IMMIGRATION, PERSONAL LIBERTY, FUNDAMENTAL RIGHTS

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with the assistance of
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THE PROTECTION OF FUNDAMENTAL RIGHTS AND THE DIGNITY OF MIGRANTS IN EU LAW. AN OVERVIEW OF FAIR TRIAL RIGHTS AND DEFENCE RIGHTS

Silvia Allegrezza - Lorenzo Bernardini

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1. Fundamental rights, immigration and criminal proceedings: introductory remarks

The management of the so-called migration phenomenon has long been considered a real test case for the future of European identity. [1] On the one hand, the socio-political implications of controlling the presence of foreigners on national territory evoke securitarian impulses that are never entirely dormant. For a large part of the population, this phenomenon represents a fundamental issue on which to orientate their electoral choices. [2] On the other hand, and consequently, it poses a problem of competence for the European

[1] The development of a shared and coherent migration policy among the European Union (EU) Member States is considered crucial for the very future of the Union, according to M. Ambrosini, L*e sfide dell'immigrazione per l'Unione Europea*, in M. Lazar-M. Salvati-L. Sciolla (Eds.), *Europa. Culture e società,* Istituto dell'Enciclopedia Italiana, Rome, 2018, p. 59 ff.

[2] The discouraging picture according to which 60% of Europeans believe that there is 'too much immigration' in their countries and 45% think that immigration constitutes a 'threat to national identity' is provided by R. Brunelli, *Paura dei migranti: metà degli europei è a favore dei muri*, in *la Repubblica (web)*, 23 December 2021. For a more in-depth analysis of the reasons for being "afraid of the wave of migrants", with obvious repercussions on the choices of the electorate, see M. Pifferi, *Paure dello straniero e controllo dei confini. Una prospettiva storico-giuridica*, in *Quad. st. pen. giust*., 2019(1), p. 179 ff.

Union *vis-à-vis* the Member States, which jealously intend to keep the monopoly of coercive power (also) over 'non-citizens'.

Moreover, the migration phenomenon 'goes beyond the territorial borders of States and cannot find adequate solutions in a state dimension'. [3] Indeed, it would seem that a supranational organisation such as the EU, by virtue of its global dimension, should (and could) become the place of choice for the creation of binding norms capable of re-organising such a complex matter. Yet, the rise of 'sovereigntist populism' seems to be undermining the Union's aspirations, as 'national interests have consistently trumped the common European response to this influx of migrants'. [4]

This is also the reason why, despite the numerous European pieces of legislation regulating the issue (such as the so-called Return Directive, [5] the so-called Reception [6] and Procedures directives [7] or, finally, the famous Dublin III Regulation [8]), the EU response is far from being able to be defined as 'common'. The initiatives of the Visegrad Group (V4), a political alliance between Poland, the Czech Republic, Slovakia and Hungary could be mentioned in this context. This group supports, among other things, a policy of 'zero tolerance' in the management of migratory flows, through a securitarian twist in national and European regulations, [9] and opposes in particular the

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[3] S. GAMBINO-G. D'IGNAZIO, *Prefazione*, in S. GAMBINO-G. D'IGNAZIO (Eds.), *Immigrazione e diritti fondamentali*, Giuffrè, Milan, 2010, p. XIV.

[4] F. RATTO TRABUCCO, *La risposta alla crisi migratoria degli Stati membri UE nel quadro dell'apparente immobile Trattato di Dublino*, in *Amm. in camm.*, 29 September 2021, p. 16.

[5] Directive 2008/115/EC of 16 December 2008 of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (the so-called return Directive) [OJ L 348, 24.12.2008, p. 98–107].

[6] Directive 2013/33/EU of 26 June 2013 of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) [OJ L 180, 29.6.2013, p. 96–116].

[7] Directive 2013/32/EU of 26 June 2013 of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (recast) [OJ L 180, 29.6.2013, p. 60–95].

[8] Regulation (EU) 604/2013 of 26 June 2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [OJ L 180, 29.6.2013, p. 31–59].

[9] See, among others, M. KOß-A. SÉVILLE, *Politicized Transnationalism: The Visegrád Countries in the Refugee Crisis*, in *Politics & Governance*, 2020(1), p. 95–106, and W. TIEKSTRA, *The Future of the European Migration System: unlikely partners?*, available at the following URL: *www.clingendael.org*, Strategic Alert, 6th July 2018. For their radical positions, however, the members of the V4 have been

Union's attempts to redistribute fairly, among the various countries, the foreigners arriving on the continent, including many applicants for international protection. [10]

However, in this dialogue (oftentimes more political than legal) between the Member States and the EU on the migration policies to be adopted *pro futuro*, fundamental rights—which every human being should enjoy, regardless of his or her status as a citizen—should not 'pay the price'. [11] Analysing the context in which the EU's migration policies have been conceived, one can agree that the concern for the fundamental rights of foreigners is not a mere intellectual exercise, but an absolute urgency to which one should not remain indifferent.

A first element to be duly taken into account is the acknowledgement that migration issues have traditionally been treated by the EU legislator as an 'emergency', [12] or a 'crisis', [13] to be resolved as quickly as possible, according to a purely efficiency-based logic. [14] Another circumstance worthy of consideration is the situation of what could be labelled as the real 'object' of migration policies, namely an individual who does not hold the citizenship of an EU State. The combination of these two factors could create an explosive mix for the fundamental rights of the migrant concerned: from a perspective oriented towards the efficiency of procedures (whether for return or international protection), the recognition of certain rights *vis-à-vis* the person concerned constitutes an 'obstacle' for the national authorities which are eager, respectively, to remove

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called 'merchants of fear' (G. GIGITASHVILI-K.W. SIDLO, *Merchants of Fear. Discursive Securitisation of the Refugee Crisis in the Visegrad Group Countries*, available at the following URL: *www.iemed.org*, 7th January 2019).

[10] For an in-depth study on this specific issue, see G. MORGESE, *La riforma del sistema Dublino: il problema della condivisione delle responsabilità*, in *Dir. pubbl.*, 2020(1), p. 102 ff.

[11] See *infra* § 2, for a more in-depth analysis of the hierarchy of EU sources on the acknowledgement of fundamental rights of the individual.

[12] G. CAGGIANO, Are You Syrious? *Il diritto europeo delle migrazioni dopo la fine dell'emergenza alla frontiera orientale dell'Unione*, in *Freedom, Security & Justice: European Legal Studies*, 2017(2), p. 7–25. In the same sense, among others, see also C. FAVILLI, *L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'emergenza immigrazione*, in *Quad. cost.*, 2015(3), p. 785–788.

[13] H. CRAWLEY, *Managing the Unmanageable? Understanding Europe's Response to the Migration 'Crisis'*, in *Human Geography*, 2016(2), p. 13–23.

[14] EU policies oscillate between the intention to protect the foreigner—which is reflected in the possibility for the non-citizen to apply for international protection—and the need to maximise the efficiency of the relevant expulsion procedures, thus deterring irregular entries. In this respect, see A. TRIANDAFYLLIDOU-A. DIMITRIADI, *Governing Irregular Migration and Asylum at the Borders of Europe: Between Efficiency and Protection*, in *Imagining Europe*, 2014(6), p. 1 ff.

the unwanted foreigners from the territory [15] or, alternatively, to decide quickly on their application for international protection. [16]

The concerns briefly outlined above may be seen as the background to the standard situation of a third-country national, arriving in the territory of an EU Member State. It is this particular category of migrants that will be the focus of this analysis, given the high vulnerability that characterises them. [17]

However, the situation of the aforementioned category of migrants—already particularly problematic in itself [18]—may vary depending on whether they are involved in criminal proceedings, giving rise to a peculiar phenomenon of progressive extension of guarantees. In such a case, indeed, the attainment of a certain procedural *status*, be it that of suspect or defendant, naturally determines the activation of a series of further prerogatives (also included among the 'fundamental' ones) which are added to the the 'extra-judicial' ones.

In this sense, it should be noted that the EU legal framework has long embraced a 'universalist' view of human rights which it explicitly recognises. [19] Every individual is the holder of such guarantees, such

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[15] This could be, for example, an alien who is already irregularly present on the territory or a non-citizen who presents him/herself at the border of a Member State but does not fulfil the conditions for legal entry. On the other hand, the national authorities are obliged under EU law to 'adopt a return decision against any third-country national staying illegally on their territory', in accordance with Article 6(1), Directive 2008/115/EC.

[16] If the application for protection is accepted, *nulla quaestio.* If, on the other hand, the application is rejected, the national authorities will take steps to carry out the relevant return procedures for the foreigner, formerly an applicant, who has now become 'irregular' and must therefore be removed as soon as possible.

[17] C. O'CINNEIDE, *The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism*, in S. SPENCER-A. TRIANDAFYLLIDOU (Eds.), *Migrants with Irregular Status in Europe*, Springer-IMISCOE Research Series, Cham, 2020, p. 53.

[18] For example, the lack of knowledge of the language spoken in the country where he/she is staying or the absence of stable links with that territory or, finally, the presence of 'cultural barriers', e.g. religious ones, which make it difficult for the foreigner to come into contact with the first people he/she meets (often the border or public security authorities). This is, in fact, a situation of 'initial disadvantage' that characterises the migrant in relation to *cives*; it can be partially redressed, in particular, by hypothesising a series of 'corrective' measures that intervene in the foreigner's language gap.

[19] This is the opinion of P. LEINO, *European Universalism?–The EU and Human Rights Conditionality*, in *Yearbook of European Law*, 2005(24/1), p. 329 ff., where the Author focuses, in particular, on the content of the EU *position paper* to the 1993 Vienna Conference (Brussels 22nd November 1995, COM (95) 567 final, para. 18) and, more recently, on the formulation of the preamble to the Charter of Fundamental Rights of the European Union (CFR), signed in Nice in 2000.

as the right to life,[20] the right to physical integrity,[21] freedom and security,[22] to name but a few. Belonging to a particular national community should not, in principle, call this into question.[23] However, special circumstances may trigger additional safeguards in their favour: one of these, as already mentioned, is the institution of criminal proceedings. Among the guarantees recognised for anyone (notwithstanding *status civitatis*) suspected or accused of a particular crime are fair trial rights.

Still, the subject is of particular interest when it is the third-country national who is caught up in the meshes of criminal proceedings, given the frequency with which the problem of language assistance arises, a genuine 'meta-right'[24] for the person who does not understand the language of the proceedings, which is rightly considered to be the 'cornerstone of the quality of justice in Europe'.[25]

However, before analysing the EU's approach to this very sensitive issue, it is necessary to outline, albeit briefly, the constitutional framework that the EU legislature has developed over time with regard to fundamental rights, which is the regulatory framework from which fair trial rights have gradually evolved in the European legal area.

2. A multilevel constitutional framework for the protection of fair trial rights

The issue needs to be analysed using an 'inverted cone' methodology. The premise from which one must start is the

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[20] Article 1 CFR.

[21] Article 2 CFR.

[22] Article 6 CFR.

[23] Yet, a prerogative contained in Article 45(1) CFR, i.e. freedom of movement, is guaranteed to EU citizens—and to individuals treated as such—but not to third-country nationals, i.e. those 'persons who are not citizens of the European Union within the meaning of Article 20(1) of the Treaty on the Functioning of the European Union (TFEU) and who do not enjoy the right of free movement', according to Article 2(5) of the Regulation (EU) 2016/399 of 9 March 2016 of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [OJ L 77, 23.3.2016, p. 1-52].

[24] The powerful expression is due to M. GIALUZ, *L'assistenza linguistica nel processo penale. Un meta-diritto fondamentale tra paradigma europeo e prassi italiana*, Wolters Kluwer-Cedam, Milan, 2018.

[25] Y. VANDEN BOSCH, *Adequate legislation to 'Equal Access to Justice across Language and Culture'*, in E. HERTOG (Eds.), *Aequalitas. Equal Access to Justice across Language and Culture in the EU*, Lessius Hogeschool, Antwerp, 2003, p. 32.

following – fundamental rights, within the EU legal framework, are acknowledged to each individual as such. The second is that these rights include the guarantees of criminal fair trial rights. The third, and final, logical step allows us to distinguish, alongside these, the content of the right to defence.

Respect for fundamental rights of the individual—whether suspect, accused or convicted—plays a fundamental role in criminal proceedings. Given that the conduct of the latter involves the 'vital interests' of the individual, on the one hand, and those of society, on the other, this circumstance clearly needs no elaboration.[26] At the end of criminal trials, moreover, the person found guilty runs the risk of being sentenced to a punishment, most often imprisonment, which irreparably affect his/her personal freedom.

Therefore, if one wishes to adhere to a liberal understanding of criminal law, based on the inescapable respect for the principle of legality, the due process of law and judicial review, there must be no room—in the absence of solid constitutional foundations—for the exercise of punitive powers by the State.[27] Hence the need for superordinate norms capable of reinforcing these foundations by providing, on the one hand, the legitimacy for the State to exercise its coercive power and, on the other hand, codifying the indispensable guarantees that the subject involved in the proceedings must be able to oppose to the *auctoritas*.

As will be seen, the European Union's legal system has attempted to develop a regulatory system that moves in this direction. The question, however, is how it has managed to ensure the protection of fundamental rights in criminal proceedings and to shape the physiognomy of a European criminal 'fair trial' in an area that is notoriously difficult for the EU legislator to penetrate.[28]

Leaving aside the pre-Lisbon framework—where it was left to the Court of Justice (CJEU) to perform the arduous task of bringing the category of fundamental rights into the framework of the general principles of European law[29]—the content of Article 6 of the Treaty

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[26] S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, 2005, p. 7.

[27] S. ALLEGREZZA, *Toward a European constitutional framework for defence rights*, in S. ALLEGREZZA-V. COVOLO (Eds.), *Effective Defence Rights in Criminal Proceedings*, Wolters Kluwer-Cedam, Milan, 2018, p. 26 ff.

[28] Reference to the traditional 'hostility of the Member States' to the idea that the EU could legislate in criminal matters has been made by K. LENAERTS-J.A. GUTIÉRREZ-FONS, *The European Court of Justice and fundamental rights in the field of criminal law*, in V. MITSILEGAS-M. BERGSTRÖM-T. KONSTANTINIDES (Eds.), *Research Handbook on EU Criminal Law*, Edward Elgar Publishing, Cheltenham, 2016, p. 7.

[29] The reference is, *inter alia*, to Case C-44/79, *Liselotte Hauer v Land*

on European Union (TEU), which is the central provision in the EU system of fundamental rights protection, must be taken into account immediately. Indirectly, as will be analysed later, Article 6 TEU has contributed to laying the normative foundations for the elaboration of acts of secondary law concerning—albeit not exclusively—the position of the foreign suspect/defendant as a third-country national.

Firstly, this provision gives the EU Charter of Fundamental Rights the same 'legal value as the Treaties' and acknowledges its 'rights, freedoms and principles'. [30]

The EU Charter of Fundamental Rights (CFR), signed in Nice in 2000, contains numerous provisions on fair trial rights that form part of the constitutional framework of the Union. Notably, Article 47 CFR is the key provision on fair trial rights in EU law: [31] it establishes the right to an 'effective remedy' for any individual whose rights and freedoms guaranteed by Union law have been infringed; [32] the right of the individual to have his/her case heard fairly, publicly and within a reasonable time by an independent and impartial tribunal established by law'; [33] the right to legal aid, [34] including free of charge, 'in so far as such aid is necessary to ensure effective access to justice'. [35] This rule clearly covers all types of proceedings, whether administrative, civil or criminal.

Moreover, the Charter explicitly guarantees the 'respect for the rights of the defence', not for the benefit of any individual, but of 'anyone who has been charged'. [36] This detail is significant, because it allows Article 48(2) CFR to be seen as a precise affirmation of defence rights in criminal proceedings. Moreover, it makes it possible to extend the scope of application of the rule *ratione materiae* not only to criminal proceedings *stricto sensu,* but also to

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Rheinland-Pfalz, ECLI:EU:C:1979:290, para. 15, where it was also stated that 'in guaranteeing the protection of those rights, [the Court] is bound to be guided by the constitutional traditions common to the Member States and could not, therefore, admit measures incompatible with the fundamental rights recognised and guaranteed by the constitutions of those States' and that 'international treaties on the protection of human rights, to which the Member States have cooperated or acceded, may also provide elements which must be taken into account in the context of Community law'. According to the wording of these sentences, the reference to the ECHR is blatant.

[30] Article 6(1) TEU.

[31] On this point, see P. DE HERT, *EU criminal law and fundamental rights*, in V. MITSILEGAS-M. BERGSTRÖM-T. KONSTANTINIDES (Eds.), *supra* note 28, p. 117 ff.

[32] Article 47(1) CFR.

[33] Article 47 (2), first sentence, CFR.

[34] Article 47(2), second sentence, CFR.

[35] Article 47(3) CFR.

[36] Article 48(2) CFR.

those administrative proceedings where punitive sanctions are involved. [37]

Secondly, Article 6(2) TEU requires the EU to accede to the European Convention on Human Rights (ECHR), although 'such accession shall not modify the competences of the Union as defined in the Treaties'. This provision must be read in conjunction with the 'conformity clause' [38] enshrined in Article 52(3) CFR, which provides that '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'. The *trait d'union* between the fundamental rights recognised by the Charter and those enshrined in the ECHR is thus traced in the terms just explained. However, since Article 48(2) CFR does not provide for a list of the rights it enshrines, the analysis of the ECHR, in particular Article 6 ECHR, is of particular interest.

As Advocate General Bobek pointed out in *Moro*, there is a twofold relationship between Article 48(2) CFR and Article 6(3) ECHR. [39] While, in principle, Article 6(1) ECHR is considered to correspond to Article 47(2) CFR––on the subject of fair trial rights [40]—, Article 6(3) ECHR is considered to be the expression of the 'rights of the defence', to use the EU legislator's expression, in the ECHR legal order. The use of the plural is, moreover, apt since this category in itself encompasses various prerogatives to be granted to the person concerned. In contrast to the CFR, there is here an exhaustive list of the latter, [41] including, first and foremost,

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[37] For further references, see S. ALLEGREZZA, *supra* note 27, p. 27 ff.

[38] G. CARLOS RODRÌGUEZ IGLESIAS, *Speech on the occasion of the Opening of the Judicial Year, 31 January 2002*, in EUROPEAN COURT OF HUMAN RIGHTS, *Annual report 2001*, Strasbourg, 2002, p. 31.

[39] Case C-646/17, *Criminal proceedings against Gianluca Moro*, Opinion of Advocate General Bobek, ECLI:EU:C:2019:95, para. 94.

[40] See *Explanations relating to the Charter of Fundamental Rights* [OJ C 303, 14.12.2007, p. 17-35].

[41] Among other guarantees, Article 6(3) ECHR confers on any person 'charged with a criminal offence' the right 'to have adequate time and facilities for the preparation of his defence' (Article 6(3)(b) ECHR), the right 'to defend himself in person or through legal assistance of his own choosing and, if he has not sufficient means to pay for legal assistance, to be assisted free of charge by legal counsel, when the interests of justice so require' (Article 6(3)(c) ECHR) and finally, the right to examine witnesses against him/her and to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him/her (Article 6(3)(d) ECHR).

the right of the accused 'to be informed, as soon as possible, in a language he understands and in detail, of the nature and cause of the accusation against him'. [42] This is followed, last but not least, by the right 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court'. [43]

Finally, the influence of the ECHR on EU law has made it possible to extend the guarantees of Article 48(2) CFR, not only to the *accused*–as would result from the wording of the latter provision—but, in principle, also in favour of the person *suspected* of a criminal offence. Indeed, the prerogatives enshrined in Article 6(3) ECHR—and acknowledged within the EU legal order as per Article 52(3) CFR—are triggered *vis-à-vis* the person concerned as soon as he receives 'the official notification [...] by the competent authority of an allegation that he has committed a criminal offence'. [44]

The rights of defence should therefore be seen in a different light, that of the migrant, a third-country national, who may—and this is not uncommon–find him/herself facing criminal charges without knowing the language of the relevant proceedings. He or she would also find him/herself in a real 'Kafkaesque trial', unaware of what was happening around him/her and unable to communicate with anyone: [45] the third-country national might not understand the nature of the charges against him/her, [46] for example, or not be properly informed of the consequences of not attending the trial [47] or of the possibility of having a lawyer [48] or of benefiting from legal aid. [49]

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[42] Article 6(3)(a) ECHR.

[43] Article 6(3)(e) ECHR.

[44] Among others, *Eckle v. Germany*, App. no. 8130/78 (ECtHR, 15th June 1982), para. 73.

[45] L. SIRY, *The ABC's of the Interpretation and Translation Directive*, in S. ALLEGREZZA-V. COVOLO (Eds.), *supra* note 27, p. 36.

[46] Directive 2012/13/EU of 22 May 2012 of the European Parliament and of the Council on the right to information in criminal proceedings [OJ L 142, 1.6.2012, p. 1-10].

[47] Directive 2016/343/EU of 9 March 2016 of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [OJ L 65, 11.3.2016, p. 1-11].

[48] Directive 2013/48/EU of 22 October 2013 of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [OJ L 295, 6.11. 2013, p. 1-12].

[49] Directive 2016/1919/EU of 26 October 2016 of the European Parliament and of the Council on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [OJ L 297, 4.11.2016, p. 1-8].

As far as a third-country national is concerned, *ça va sans dire*, the right to linguistic assistance–as configured in the CFR in conjunction with the relevant provisions of the ECHR—obviously acquires a peculiar character, as a prodromal prerogative of all other forms of procedural safeguards, which becomes, in other words, 'a fundamental precondition, capable of influencing the effectiveness of the system of individual guarantees'. [50]

3. The right to linguistic assistance (referral)

Against the background of such European constitutional framework, the EU legislator has drawn up a series of acts of secondary legislation; on the one hand, in order to give substance to the prerogatives provided for the CFR and under the influence of the rules contained in the ECHR (as interpreted by the Strasbourg Court), on the other hand to strengthen mutual trust between the Member States, which, in turn, would imply a more effective judicial cooperation within the European legal area. Prominent in its importance is Directive 2010/64/EU, [51] the first Union act on the right to interpretation and translation in criminal proceedings and, more generally, aimed at 'protecting the rights of the accused'. [52] Its content, its inevitable impact and its relevance *vis-à-vis* the foreign suspect/defendant will be dealt with separately. [53]

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[50] L. PARLATO, *L'assistenza linguistica come presupposto delle garanzie dello straniero*, in V. MILITELLO-A. SPENA (Eds.), *Il traffico di migranti. Diritti, Tutele, Criminalizzazione,* Giappichelli, Turin, 2015, p. 87.

[51] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 *on the right to interpretation and translation in criminal proceedings* [OJ L 280, 26.10.2010, p. 1–7].

[52] L. SIRY, *The ABC's*, *supra* note 45, p. 39.

[53] See *infra* Part III, S. ALLEGREZZA, *Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings*.