in African waters and coasts account for the practical impossibility of thousands of people leaving their country by virtually the only avenue they have available. Indeed, in some cases, the act of trying can mean detention (without basic guarantees) and the subsequent submission to a criminal trial, either for the crime of "illegal emigration" or as an accomplice to the crime of trafficking of persons. Thousands die in the attempt. The circumstances that depict this situation -- military checkpoints, intelligence services, detention, criminalization, and deaths -- are becoming ever closer to realities that the world seemed to have overcome, as aptly described by Sassen (2006) as the *Berlin Wall on Water*.

Along with the inability to leave the country by formal means, the policy of European States, the EU (FRONTEX) and the (subsidized) collaboration of African countries have led to an inability to do so irregularly. Note that: historically, the relevance of this right was precisely linked to the special need for protection in the event that a State imposed constraints on leaving the country through regular channels, in which case people were forced to resort to alternatives. In the present circumstances, immigration controls in countries of origin and transit, along with restrictions on entry, make it virtually impossible, in one way or another, for a person to exercise that right. In operating in African waters, the right to leave is seriously threatened (Weinzierl, 2007, p. 47-50).

Also, given the formal recognition of the right to leave the country, when a State implements policies that directly restrict or prohibit the entry of immigrants into its territory, it is alleged that there is no "right to enter" another country. In this regard, it must be stressed that in both States in this situation, shielded by the principle of sovereignty and seeking to continue to freely control their borders (albeit with low efficiency), there is "a moral crisis: while emigration is widely regarded as a human rights issue (asylum and non-refoulement), immigration is seen as an issue of national sovereignty (entry, residence). But, if people are only free to leave their country, where can they go?" (Wihtol de Wenden, 2000, p. 49).

The current scenario, therefore, is characterized by deep iniquity. On the one hand, people who are nationals of the most economically developed States -- the majority being recipients of migration flows from other regions -- find few barriers in

exercising the right to freedom of movement in all its components: the right to leave their country and its logical counterpart, the right to enter another. Thus, the right to mobility seems to be available only for those of certain nationalities or, in other countries for the very few who have a certain economic status or other privileges. Other people may, after overcoming innumerable obstacles, leave their country, enter another, and reside there, thanks to family ties in the host society, or to the needs and convenience of the labor market. However, the vast majority of people are deprived of that right, in one or both directions. This situation is legitimized even though those deprived of mobility are precisely those people for whom this right would represent one of the few – or only – opportunities to enjoy other basic rights such as health, nutrition, physical integrity, and so on⁴⁵.

The circumstances are even more complex if we incorporate other variables into the analysis. More than two decades ago, Hannum (1987, p. 34-40) described several debates of the '70s, which assessed whether it was legitimate for developing countries to impose restrictions on the right to leave the country, with the objective of avoiding “brain drain” and assisting the development of that society. It is ironic that today, the countries receiving these migrants are those imposing these constraints, although such restraints are not applied to the better educated people, but to those who suffer from different mechanisms of exclusion and disenfranchisement in their places of origin. Thus, this “leak” is allowed or promoted⁴⁶ (without prejudice to its impact on the country of origin), while severely restricting the exit of those who do not benefit from an unequal and marginalizing development.

At the current juncture, particularly in international law, there is a dispute referred to in clear terms: at one extreme, there is a discretionary exercise of state sovereignty, and at the other, there is a right to immigrate and the rights of migrants. The powers of the States with respect to the admission of migrants, which in previous decades was almost without objection, are now constantly being questioned. The law of human rights is not outside of that debate, but rather is a particularly important factor tipping the balance toward recognizing the right to immigrate (without negating the other extreme). Central principles of international human rights law, such as non-discrimination, progressivism, *pro homine*, universality, and dynamism, have a determinative role. Reaffirming and deepening these principles is perhaps the most important task, not only within States but also internationally.

However, immigration control policies and mechanisms being implemented by States and European organizations on African soil not only avoid the debate over the right to freedom of movement (and negatively impact this right), but also pose a grave danger to the protection of various fundamental rights. While these operations are a clear exercise of the jurisdiction of the individual European States involved, it is necessary to analyze – in an extraterritorial manner – their responsibility with regard to human rights, without prejudice to the liability of African States. The main objective of this article was to contribute to raising awareness of this reality, reflect on its implications and propose the discussions needed for a comprehensive approach (focusing on human rights) to the complex phenomenon of international migration, its causes, and its consequences.

REFERENCES

- EFE Agency. Canoe intercepted in Senegal with 138 people bound for the Canary Islands. *El Día*, Dakar, 27 Mar. 2007.
- AGUELO, P.; CHUECA SANCHO, A. The brand new human right to immigrate. *Immigration and Foreign Law*, Valladolid, n. 5, p. 291-292, 2004.
- Someone informed on the Cheik expedition. *El País*, Ziguinchor, 12 Sep. 2006a.
- ALLAIN, J. The *jus cogens* nature of *non-refoulement*. *International Journal of Refugee Law*, Oxford, v. 4, n. 13, p. 533-558, 2001.
- HIGH COMMISSIONER FOR REFUGEES UNITED NATIONS [UNHCR]. Interception of Asylum-Seekers and Refugees: the International framework and recommendations for a comprehensive approach. EC/50/SC/CPR.17. Geneva: June 9, 2000.
- . Executive Committee. Conclusion on protection safeguards in interception measures, n. 97 (LIV), 2003. Available at: <<http://www.acnur.org/biblioteca/pdf/2411.pdf>>. Accessed on: August 20, 2009.
- ; International Maritime Organization [IMO]. Rescue at sea: a reference guide on the principles and practices applicable to migrants and refugees. Geneva: UNHCR, IMO, 2006. Available at: <<http://www.acnur.org/biblioteca/pdf/4495.pdf>>. Accessed on: August 20, 2009.
- AMNESTY INTERNATIONAL. Mauritania: “Nobody wants anything to do with us”: Arrests and collective expulsions of migrants who have been denied entry into Europe: AFR 38/001/2008. 2008. Available at: <<http://www.amnesty.org/en/library/asset/AFR38/001/2008/en/ad888d90-46c2-11dd-9dcb-1bbf1ead8744/afr380012008eng.html>>. Accessed on: August 20, 2009.
- ALGERIA IMPRISONS 65 ‘without papers’ who tried to emigrate to Spain. *El País*, Madrid, Nov. 22. 2006b.
- PRO HUMAN RIGHTS ASSOCIATION OF ANDALUSIA [APDHA]. Human Rights on the Southern Frontier 2007. 2008. Available at: <http://www.apdha.org/index.php?option=com_content&task=view&id=486&Itemid=45>. Accessed on: August 20, 2009.
- BALIBAR, E. We, Citizens of Europe?: Borders, the state and the people. Madrid: Tecnos, 2003.
- BAUMAN, Z. Globalization: the human consequences. Buenos Aires: Fondo de Cultura Economica, 1999.
- BELGUENDOZ, A. Morocco border with Spain: member or policeman of Europe in North Africa? In: PIMENTEL SILES, M. (ed.). Migratory processes, economy and people. Almeria: Caja Rural Inter, n.1, 2002, p. 33-74. (Economic Mediterranean Collection).
- . *Le Maroc non Africain Gendarme de l’Europe?* Alerte au projet de loi n° 02-03 relative à l’entrée et au séjour des étrangers au Maroc, à l’émigration et l’immigration irrégulières! Rabat: Inter Graph, 2003.
- BENHABIB, S. *The rights of others: aliens, residents and citizens*. Barcelona: Gedisa, 2005.
- BORELLI, S. Casting light on the legal black hole: international law and detentions

- abroad in the 'war on terror'. **International Review of the Red Cross**. Geneva, n. 857, p. 39-68, 2005.
- CARENS, J. Migration and morality: a liberal egalitarian perspective. In: BARRY, B.; GOODIN, R. (eds.). **Free movement: ethical issues in transnational migration of people and money**. Hertfordshire: Harvester Wheatsheaf, 1992, p. 25-47.
- CARRERA, S. The EU Border Management Strategy: FRONTEX and the challenges of irregular immigration in the Canary Islands. **CEPS Working Document**. Bruselas, n. 261, 2007. Available at: <http://shop.ceps.eu/BookDetail.php?item_id=1482>. Visited on August 20, 2009
- African Charter on Human and Peoples' Rights**. Nairobi, July 27. 1981.
- CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION. December 18, 2000. Available at: <http://www.europarl.europa.eu/charter/pdf/text_es.pdf>. Accessed on: August 20, 2009.
- CERIANI CERNADAS, P. The control of illegal migration into Spain in the light of human rights treaties: on the borders of legitimacy. PhD (Dissertation) - University of Valencia. València, June 2008. 203p.
- African Charter on Human and Peoples' Rights** The rights of migrants without legal residence in the European Court of Human Rights: A complex balance of the realities and challenges of migration in the region. In: Ceriani, P., FAVA, R. (eds.). *Migration Policy and Human Rights*. National University of Lanus, 2009th. [in press].
- African Charter on Human and Peoples' Rights** The return directive of the European Union: critical notes from a human rights perspective. *Human Rights Yearbook*. Santiago: Center for Human Rights, Law Faculty, University of Chile, n. 5, 2009b, [s / p]. [in press].
- AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS. Communication No. 71/92: Reencontro Africaine pour la Defense des Droits de l'Homme v. Zambia. Decision 20th Session, 21-31, October 1997a.
- _____. Communication n. 159/96: **Union Inter Africaine des Droits de l'Homme et autres c. Angola**. Decision. November 11, 1997b.
- Spanish Commission for Refugee Aid [CEAR]. *Crisis Marine I: Violation of asylum seekers from Sri Lanka*. Press release. Madrid: March 27, 2007.
- EUROPEAN COMMISSION ON HUMAN RIGHTS. *Becker v. Denmark*. Decision. October 3, 1975
- _____. *Alibaks et al v. Netherlands*. Decision. December 16, 1988.
- _____. *Stocke v. Federal Republic of Germany*. Decision. October 12, 2005.
- AMERICAN COMMISSION ON HUMAN RIGHTS [IACHR]. Case 10,675: Haitian Human Rights Committee and Others v. United States. Report No. 51/96. Decision. March 13, 1997.
- COMMITTEE AGAINST TORTURE. Communication No. 88/1997: Sweden. November 16, 1998.
- COMMITTEE ON PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND THEIR FAMILIES. Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee [...] Mexico. CMW/C/MEX/CO/1. Geneva, Dec. 8. 2006.
- CONFERENCE ON SECURITY AND COOPERATION IN EUROPE. Final Act. Helsinki: Aug. 1, 1975.

- CONSEIL CONSULTATIF DES DROITS DE L'HOMME. **La protection des refugies au Maroc**. Rabat: 2008.
- AMERICAN HUMAN RIGHTS CONVENTION. San Jose: November 22, 1969.
- CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT. Geneva: Dec. 10, 1984
- INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS and their families. Geneva: December 18, 1990.
- UN CONVENTION ON THE LAW OF THE SEA. Montego Bay: 1982.
- CONVENTION ON THE STATUS OF REFUGEES. July 28, 1951.
- EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS and Fundamental Freedoms. November 4, 1950.
- INTERNATIONAL CONVENTION ON MARITIME SEARCH AND RESCUE. 1979.
- INTER-AMERICAN COURT OF HUMAN RIGHTS [IACHR]. Case of Haitians and Dominicans of Haitian Origin in the Dominican Republic. Provisional Measures. Decision. Aug. 18, 2000.
- International Court of Justice [ICJ]. **Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory**. Advisory Opinion. July 9, 2004.
- CRAWFORD, J. The articles of the International Law Commission on International State Responsibility: Introduction, text and comments. Madrid: Dykinson, 2004.
- CUTTITA, P. The changes in the fight against illegal immigration in the Euro-Mediterranean area and in Euro-Mediterranean relations. Challenge Liberty & Security Working Paper No. 8. 2006. Available at: <<http://www.libertysecurity.org/article1293.html>>. Accessed on: August 20, 2009.
- LUCAS, J. The challenge of borders, human rights and xenophobia in a pluralistic society. Madrid: Temas de Hoy, 1994.
- . Some proposals to start talking seriously about immigration policy. In: DE LUCAS, J., TORRES, F. (eds.). *Immigrants: Why do we have them?* Madrid: Thalassa, 2002, p. 23-48.
- . The international legal framework of migration. Some considerations on the protection of human rights of migrants: on the right to be an immigrant. In: Mariño Menéndez, F. (ed.). *A world without uprooting: international law of migration*. Madrid: Catarata, 2006, p. 29-56.
- . The EU regarding immigration: a balance of legal and political schizophrenia. In: Ceriani Cernadas, P., FAVA, R. (eds.). *Migration Policy and Human Rights*. Lanús: Universidad Nacional de Lanús, 2009. [in press].
- De Schutter, O. Globalization and jurisdiction: lessons from the European Convention on Human Rights. CRIDHO Working Paper No. 04. Louvain: Université Catholique de Louvain, 2005. (Cellule de recherche interdisciplinaire in droits de l'homme).
- 2004 AMENDMENTS to the International Convention for Safety of Life at Sea, 1974 as amended.
- SPAIN. National Court. Contentious-Administrative Chamber. Section 5. No. 01584/2007. December 12, 2007a.
- . Civil Guard. Press Releases. [s.f.]. Available at: <<http://www.guardiacivil.es/prensa/notas>>. Accessed on: August 20, 2009.

- _____. Supreme Court. Criminal Chamber II. STS No. 788/2007. October 8, 2007b.
- _____. Ministry of Interior. Balance of combating illegal immigration. 2008.
- Ferrajoli, L. Law and Reason. Theory of penal guarantees. Madrid: Trotta, 1995.
- SOUTHERN BORDER: new management policies and outsourcing of immigration control in Europe. Barcelona: Virus Editorial, 2008.
- GIL ARAUJO, S. Foreigners suspected: the fight against terrorism and immigration policy in the U.S. and the EU. In: From New York to Kabul. Barcelona: Icaria-CIP Yearbook 2002, p. 127-144.
- GIL-BAZO, M. The practices of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension: the Safe Third Country concept revisited. *International Journal of Refugee Law*, Oxford, v. 18, p. 571-600, 2006.
- GONDEK, M. Extraterritorial application of the European Convention on Human Rights: territorial focus in the age of globalization? *Netherlands International Law Review*, Amsterdam, No. 3, p. 349-388, 2005.
- HANNUM, H. **The right to leave and return in International Law and practice**. Dordrecht: Martinus Nijhoff, 1987.
- CANARY ISLANDS. PRE/3108 Presidential Order. October 10, 2006.
- JOHN A. Family reunification for migrants and refugees: a forgotten human right? A comparative analysis of family reunification under domestic law and jurisprudence, international and regional instruments, ECHR and the EU CaseLaw 2003 family reunification Directive. Coimbra: Coimbra University, Center for Human Rights, 2004.
- Khachani, M. Saharan Migration: Morocco as a transit space. Barcelona: Fundació CIDOB, 2006.
- LAUTERPACHT, E.; BETHLEHEM, D. The Scope and Content of the Principle of Non-refoulement. In: FELLER, E.; TÜRK, V.; NICHOLSON, F. (eds.). **Refugee Protection in International Law: UNHCR Global Consultations on International Protection**. Cambridge: Cambridge University Press, 2003, p. 78-177.
- MOROCCO. Immigration bill 02-03, of November 11, 2003, regarding the entry and residence of foreigners in the Kingdom of Morocco, and irregular emigration and immigration.
- MEZZADRA, S. The Right to Flee: migration, citizenship, and globalization. Madrid: Traffickers of Dreams, 2005.
- MIR, M. **Managing the EU's external frontiers: Lessons to be learned from FRONTEX's action in the Canary Islands**. Bruselas: Challenge Liberty & Security, 2007. Available at: <http://www.libertysecurity.org/IMG/pdf_Managing_EU_s_External_Frontiers.pdf>. Last visited: 20 ago. 2009.
- NAÏR, S. And they will come... Migration in hostile times. Barcelona: Bronce-Planeta, 2006.
- UNITED NATIONS. General Assembly [UN-GA]. Resolution 43/173: Set of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. 1988.
- _____. Committee on Economic, Social and Cultural Rights. [UNCESCR]. Concluding Observations: Israel. 2003.

- _____. Committee on Human Rights [UNCHR]. Communication No. 52/1979: Uruguay. Caso López Burgos. Decision. July 29, 1981.
- _____. _____. General Comment No. 31: The Nature of the General Legal Obligation. 2004a.
- _____. Human Rights Council. Report of the Special Rapporteur on the human rights of migrants. Geneva: 2008.
- INTERNATIONAL MARITIME ORGANIZATION (OMI) **Interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea.** MSC/Circ.896/Rev.1. 2001.
- INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.
December 19, 1966
- PÉCOUD, A.; DE GUCHTENEIRE, P. Introduction: the migration without borders scenario. In: PÉCOUD, A.; DE GUCHTENEIRE, P. (eds.). **Migration without borders: essays on the free movement of people.** Geneva: UNESCO; Berhahn Books, 2007, p. 1-30.
- RIJPM, J.; CREMONA, M. The Extra-Territorialisation of EU Migration Policies and the Rule of Law. **European University Institute LAW Working Paper 1/07.** 2007.
- SASSEN, S. **Migration policy: from control to governance.** 2006. Available at: <www.opendemocracy.net/people-migrationeurope/militarising_borders_3735.jsp>. Visited on: 15 Jan. 2009.
- SOLANES, A. Immigration policy in the European Union in three keys. *Arbor Magazine: Science, Thought and Culture*, Madrid, No. 713, p. 81-100, 2005.
- SPIJKERBOER, T. The Human costs of border control. **European Journal of Migration and Law**, No. 9, p. 127-139, 2007.
- EUROPEAN COURT OF HUMAN RIGHTS [ECHR]. *Amuur v. France.* Decision. 25 Jun. 1996a.
- _____. *Chahal v. United Kingdom.* Decision. November 15, 1996b.
- _____. *Andric v. Sweden.* Eligibility Decision. February 23, 1999.
- _____. *T.I. v. United Kingdom.* Inadmissibility decision. March 7, 2000.
- _____. *Congo v. Belgium.* Decision. February 5, 2002.
- UNIÓN EUROPEA [UE]. Electronic site: Towards a common European Union immigration policy. [s.f.]. Available at: <http://ec.europa.eu/justice_home/fsj/immigration/fsj_immigration_intro_en.htm>. Visited on: August 20, 2009.
- _____. European Commission. Hague Program. Communication from the Commission COM/2005/0184. Brussels: 10 May 2005.
- _____. _____. **Reinforcing the management of the European Union's Southern Maritime Borders.** Communication from the Commission: COM (2006) 733 final. Brussels: November 30, 2006. Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0733:FIN:ES:PDF>>. Last visited: August 20, 2009
- _____. EUROPEAN COUNCIL. Regulation No. 574, March 12, 1999.
- _____. _____. Directive No. 51, 28 June 2001.
- _____. _____. Directive No. 86, 22 September 2003.
- _____. _____. Decision 573, 29 April 2004a.
- _____. _____. Regulation No. 2007, 26 October 2004b.

_____. EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL. Regulation No. 562/2006. Community Code on the rules governing the movement of persons across borders. March 15, 2006.

_____. _____. _____. Directive No. 115. December 16, 2008.

WEINZIERL, R. **The Demands of Human and EU fundamental Rights for the Protection of the European Union's External Borders**. Berlin: German Institute for Human Rights, 2007.

WIHTOL DE WENDEN, C. *Should we open the borders?* Barcelona: Bellaterra - The library of the citizen, 2000

ZAMORA, J. *Politics of immigration, citizenship, and a state of emergency*. *Arbor Review: Science, Thought, and Culture*, Madrid, No. 713, p. 53-66, 2005.

NOTES

1. Created by Regulation No. 2007/2004 of the European Council.

2. It is incomprehensible that the EU bodies keep formally alluding to the concept of "illegal" immigration, given the many criticisms made against this term, as with the complexity of the migration phenomenon in terms of a "fight" against it. (EU European Commission, 2005). The Spanish government acts in the same manner. (Spain, Ministry of the Interior, 2008).

3. For more, see JOHN (2004).

4. For more information about the different EU migration control programs and mechanisms (s.f.).

5. A detailed analysis of the externalization process of migration controls can be found in the many works compiled by the Southern Border (FRONTERA SUR) (2008).

6. In the last few years, there has been a considerable rise in the number of migrants going from these countries to Europe. To a large extent, the transfer of exit points further south and to the Atlantic coasts have increased with the rise in European control mechanisms in the Mediterranean.

7. According to FRONTEX, during the Ilamada Hera II operation (2006), 57 canoes were intercepted with total of 3887 people ("illegal immigrants," according to the official terminology), and in 2008, 5443 people were intercepted and returned.

8. EU. EUROPEAN COMMISSION ON HUMAN RIGHTS. *Stocke v. Federal Republic of Germany*. Decision. 12 Oct. 2005, § 166.

9. CIJ. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Advisory Opinion. 2004. §102-113.

10. Presidential Order, published by the Council

of Ministers, which provides for the creation of authority for coordination of actions to tackle illegal immigration in the Canaries and to set standards for their performance (CANARY ISLANDS, Presidential Order No. PRE/3108, 2006).

11. We cannot avoid mentioning the historical paradox of the name attached to this transaction ("Goreé"). The Gorée Island, off the coast of Dakar, was for centuries one of the main points of the slave trade from Africa to America (and for this reason was declared a World Heritage by UNESCO). Therefore, it is striking that the name of a place that symbolizes the forcible transfer of millions of people (a crime against humanity) is now invoked – also coercively and by European boats – to "stem the outflow of boat trips."

12. The information disseminated by the Civil Guard on its operations in African waters also demonstrates the on "authority" they have over persons apprehended and returned. In this regard, see Spanish Civil Guard (sf.).

13. The program Sea Horse Network, funded by the EU and the Spanish State, started in January 2009 with satellite monitoring of canoes in the waters of the Atlantic Ocean.

14. Among these, those ratified by Spain include: the Convention on the Status of Refugees (art. 33); the ECHR (art. 3); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (art. 3); and the International Covenant on Civil and Political Rights (art. 7).

15. See, among others: ECHR. *Chahal v. UK*. Decision. 15 Nov. 1996b, § 80.

16 It should be stressed that these vessels not only move people from the countries where European Patrols operate (i.e., Senegalese, Mauritians, etc.), but also carry thousands of migrants from

other sub-Saharan African countries (Sudan, Congo, Chad, Guinea Conakry, etc.) and even from Asia (Myanmar, Pakistan, Sri Lanka, among others).

17. The UN High Commissioner for Refugees (UNHCR) has also explicitly confirmed the validity of the non-refoulement obligation where one State acts in the territory of another (UNHCR, 2000, § 19, 22, 23).

18. IACHR. Case 10,675: Haitian Human Rights Committee and Others v. United States. Report No. 51/96. Decision. 13 Mar. 1997, § 157).

19. ECHR. T.I. v. United Kingdom. Decision of inadmissibility. 07 Mar. 2000, § 15.

20. For a discussion of the case and of indirect refoulement, see De Schutter (2005, p. 28).

21. According to the APDHA (2007, p. 19) in this type of mass repatriation procedure, it is not evaluated on a case by case basis whether "there are sufficient guarantees that the country to which migrants are returned is the true country of origin, that they will not suffer mistreatment or torture, or they will not be stranded in the desert, as has happened on countless occasions." They also complained that many people returned to Senegal have been tortured, fined or imprisoned.

22. Among others, see: SPIJKERBOER (2007, p. 127-139); CUTTITA (2006, p. 4-5); Khachani (2006, p. 27-30).

23. Such acts of "rescue" do not represent, in many cases, a comprehensive and coherent policy to ensure the right to life and other fundamental rights, if, as we have seen, the person intercepted is returned without even being asked whether, as a consequence of such return, his or her life or physical integrity could be endangered.

24. For more on the right to leave the country and its content and scope, see Hannum (1987).

25. A simple change of word placement (2006, p. 153) gives us a better view of reality: they are "Illegal detention centers for foreigners," not "Detention Centers for Illegal Foreigners."

26. See more detailed information in the SPANISH COMMISSION for Refugee Aid (CEAR) (2007).

27. Among them, ECHR (art. 5.3) and the International Covenant on Civil and Political Rights (art. 9.3).

28. A few weeks later, these people were transferred to the migrant detention center built in the city of Nouadhibou (in cooperation with Spain and the EU) (APDHA, 2007, p. 19). While this involved an "improvement" of the conditions of detention, it did not result in judicial intervention (CEAR, 2007).

29. National Court, Contentious- Administrative Chamber, 5th Section. N. 01584/2007. December 12, 2007a.

30. On the contrary, the Supreme Court recognized its jurisdiction for the prosecution of crimes against foreigners produced outside Spanish waters, through the journey in canoes from

Africa. It was forced to conclude that, if justice may intervene in alleged crimes against migrants, produced beyond the Spanish territory and in the framework of policies to control irregular migration, then it also has jurisdiction to ensure the rights and interests of victims of such offenses (Spain, Supreme Court, Chamber II – Criminal.. October 8, 2007).

31. The Committee recommended that the Mexican State adjust its immigration laws to comply with the provisions of the 1990 Convention and other international treaties, which included the duty to remove "a crime punishable with imprisonment for the illegal entry of a person in its territory" (COMMITTEE ON PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND THEIR FAMILIES, 2006, § 15).

32. The EFE Agency (2007) reported that after FRONTEX intercepted a wooden boat with 138 people, the occupants were arrested in the police station in Dakar and could be tried by a court for violation of the law on "illegal emigration." *El Pais* stressed that the Attorney General of Senegal had revealed the decision of the Minister of Justice to strengthen the punishment for migrants. So, people who pay to travel by canoe would not be considered "victims" of trafficking, but perpetrators of crimes (SOMEONE Delate, 2006).

33. According to *El Pais*, "[a] court [...] sentenced [...] 65 Algerians who tried to emigrate to Spain to two months in prison [...] they were arrested [...] by a patrol boat as they sailed towards the Spanish coast. With this first prison term of those aspiring to migrate, the Algerian authorities seek to discourage young people from emigrating illegally." (ALGERIA IMPRISONS, 2006).

34. IACHR. Case 10,675: Haitian Human Rights Committee and Others v. United States. Report No. 51/96. Decision. 13 Mar. 1977, § 169.

35. For a more detailed analysis on the measures that the authorities of the intercepting ship took to ensure the right to asylum, see UNHCR and IOM (2006).

36. ECHR. *Amuur v. France*. Decision. 25 Jun. 1996a, § 43.

37. IACHR. Case 10,675: Haitian Human Rights Committee and Others v. United States. Report No. 51/96. Decision. 13 Mar. 1977, § 163.

38. In this regard, see CERIANI CERNADAS (2009).

39. IACHR. Case 10,675: Haitian Human Rights Committee and Others v. United States. Report No. 51/96. Decision. 13 Mar. 1977, § 180.

40. IACHR. Case 10,675: Haitian Human Rights Committee and Others v. United States. Report No. 51/96. Decision. 13 Mar. 1977, § 53).

41. See the following cases: ECHR. *Andric v. Sweden*. Eligibility Decision. 23 Feb. 1999; ECHR. *Congo v. Belgium*. Decision. 05 Feb. 2002 ECHR, *Becker v. Denmark*. Decision. 03 Oct. 1975 and

ECHR, *Alibaks et al v. Netherlands*. Decision. 16 Dec. 1988.

42. ECHR, *Congo v. Belgium*. Decision. 05 Feb. 2002, § 61-63.

43. IACHR. *Haitians and Dominicans of Haitian Origin in the Dominican Republic*. Provisional Measures. Decision. August 18, 2000; African Commission for Human and People's Rights. *Communication n. 71/92: African Conference for the Defense of Human Rights v. Zambia*. Decision. 20th Session, October 20-31, 1997a; African Commission for Human and People's Rights, *Communication n. 159/96: Inter African Union for Human Rights and*

others v. Angola, Decision. November 11, 1997b.

44. See, in particular, the section on "Human Contact."

45. DE LUCAS (2006, p. 40) states that the right to movement cannot be "an option reserved for the few, the rich, and the famous (a privilege)."

46. In this sense, besides the regulation of different countries on the migration, categories included the proposal for a directive currently under discussion in the EU "concerning the conditions of entry and residence of third country nationals for highly qualified employment."

RESUMO

Os instrumentos normativos adotados pela União Européia (UE) para garantir a livre circulação entre os territórios de seus Estados-membros estão estreitamente ligados ao controle de suas fronteiras nacionais. Nos últimos dez anos foram criados diversos mecanismos para prevenir, controlar e punir a imigração irregular para a comunidade européia, cujo modelo migratório caracteriza-se por sua visão instrumental que burla os direitos fundamentais e reduz a imigração à mão-de-obra que seu mercado de trabalho necessita. A partir disso, derivam-se normas que reconhecem direitos conforme a nacionalidade e a condição migratória da pessoa. Nesse contexto, o artigo analisará, com um enfoque de direitos humanos, o que se supõe ser um "avanço" radical do processo de exteriorização, do ponto de vista físico, simbólico, político e também jurídico: as operações criadas para impedir a migração de pessoas em "cayucos" ou "pateras" para a Europa a partir das costas de países como Marrocos, Argélia, Senegal e Mauritània.

PALAVRAS-CHAVE

Controle Migratório – União Européia – Direitos Humanos – Extraterritorialidade – África.

RESUMEN

Los instrumentos normativos adoptados por la Unión Europea (UE) para garantizar la libre circulación en el territorio de los Estados miembros están estrechamente ligados al control de las fronteras exteriores. En los últimos diez años se han creado diversos mecanismos para prevenir, controlar y sancionar la inmigración irregular hacia la comunidad europea, cuyo modelo migratorio se caracteriza por su visión instrumental que regatea los derechos fundamentales y reduce la inmigración a la mano de obra que necesita el mercado de trabajo. De allí se derivan normas que reconocen derechos según la nacionalidad y condición migratoria de la persona. En este contexto, este trabajo analizará, con un enfoque de derechos humanos, lo que supone un "avance" radical de ese proceso de externalización, desde el punto de vista físico, simbólico, político y también jurídico: los operativos creados para impedir la migración de personas en "cayucos" o "pateras" hacia Europa desde las costas de países como Marruecos, Argelia, Senegal o Mauritania.

PALABRAS CLAVE

Control Migratorio – Unión Europea – Derechos Humanos – Extraterritorialidad – África.