

## **MIGRATION AND THE RULE OF (HUMAN RIGHTS) LAW: TWO 'CRISES' LOOKING IN THE SAME MIRROR**

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*Abstract: This article will attempt to demonstrate the interrelationship between two 'crises' that the European Union is facing: the so-called 'migration' or 'refugee crisis' and the crisis of the principle of the rule of law. In particular, the two crises find their point of connection in the responses to migratory flows put in place by the EU and some of its Member States. The increasing migratory pressure on European external borders has induced some governments to adopt a restrictive and security-driven approach, carried out, on the one hand, by reinforcing border controls and surveillance, and, on the other, by seeking the cooperation of non-EU countries in order to curb migratory flows, contain departures, and tackle the movements of migrants towards Europe. These 'securitisation' and 'externalisation' strategies are in contrast with the principle of the rule of law under two perspectives: on the one hand, they violate some of its essential components, such as transparency, legal and procedural certainty, democratic participation, and control; on the other, they breach the same principle insofar as they lead to severe human rights violations. As for the first aspect, migration and border control policies have been put in place by frontline States through a growing proliferation of atypical, informal, and non-transparent measures of migration governance, which, sounding 'legal' without actually being so, allow legislative, procedural and democratic frames to be avoided. Examples in this sense may be identified in the so-called EU-Turkey Statement or in the informal, over-simplified cooperation arrangements concluded by some EU frontline Member States with African countries, as in the case of Italy and Niger. As for the second aspect, the impact on the rule of (human rights) law of the response of some EU Member States to the migration crisis may be measured through the case law of the European Court of Human Rights and, more specifically, by considering the decisions concerning the most severe violations of migrants' rights, including those of the prohibitions of refoulement and of collective expulsion, as well as cases of illegal detention and deprivation of liberty.*

*Keywords: rule of law, refugee crisis, refoulement, collective expulsion, detention, European Court of Human Rights, European Union*

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## 1 Introduction: the migration crisis as a ‘mirror’ of the crisis of the rule of law

In recent years, the European Union (EU) and its Member States have been confronted with increasing migratory pressure. From 2011 onwards, migratory flows towards Europe have been intensifying, fuelled especially by particular international events and circumstances such as the so-called ‘Arab Spring’ and the outbreak of the war in Syria. The ‘refugee crisis’ then reached its peak in 2015, when an estimated one million migrants irregularly entered the territory of the EU across the Mediterranean.<sup>1</sup> Migration, therefore, has become a common and long-lasting challenge in the EU, gaining prominence and representing, since then, one of the main concerns for European policymakers and a top priority on the EU’s political agenda.<sup>2</sup>

In parallel, another ‘crisis’ has gradually emerged in the EU: that of the principle of the rule of law, one of the founding values of the European integration experience and a cornerstone of its modern democracies. From 2010 onwards, there has been an escalating number of episodes where observance of this principle has started to deteriorate in some EU Member States, given the increasing sequence of controversial measures and practices put in place by some national governments in different areas.

This phenomenon of ‘rule of law backsliding’ is observable in the EU with regard to a variety of contexts, as the rule of law in itself represents a multifaceted concept, entailing various guarantees and precepts.<sup>3</sup> In

<sup>1</sup> For detailed data and statistics on migratory flows and irregular arrivals in the EU during 2015, see Frontex, ‘Annual Risk Analysis for 2016’ Frontex 2499/2016 (2016). For an analysis of the reasons and the features of the European migration crisis, see Jean-Yves Carlier and François Crépeau, ‘De la “Crise” Migratoire Européenne au Pacte Mondial sur les Migrations: Exemple d’un Mouvement sans Droit?’ [2017] 1 *Annuaire Français de Droit International* 461; Idil Atak and François Crépeau, ‘Managing Migration at the External Borders of the European Union: Meeting the Human Rights Challenges’ [2014] 5 *Journal Européen des Droits de l’Homme – European Journal of Human Rights (JEDH)* 601; Marc Bossuyt, ‘The European Union Confronted with an Asylum Crisis in the Mediterranean: Reflections on Refugees and Human Rights Issues’ [2015] 5 *Journal Européen des Droits de l’Homme – European Journal of Human Rights (JEDH)* 598.

<sup>2</sup> As confirmed by the findings of the Eurobarometer of December 2018, according to which 40% of European citizens consider migration as the main challenge to be addressed by the EU, followed by other issues such as terrorism (20%) and the economic situation (18%). See Commission, ‘Autumn 2018 Standard Eurobarometer: Positive Image of the EU Prevails ahead of the European Elections’ (Press Release) IP/18/6896.

<sup>3</sup> According to the United Nations, ‘the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation

particular, the backsliding has been clearly recognisable in Hungary and Poland, especially with regard to issues such as the functioning of the constitutional and electoral system, institutional balance and the independence of the judiciary;<sup>4</sup> or in Romania and Bulgaria, with a growing number of significant questions concerning corruption and conflicts of interest.<sup>5</sup>

Additional issues entailing the deterioration of the rule of law have also manifested themselves with regard to freedom of association and expression. The Council of Europe (CoE), in particular, has been reporting an increasing number of threats to academic and journalistic freedom of expression with regard, for example, to Malta and Italy, or, within a wider European context, Turkey and Russia.<sup>6</sup> Further rule of law issues have targeted the rights of persons belonging to minorities and protection against discrimination.

These episodes have increasingly attracted attention to the attacks on and threats to the principle of the rule of law in Europe and have raised the question of how to effectively ensure its respect, revealing the EU's deficiencies in the capacity to do so. The 'crisis of the rule of law'

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of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency'. See United Nations, United Nations and the Rule of Law <[www.un.org/ruleoflaw/what-is-the-rule-of-law/](http://www.un.org/ruleoflaw/what-is-the-rule-of-law/)> accessed 27 October 2019.

<sup>4</sup> On the rule of law backsliding in Hungary, see, among others, Nóra Chronowski and Márton Varju, 'Two Eras of Hungarian Constitutionalism: From the Rule of Law to Rule by Law' (2016) 8(2) *Hague Journal on the Rule of Law*; Gábor Halmai, 'The Coup Against Constitutional Democracy. The Case of Hungary' in Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018); Gábor Halmai, 'The Rise and Fall of Constitutionalism in Hungary' in Paul Blokker (ed), *Constitutional Acceleration within the European Union and Beyond* (Routledge 2018); for a general introduction, see András László Pap, *Democratic Decline in Hungary* (Routledge 2017). As for Poland, see, among others, Laurent Pech and Patryk Wachowiec, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part I)' (*Verfassungsblog*, 13 January 2019) <<https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-i/>> accessed 1 November 2019; Laurent Pech and Patryk Wachowiec, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part II)' (*Verfassungsblog*, 17 January 2019) <<https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-ii/>> accessed 1 November 2019.

<sup>5</sup> On the rule of law backsliding in Bulgaria and Romania, see Sabina Pavlovskaja-Hilal, 'The EU's Losing Battle Against Corruption in Bulgaria' (2015) 7(2) *Hague Journal on the Rule of Law* 199; Elena-Simina Tănăsescu, 'Romania: Another Brick in the Wall Fencing the Fight against Corruption' (*Verfassungsblog*, 19 March 2019) <<https://verfassungsblog.de/romania-another-brick-in-the-wall-fencing-the-fight-against-corruption/>> accessed 28 October 2019; Laurent Pech, 'How to Address Rule of Law Backsliding in Romania' (*Verfassungsblog*, 29 May 2019) <<https://verfassungsblog.de/how-to-address-rule-of-law-backsliding-in-romania/>> accessed 28 October 2019.

<sup>6</sup> Council of Europe, 'Democracy at Risk: Threats and Attacks Against Media Freedom in Europe' (2019) Annual Report 2019 by the Partner Organisations to the Council of Europe Platform to Promote Protection of Journalism and Safety of Journalists.

has consequently fuelled the debate on how to improve and guarantee respect of this principle, which, as the European Commission has recently admitted, 'is not properly protected in all Member States'.<sup>7</sup>

In addition to the exemplifying above-mentioned issues, the deterioration of the rule of law in the EU has also been especially seen in the migration domain and, specifically, in the responses to the migratory flows put in place by the EU and some of its Member States. Such responses, indeed, appear to be in contrast with the principle of the rule of law from two points of view: first, in terms of conformity with the legal and procedural requirements established under either EU or national law, and, second, in terms of respect of fundamental human rights, as protected by international and EU legal instruments.

The migration crisis has somehow acted as a 'catalyst' for the crisis of the rule of law, as it has prompted the EU institutions and the governments of frontline Member States to react and take actions which have often been characterised by controversial features, raising problems in terms of compliance with the principle of the rule of law and some of its essential components. These include, in particular, elements such as respect of legal and procedural requirements, transparency, accountability to the law, democratic control and participation in the decision-making process, legal certainty, avoidance of arbitrariness.

Confronted with intense migratory pressure, some frontline Member States, needing quick responses to the situation of emergency, but at the same time being unable or unwilling to wait – also for electoral reasons – for EU-wide solutions, have reacted by resorting to informal and atypical measures, adopted in a rather obscure manner and outside the traditional EU or national legal and procedural framework. By way of example, one might consider, emblematically, the EU-Turkey Statement, discussed below, and the cooperation arrangements concluded by frontline Member States, like Italy and Spain, with third countries deemed as strategic for managing migratory flows. Such measures, which have produced a tangible impact on the flows in terms of numbers, are nevertheless in contrast with the rule of law, insofar as they have been negotiated and adopted in a non-transparent way, circumventing legal and procedural guarantees, and without involving the control of parliaments, whether national or that of the EU. Their implementation is equally prob-

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<sup>7</sup> Commission, 'Further Strengthening the Rule of Law within the Union' COM(2019) 163 final 2. An analysis of the EU's existing rule of law toolbox of measures to address the rule of law backsliding is provided in Laurent Pech and Dimitry Kochenov, 'Strengthening the Rule of Law within the European Union: Diagnoses, Recommendations, and What to Avoid' (Reconnect Policy Brief, June 2019).

lematic, especially in terms of accountability for potential violation of migrants' fundamental rights.<sup>8</sup>

Indeed, besides this approach towards informalisation, which has become alarmingly common in the decision-making process of the last few years on asylum and migration matters, the migration crisis has propelled another element of contrast with the rule of law, that is, the proliferation in some Member States of practices and strategies which have led to manifest violations of their human rights obligations towards migrants as well as towards persons in need of international protection. Such violations appear particularly serious, as they are in breach of the fundamental rights of the individual, such as those to life and safety, personal liberty, protection against torture and inhuman and degrading treatment. The breach of these human rights obligations, which are often of an absolute character, appear as particularly significant symptoms of the deterioration of the principle of the rule of law, understood in terms of respect of human rights obligations.

Against this background, the purpose of this contribution is to show how the crisis of the rule of law is linked with that of migration, as the latter has acted as a facilitator of the deterioration of some fundamental components of the wider principle of the rule of law. In particular, the migration crisis has led to a breach of the rule of law understood, on the one hand, in terms of legal and procedural certainty, and, on the other, as the rule of (human rights) law.

While the first aspect of the crisis of the rule of law in the migration domain is addressed by considering some examples of informal, problematic measures adopted by the EU and some of its Member States in order to better manage migratory movements, whether towards the EU or internally, the crisis of the rule of (human rights) law is 'measured' and assessed by taking into account the case law of the European Court of Human Rights (ECtHR) relating to some of the most evident violations of migrants' rights, such as the prohibition of *refoulement* and torture and inhuman and degrading treatment, the prohibition of the collective expulsion of aliens and illegal detention and other unlawful forms of deprivation of liberty.

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<sup>8</sup> On the issues of compliance with the rule of law and human rights obligations of the co-operation agreements concluded between EU Member States and third countries, see Sergio Carrera and Roberto Cortinovis, 'Search and Rescue, Disembarkation and Relocation Arrangements in the Mediterranean: Sailing Away from Responsibility? (2019) CEPS Paper No 2019-10 June 2019-11-02 <[www.ceps.eu/wp-content/uploads/2019/06/LSE2019-10\\_ReSoma\\_Sailing-Away-from-Responsibility.pdf](http://www.ceps.eu/wp-content/uploads/2019/06/LSE2019-10_ReSoma_Sailing-Away-from-Responsibility.pdf)> accessed 28 October 2019.

## 2 Migration crisis, governance of informal migration and the rule of law

The connection and the interrelation between the two ‘crises’ – the migration crisis and the crisis of the rule of law – are to be contextualised in the framework of the responses put in place in recent years in order to face the migratory flows in Europe. These responses collide with the principle of the rule of law insofar as they circumvent some of its essential, inherent elements such as legal certainty, transparency, accountability, democratic control and participation.

The reaction to the ‘refugee crisis’ in Europe has mainly taken the shape of a robust operational and restrictive approach to flows, prioritising sectors considered as crucial in order to tackle the migratory pressure, namely border management and control, internal security and surveillance activities, and the fight against irregular migration. Actions undertaken in these frameworks appear to be characterised by two key-aspects that properly describe and summarise the strategy adopted by the EU and some of its Member States in order to deal with the migration crisis: ‘securitisation’ and ‘externalisation’.

As for the first, the reinforcement of border controls and surveillance has been the main focus of the EU, as well as of many Member States, which have allocated considerable financial and political resources to the securitisation of borders so as to ensure an increased level of security. To use the European Commission’s own words, the EU’s response to the refugee crisis so far has aimed, basically, at three main objectives: ‘security *at* our borders, better management and control *within* our borders and stability *beyond* our borders’.<sup>9</sup>

At the EU level, in particular, the security-driven approach and the securitisation process of European external borders are well-exemplified by the creation in 2016 of the European Border and Coast Guard (EBCG), which was established and put into operation in less than one year.<sup>10</sup> Sig-

<sup>9</sup> Frans Timmermans, ‘Opening Remarks of First Vice-President of the European Commission on the Occasion of the Press Conference on the Way Forward for EU Migration Policy’ (Speech, Brussels, 7 December 2017) emphasis added, available at [https://ec.europa.eu/commission/presscorner/detail/cs/speech\\_17\\_5166](https://ec.europa.eu/commission/presscorner/detail/cs/speech_17_5166) accessed 25 November 2019.

<sup>10</sup> The Commission proposal for a new border agency was presented in December 2015 with the so-called ‘border package’ [Regulation on the European Border and Coast Guard COM(2015)671 final]; only 9 months later, on 14 September 2016, the regulation establishing the European Border and Coast Guard Agency was approved by the Council and the European Parliament [Regulation (EU) 2016/1624] and, on 6 October 2016, the new agency was officially launched and put into operation. On this subject see, among others, Sergio Carrera and Leonard Den Hertog, ‘A European Border and Coast Guard: What’s in a Name?’ (2016) CEPS Paper, No 88, March 2016; Sergio Carrera and others, ‘The European Border and Coast Guard, Addressing Migration and Asylum Challenges in the Mediterranean?’ (2017) CEPS Task Force Report, 2017; Herbert Rosenfeldt, ‘Establishing the European Border and Coast

nificantly, while other migration-related reforms have either taken considerable time to be adopted, or, on the contrary, following complex and long negotiations, have remained stuck,<sup>11</sup> the transformation of Frontex into a new agency has been rapidly and positively carried out, the EBCG now operating with significantly increased resources and capacities.

The process of reinforcement of the EBCG has been further developed, as the European Commission, in September 2018, put forward a proposal for further strengthening the agency, aiming at obtaining a stronger and more effective system of borders control and management.<sup>12</sup> The proposed reform was quickly and positively adopted, the new EBCG being now able to operate counting on increased capacities and resources.<sup>13</sup> This trend towards greater security and enhanced border control has been confirmed also by the new Commission, as President Von der Leyen announced the intent to further develop and reinforce the agency, affirming that 'we need strong external borders. A centrepiece in this ambition is a reinforced European Border and Coast Guard Agency'.<sup>14</sup> Enhanced security at the external borders is pursued also by way of cooperation with targeted neighbouring non-EU countries, as showed, for example, by the first ever joint operation outside the EU, launched by the EBCG in May 2019 on the basis of an *ad hoc* status agreement concluded between the EU and Albania.<sup>15</sup> Similar initiatives have also been launched with Montenegro and Serbia.

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Guard: All-new or Frontex Reloaded?' (*EU Law Analysis*, 16 October 2016); Vittoria Meissner, 'The European Border and Coast Guard Agency Frontex Beyond Borders: The Effect of the Agency's External Dimension' (2017) TARN Working Paper, Series 16/2017.

<sup>11</sup> For example, the proposal for the establishment of a Union Resettlement Framework, put forward by the Commission in July 2016. See, Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council' (Communication) COM(2016) 468 final. For an analysis of the Commission proposal and of the different positions of the European Parliament and the Council, see Francesco Luigi Gatta, 'Legal Avenues to Access International Protection in the European Union: Past Actions and Future Perspectives' [2018] *Journal Européen des Droits de l'Homme - European Journal of Human Rights (JEDH)* 2018/3, 163.

<sup>12</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action No 98/700/JHA, Regulation (EU) No 1052/2013 of the European Parliament and of the Council and Regulation (EU) No 2016/1624 of the European Parliament and of the Council' COM(2018) 631 final.

<sup>13</sup> Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L295/1.

<sup>14</sup> Ursula von der Leyen, 'A Union That Strives for More. My Agenda for Europe', Political Guidelines for the next European Commission 2019-2024, 15.

<sup>15</sup> Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania [2019] OJ L46/3. In this regard, see also Commission, 'European Border and Coast Guard:

Frontline EU Member States, for their part, have also acted individually and autonomously, sometimes strengthening border controls without waiting for the EU to discuss and adopt common measures within its legal and institutional framework. Several States have adopted a particularly restrictive approach to migratory flows, based on increased security checks and stricter border surveillance activities. Accordingly, unilateral measures such as the construction or the reinforcement of walls and protective fences, or even the deployment of military personnel at borders, have multiplied during the years, especially in the Eastern-European area and with regard to frontline EU Member States having external land borders.

Border and migration controls have not only been reinforced but also 'externalised'.<sup>16</sup> Besides the securitisation, the EU and some of its frontline Member States have also developed and implemented an externalisation strategy, aimed at offshoring migration and border controls beyond the European territory with a view to curbing flows, preventing arrivals and thus avoiding migrants' contact with the EU (this approach has been described as a 'contact-less strategy').<sup>17</sup> This has been done, in particular, through cooperation with those third countries that have been considered as strategic from a geographical and migratory point of view. The governments and national authorities of these countries have been involved in migration management operations and pre-emptive surveillance activities, including, in particular, stricter control of points of departure, restrictive border management, push-back practices, and interception of migrants on the high seas and return to their countries of origin.

While reinforcing border controls and cooperating with third countries to manage migratory flows do not represent, *per se*, an infringement of the rule of law, since States have and maintain the right to control borders, the ways in which these strategies have been carried out and implemented raise a number of problematic issues in terms of compliance with several inherent components of the mentioned principle.

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Launch of the First Ever Joint Operation outside the EU' (Press Release) 21 May 2019 (IP/19/2591).

<sup>16</sup> On the topic of 'externalisation', see Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' [2018] 20 *European Journal of Migration and Law*, 452; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2011); Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control* (CUP 2011).

<sup>17</sup> Violeta Moreno-Lax and Mariagiulia Giuffrè, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar, forthcoming).

As far as the EU is concerned, an emblematic example of a practice colliding with the rule of law may be identified in the 'EU-Turkey Statement' of March 2016, which led, *inter alia*, to an increased level of surveillance of the migratory routes between Turkey and the Greek islands, thus enabling a considerable reduction – at least in the short term – of migratory flows and irregular crossings towards Greece.<sup>18</sup> As has been pointed out, the EU-Turkey Statement appears in breach of the rule of law under different profiles: uncertainty as regards the legal nature of the act (formally a 'statement', only available as a press release on the website of the Council of the EU), lack of transparency about its exact content, as well as regarding who precisely negotiated it and how it has been adopted.<sup>19</sup>

The EU-Turkey Statement was indeed elaborated and concluded in an informal, de-proceduralised and non-transparent manner, outside the relevant EU legal framework (namely, the procedure laid down under Article 218 TFEU for concluding international agreements between the Union and third countries). Procedural and substantive guarantees were circumvented, in particular by excluding the control and supervision of the European Parliament.<sup>20</sup>

In addition to those relating to its negotiating and adoption processes, further legal issues of the EU-Turkey Statement concern the profiles of accountability and access to justice in the case of human rights violations of migrants, as well as the effective accessibility of asylum procedures for people in need of international protection.<sup>21</sup> These problems

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<sup>18</sup> EU-Turkey Statement, 18 March 2016, Council of the European Union, Foreign Affairs & International Relations, Press release 144/16. The EU-Turkey Statement was agreed in the wake of a series of meetings and negotiations with Turkey conducted from November 2015 in order to deepen Turkey-EU relations, as well as to strengthen their cooperation in the field of migration. The EU-Turkey Statement was preceded by the EU-Turkey Joint Action Plan of 29 November 2015. In this regard, see Commission, EU-Turkey Joint Action Plan, Brussels, 15 October 2015, European Commission Fact Sheet (MEMO/15/5860).

<sup>19</sup> On these legal issues surrounding the EU-Turkey Statement, see Maarten Den Heijer and Thomas Spijkerboer, 'Is the EU-Turkey Refugee and Migration Deal a Treaty?' (*EU Law Analysis*, 7 April 2017); Steve Peers, 'The Draft EU/Turkey Deal on Migration and Refugees: Is It Legal?' (*EU Law Analysis*, 16 March 2016).

<sup>20</sup> According to Article 218(6) TFEU, the Council, following specific procedural steps, adopts a decision concluding an international agreement. This has to be done after either obtaining the consent of the European Parliament or after consulting it, depending on the cases. Among other hypotheses, Article 218(6)(a) prescribes that the European Parliament gives its consent in cases of agreements with important budgetary implications for the Union (iv). Although under the EU-Turkey Statement, the EU is to pay Turkey EUR 6 billion in different tranches, the consent of the European Parliament was neither asked for nor obtained.

<sup>21</sup> On this subject, see, among others, Maybritt Jill Alpes, S Tunaboylu, and Ilse Van Liempt, 'Human Rights Violations by Design: EU-Turkey Statement Prioritises Returns from Greece over Access to Asylum' (2017) Migration Policy Centre, Policy Brief, Issue 2017/29; Maybritt Jill Alpes and others, 'Post-Deportation Risks under the EU-Turkey Statement:

have been addressed, but have been left substantially unsolved, by the General Court of the EU, which declared its lack of jurisdiction to hear and determine actions brought by asylum seekers against the migration management measures put in place under the EU-Turkey Statement.<sup>22</sup>

Similar problematic issues have also arisen in some frontline Member States, with regard to cooperation initiatives undertaken with specific African countries, identified as key partners to manage migratory flows and curb irregular migration movements towards their southern maritime borders. In this context, the need to tackle migratory pressure has urged governments to launch such collaboration with third countries in informal, atypical and over-simplified ways, once again bypassing procedural safeguards and substantive guarantees provided for by their national legislation.

Pushed also by electoral necessity – the migration crisis requires quick answers – some frontline States have engaged in dialogues with targeted African partners, generating a variety of atypical acts, as cooperation platforms, *ad hoc* working arrangements, memoranda of understanding, exchange of letters and notes, and so on. These instruments, adopted in the name of a migration-related ‘emergency’ but put in place in an informal and non-transparent manner, have led to the avoidance of legal and procedural guarantees and, thus, to a breach of the principle of the rule of law.

Examples of cooperation initiatives for the purpose of migration and border controls may be found in the relationships between Spain and

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What Happens after Readmission to Turkey?’ (2017) Migration Policy Centre, Policy Brief, Issue 2017/30; Elizabeth Collett, ‘The Paradox of the EU-Turkey Refugee Deal’ (2016) Migration Policy Institute, 2016; Bianca Benvenuti, ‘The Migration Paradox and EU-Turkey Relations’ (2017) IAI Working Papers, No 17105, January 2017; Ahmet I çduygu and Evin Millet, ‘Syrian Refugees in Turkey: Insecure Lives in an Environment of Pseudo-Integration’ (2016) Global Turkey in Europe Working Papers, No 13, August 2016; Gloria Fernandez Arribas, ‘The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem’ (2016)1(3) European Papers 1097.

<sup>22</sup> Case T-192/16 *NF v Council* ECLI:EU:T:2017:128; Case T-193/16 *NG v Council* ECLI:EU:T:2017:129; Case T-257/16 *NM v Council* ECLI:EU:T:2017:130. According to the General Court, neither the European Council nor any other institution of the EU decided to conclude an agreement with the Turkish Government on the subject of the migration crisis. The European Court of Human Rights, apparently, shared this view as, in dealing for the first time with a case of detention of migrants with a view to implementing the EU-Turkey Statement, the Strasbourg judges considered it as ‘*un accord sur l’immigration conclu... entre les États membres de l’Union européenne et la Turquie*’ (*JR and Others v Greece* App no 22696/16 (ECtHR, 25 January 2018, para 7). For an analysis and a comment on the judgment and its implications for the EU-Turkey Statement, see Francesco Luigi Gatta, ‘Detention of Migrants with the View to Implement the EU-Turkey Statement: The Court of Strasbourg (un)involved in the EU Migration Policy’ [2018] Cahiers de l’EDEM, mars 2018; Annick Pijnenburg, ‘JR and Others v Greece: What Does the Court (not) Say about the EU-Turkey Statement?’ (*Strasbourg Observers*, 21 February 2018).

Morocco,<sup>23</sup> or between Italy and Tunisia, Niger and Libya.<sup>24</sup> The case of Italy-Niger cooperation, in particular, is especially emblematic in revealing the contrast of Italian policy with the principle of the rule of law.<sup>25</sup>

An 'agreement' was negotiated and then signed between the two countries on 26 October 2017. It was not ratified, nor was it made publicly available by whatever means. Preceded by negotiations conducted in a rather informal way, the agreement was concluded in an atypical and over-simplified manner, outside the legal and procedural framework prescribed by the Italian Constitution and the relevant national legislation. In particular, besides a complete lack of transparency, the negotiating and adoption processes *de facto* avoided parliamentary control, as well as that of the President of the Republic, who ratifies international agreements following, in certain cases, authorisation given by the Italian Parliament.<sup>26</sup>

Blatantly disrespecting the principle of the rule of law and its guarantees, the Italy-Niger cooperation agreement was legally challenged before the Administrative Court of Rome, which, for the first time, in November 2018 ordered the Italian Ministry of Foreign Affairs to disclose the relevant text containing the agreement. In this way, Italian judges recognised the citizens' right to be informed about its content, in compliance with the principles of transparency, institutional balance and democratic control over the Government, which, indeed, may all be considered as typical and essential components of the wider principle of the rule of law.<sup>27</sup>

<sup>23</sup> On this topic, see Chloe Teevan, 'Morocco, the EU and the Migration Dilemma' (2018) ECRE Commentary, 19 November 2018. For an overview of the EU-Morocco relations, including in the migration domain, see James Moran, 'Winds of Change for EU-Morocco Relations' (2019) CEPS, 23 October 2019 <[www.ceps.eu/winds-of-change-for-eu-morocco-relations/?mc\\_cid=722dabe54b&mc\\_eid=6fb26bc16a](http://www.ceps.eu/winds-of-change-for-eu-morocco-relations/?mc_cid=722dabe54b&mc_eid=6fb26bc16a)> accessed 29 October 2019.

<sup>24</sup> On cooperation between Italy and Libya and Tunisia, see Delphine Perrin, 'Is it Time for Italy to Resume Cooperation with Libya in the Field of Migration?' (*Migration Policy Centre Blog*, 7 May 2012); Alessandra Bajec, 'Working to Control Migration Flows: Italy, Libya and Tunisia' (2018) *Aspenia International Analysis and Commentary*, 9 November 2018. For an overview of and a comparison between the Italian and Spanish cooperation initiatives with African countries on migration matters, see Carmen González Enriquez and others, 'Italian and Spanish Approaches to External Migration Management in the Sahel: Venues for Cooperation and Coherence' (2018) *Elcano Royal Institute and IAI, Working Paper 13/2018*.

<sup>25</sup> On cooperation between Italy and Niger on migration-related matters, see Valentina Pupo, 'Le Istanze di Accesso Civico come Strumento di Trasparenza Democratica in Tema di Accordi Internazionali in Forma Semplificata' (2019) *Diritto Immigrazione e Cittadinanza* 2/2019.

<sup>26</sup> Italian Constitution, Articles 80 and 87.

<sup>27</sup> Administrative Regional Tribunal of Lazio, judgment of 16 November 2018, n 11125.

### 3 Migration crisis and the crisis of the rule of (human rights) law in the EU

The European response to the migratory crisis also raises serious concerns especially regarding respect of the principle of the rule of law understood in terms of protection of human rights. EU frontline Member States' practices of migration and border controls put in place during the so-called 'refugee crisis' have indeed had serious repercussions on migrants' fundamental rights, leading to severe violations of human rights obligations stemming from international and EU law.

The problem of the compliance of national migration and border policies with the rule of (human rights) law has been highlighted by several international and European observers. The European Parliament, in particular, has specifically addressed the issue with regard to Hungary: on 12 September 2018, for the first time in the history of the EU, it voted in favour of launching the procedure under Article 7 of the Treaty on European Union (TEU) against the Hungarian State for the existence of a clear risk of a serious breach of the founding values of the Union.<sup>28</sup> These values, enshrined in Article 2 TEU and reflected in the Charter of Fundamental Rights of the EU, include the rule of law and respect for human rights.

The resolution, adopted by a large majority (448 votes in favour, 197 against and 48 abstentions), is based on a report (known as the 'Sargentini report')<sup>29</sup> which provides evidence of several serious rule of law issues in Hungary. Accordingly, the European Parliament stated the existence of a 'systemic threat to the values of Article 2 TEU' and invited the Council to determine, in accordance with the 'rule of law procedure' under Article 7(1) TEU, that there was a clear risk of a serious breach by Hungary of the European Union's founding values.<sup>30</sup>

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<sup>28</sup> European Parliament, Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded (2017/2131(INL)).

<sup>29</sup> European Parliament, Report on a Proposal Calling on the Council to Determine, pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded (2017/2131(INL)) 4 July 2018 (A8-0250/2018).

<sup>30</sup> The 'Rule of Law procedure' under Article 7 TEU entails three passages: a preliminary step, where the European Parliament, the European Commission or one-third of the Member States may request the Council to determine whether there is a 'clear risk of serious breach' of the founding values of the EU (para 1); a following phase, in which the European Council may determine, by unanimity, the existence of a 'serious and persistent breach' of the values (para 2); a third and final step where sanctions may be imposed by the Council, consisting of the suspension of 'certain of the rights deriving from the application of the Treaties to the Member State in question' (para 3). For an analysis and a discussion of the

Among the reasons that induced such unprecedented action, in particular, there are concerns relating to the issue of ‘fundamental rights of migrants, asylum seekers and refugees’.<sup>31</sup> This has its origins in a growing number of hostile initiatives against migrants put in place by the Hungarian government, including various policies spreading xenophobia and discrimination, legislative measures posing obstacles to access to asylum procedures, criminalisation of solidarity towards migrants, restrictive border practices, and ill-treatment committed by border authorities.<sup>32</sup>

With its resolution, the European Parliament thus identified one of the core issues of the rule of law crisis in Hungary in the insufficient level of protection of migrants’ fundamental rights, denouncing the very restrictive approach adopted by the government guided by the Prime Minister Viktor Orbán, resulting in a serious and persistent situation of disrespect of relevant obligations stemming from international and EU law. This conclusion is not entirely new: before the adoption of the resolution on Article 7 TEU, the European Parliament had already addressed the problematic issue of rule of law and respect for human rights of migrants in Hungary, expressing criticism towards its policies in a number of resolutions adopted during the years of the so-called refugee crisis and especially highlighting the ‘serious deterioration of the rule of law, democracy and fundamental rights’ in that Member State.<sup>33</sup>

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procedure under Article 7 TEU and its phases, see, among others, Dimitry Kochenov and Laurent Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (2015) 11(3) *European Constitutional Law Review* 512; Lucia Serena Rossi, ‘Un Nuovo Soft Instrument per Garantire il Rispetto della Rule of Law nell’Unione Europea’ (*Sidiblog* 11 May 2015) <[www.sidiblog.org/2015/05/11/un-nuovo-soft-instrument-per-garantire-il-rispetto-della-rule-of-law-nellunione-europea/](http://www.sidiblog.org/2015/05/11/un-nuovo-soft-instrument-per-garantire-il-rispetto-della-rule-of-law-nellunione-europea/)> accessed 28 October 2019; Bruno Nascimbene, ‘Lo Stato di Diritto e la Violazione Grave degli Obblighi posti dal Trattato UE’ (*Eurojus* 24 October 2017) <<http://rivista.eurojus.it/lo-stato-di-diritto-e-la-violazione-grave-degli-obblighi-posti-dal-trattato-ue/>> accessed 28 October 2019. For an analysis of the ‘rule of law procedure’ applied to Hungary and a comment on its efficacy, see Sergio Carrera and Petra Bard, ‘The European Parliament Vote on Article 7 TEU against the Hungarian Government. Too Late, Too Little, Too Political?’ (2018) CEPS Commentary, 14 September 2018; Bojan Bugarič, ‘Protecting Democracy Inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016).

<sup>31</sup> European Parliament, Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded (2017/2131(INL)) para 1.

<sup>32</sup> The Hungarian government challenged the resolution of the European Parliament by bringing an action for annulment before the General Court on 17 October 2018. See Case C-650/18 *Hungary v European Parliament* ECLI:EU:C:2019:438.

<sup>33</sup> See European Parliament, Resolution of 17 May 2017 on the Situation in Hungary (2017/2656(RSP)) para 2. See also European Parliament, Resolution of 16 December 2015 (2015/2935(RSP)) and of 10 June 2015 (2015/2700(RSP)) on the Situation in Hungary; European Parliament, Resolution of 3 July 2013 on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament Resolution of

At EU level, concerns regarding the approach of the Hungarian government towards refugees and asylum seekers have also been expressed by the Fundamental Rights Agency (FRA)<sup>34</sup> and Frontex.<sup>35</sup> The European Commission, for its part, decided to refer Hungary to the Court of Justice of the EU (CJEU) for non-compliance with its legal obligations relating to various migration-related issues, including relocation, criminalisation of solidarity and support of asylum seekers, and the non-compliance of national asylum and return legislation with EU law, as well as with the Charter of Fundamental Rights of the EU.<sup>36</sup> More recently, in October 2019, the Commission decided to move forward in the infringement procedure concerning the non-provision of food to persons held in the Hungarian transit zones at the border with Serbia,<sup>37</sup> reprehensible conduct that has also been addressed by the ECtHR.<sup>38</sup>

Outside the EU, several international actors have pointed out Hungary's problematic attitude in terms of respect of the principle of the rule of law in the field of migration, including, in the framework of the United Nations (UN), the United Nations High Commissioner for Refugees (UNHCR).<sup>39</sup> Within the Council of Europe (CoE), severe criticism has been expressed by the Special Representative of the CoE Secretary General on migration and refugees<sup>40</sup> and the European Committee for the Prevention of Torture.<sup>41</sup> The CoE Commissioner for Human Rights,<sup>42</sup> furthermore, in

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16 February 2012) (2012/2130(INI)); European Parliament, Resolution of 16 February 2012 on the Recent Political Developments in Hungary (2012/2511(RSP)).

<sup>34</sup> FRA, 'Beyond the Peak: Challenges Remain, but Migration Numbers Drop', annual review, March 2019.

<sup>35</sup> Frontex, Consultative Forum on Fundamental Rights, Fifth annual report – 2017. See notably para 4.3.1.

<sup>36</sup> Commission, 'Relocation: Commission Refers the Czech Republic, Hungary and Poland to the Court of Justice' (Press Release) IP/17/5002, 7 December 2017; Commission, 'Migration and Asylum: Commission Takes Further Steps in Infringement Procedures against Hungary' (Press Release) IP/18/4522, 19 July 2018.

<sup>37</sup> Commission, 'Hungary: Commission takes next step in the infringement procedure for non-provision of food in transit zones' (Press Release) IP/19/5994, 10 October 2019.

<sup>38</sup> Discussed below in section 6 of this paper.

<sup>39</sup> UNHCR, 'Hungary as a Country of Asylum. Observations on Restrictive Legal Measures and Subsequent Practice Implemented between July 2015 and March 2016', May 2016 available at <[www.refworld.org/docid/57319d514.html](http://www.refworld.org/docid/57319d514.html)> accessed 27 November 2019.

<sup>40</sup> Special Representative of the Secretary General of the Council of Europe on Migration and Refugees, 'First Report on the Activities', Council of Europe, February 2018, 10.

<sup>41</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'Report on the Visit to Hungary', 3 November 2016 (CPT/Inf(2016)27).

<sup>42</sup> CoE Commissioner for Human Rights, 'Hungary: Commissioner Concerned at Further Planned Barriers to the Work of NGOs Assisting Migrants', Statement of 1 June 2018. See also, CoE Commissioner for Human Rights, 'Commissioner Concerned about Hungary's New Law Allowing Automatic Detention of Asylum Seekers', Statement of 8 March 2017.

a report focusing on Hungary released in May 2019,<sup>43</sup> particularly highlighted a number of issues related to the human rights of asylum seekers and refugees, including the inaccessibility of refugee protection, forcible removals and ill-treatment, unlawful detention of asylum seekers, treatment of unaccompanied minors, xenophobia and lack of integration measures.<sup>44</sup> Finally, at the time of writing, a number of cases of allegedly unlawful detention, collective expulsions and ill-treatment of migrants at the Hungarian borders are pending before the ECtHR.<sup>45</sup>

The case of Hungary, ultimately, is particularly emblematic as regards the issue of the respect of the principle of the rule of law in the migration domain, as it shows the clash between the State's responses to the migratory pressure and its human rights obligations stemming from both international and EU law. As a consequence, there has been increasing activity of international organisations and bodies specialised in the protection of migrants and of human rights in general, resulting in the subsequent production of a variety of acts identifying and denouncing several human rights violations. These include reports, studies, notes and commentaries, analyses of data and statistics, as well as recommendations and resolutions with a more political and programmatic value, coming from institutional bodies such as the European Parliament or the CoE Parliamentary Assembly.

Among the various actors involved in the assessment of the human rights violations generated by the reaction to the migration crisis in some European countries, there are courts, which are of particular importance, as their judicial decisions represent a significant indicator of the impact of border management and migration control practices on human rights. Accordingly, the repercussions of the response to the migration crisis put in place by some EU Member States may be 'measured' and evaluated by considering especially the (growing) case law of the Strasbourg Court concerning migration and border control practices, which collide with the rights protected in the ECHR.

In particular, illegal conduct, such as the collective expulsions of aliens, push-back and *refoulement* operations, unlawful and prolonged detention, all represent significant symptomatic manifestations of non-compliance with the principle of the rule of (human rights) law as

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<sup>43</sup> CoE Commissioner for Human Rights Dunja Mijatovic, 'Report Following her Visit to Hungary from 4 to 8 February 2018', Strasbourg, 21 May 2019, CommDH(2019)13.

<sup>44</sup> *ibid.*, 8.

<sup>45</sup> See, for example, the case *WO and Others v Hungary* App no 36896/18. With regard to the situation at the Hungarian borders, see also the written observations submitted under Article 36 ECHR by the CoE Commissioner for Human Rights as Third Party Intervention in the cases *SO v Austria* (App no 44825/15) and *AA v Austria* (App no 44944/15).

associated with the migration domain. The growing engagement of the ECtHR with potential violations of the ECHR due to the mentioned practices may indeed be regarded as a direct and emblematic consequence of the restrictive border policies put in place by EU frontline Member States in response to the migratory pressure.

More specifically, such parallelism appears to be particularly evident if one specifically looks at the case law of the ECtHR concerning the prohibition of the collective expulsion of aliens (Article 4, Protocol No 4, ECHR), as its chronological and geographical characterisation shows emblematically. In fact, while over the past years violations of the mentioned provision were only sparingly invoked before the Court of Strasbourg, from 2010 onwards the litigation concerning collective expulsion of aliens has been growing considerably, becoming a matter of attention for the judges, who have been progressively called to assess the compatibility with the Convention of the EU frontline Member States' migration control and border practices. Geographically, the vast majority of European frontline States has been brought before the Strasbourg Court for potential violations of the prohibition of the collective expulsion of aliens, including Mediterranean countries (Italy, Spain, France, Greece) and islands (Malta and Cyprus), as well as, more recently, countries with land borders in the Eastern European area (Poland, Slovakia, Croatia and Hungary).

Moreover, the analysis of the case law on the collective expulsion of aliens appears as particularly significant in the light of the seriousness of the violation committed by States. Indeed, while the power to individually expel an alien is part of the State sovereign prerogatives to control its borders and national territory (as long as it is exercised according to certain conditions and requirements), collective expulsions are, on the contrary, always prohibited and have an absolute character. Collectively expelling or pushing back a group of aliens as such, without examining their individual and personal position, thus represents a quite serious human rights violation, which may typically occur, as the case law of the ECtHR shows, in circumstances of intense migratory pressure.

Similar considerations may be expressed with regard to violations of Article 3 ECHR and the associated principle of *non-refoulement*, which admit no derogation, even when national authorities and asylum systems are under pressure due to circumstances of intense migratory pressure. Furthermore, given the importance of the right at stake – the right to personal liberty – the illegal detention of migrants is another clear sign of deterioration of the rule of law in situations of migration control and borders management that deserves attention.

It is within these boundaries that it is possible to measure and better assess the compatibility of the EU frontline Member States' response

to the migration crisis with the rule of law specifically understood as entailing respect of human rights. *Refoulement* practices, collective expulsions and unlawful and prolonged detention of migrants are the selected lenses through which the impact of migration and border control on the rule of (human rights) law is measured in the following parts.

#### 4 Push-back, expulsion and *refoulement* practices

In the face of growing migratory pressure, several frontline EU Member States reacted by putting in place practices aimed at pushing-back migrants. Such conduct may be in contrast to the principle of *non-refoulement*, the cornerstone of the international legal regime for the protection of migrants and refugees.<sup>46</sup> Essentially prohibiting States to extradite, expel or return (*'refouler'*) a person to another State where there are substantial risks for his or her personal safety or life, the principle of *non-refoulement* acts as a fundamental guarantee for migrants coming to Europe, as it has an absolute character and applicability that must be ensured even in cases of intense migratory pressure.<sup>47</sup>

The ECtHR, in particular, has played a relevant role in applying and extending protection against *refoulement* practices, especially during the years of the so-called refugee crisis and in times of intense migratory flows towards the European external borders. In so doing, the Court has clarified that States have and maintain their sovereign prerogatives to conduct their own migration and border policies but, at the same time, they have to ensure that these are consistent with the obligations arising from the Convention and, above all, with Article 3 ECHR, which inherently enshrines the principle of *non-refoulement*.<sup>48</sup>

<sup>46</sup> The principle of *non-refoulement* is enshrined in relevant international instruments such as the 1951 Geneva Convention relating to Status of Refugees (Art 33), the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art 3) and the Charter of Fundamental Rights of the EU (Art 19, para 2).

<sup>47</sup> On the principle of *non-refoulement*, see, among others, Jean-Yves Carlier and Sylvie Sarolea, *Droits des étrangers* (Larcier 2016); Vincent Chetail, *International Migration Law* (OUP 2019); Bruno Nascimbene, *Lo Straniero nel Diritto Internazionale* (Giuffrè 2013); for the principle of *non-refoulement* in the European Union, see Violeta Moreno-Lax, *Accessing Asylum in Europe* (OUP 2017).

<sup>48</sup> *Soering v The United Kingdom* App 14038/88 (ECtHR, 7 July 1989) para 88. Article 3 ECHR entails protection against *refoulement* that is broader in scope by comparison with other provisions (such as those of the 1951 Geneva Convention), as it also covers persons who do not necessarily have to qualify as refugees or as beneficiaries of subsidiary protection. On the scope of the protection against *refoulement* ensured under Article 33 of the 1951 Geneva Convention, see, among others, Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law* (CUP 2003); Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (OUP 2007); Jean-Yves Carlier and Dirk Vanheule (eds), *Europe and Refugees: A Challenge?* (Kluwer 1997); Agnès

The respect of Article 3 in migration matters is particularly relevant as, under Article 15(2) ECHR, it has an absolute character and admits no derogation. The ECtHR has affirmed on many occasions that the prohibition of torture and inhuman or degrading treatment under the terms of Article 3 'must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe'.<sup>49</sup>

Building on this principle and following a pragmatic and protection-oriented approach, the Strasbourg Court has progressively developed and strengthened a system of protection of migrants against expulsion and push-back strategies through the obligation for the State to refrain from expelling an alien towards a country where he or she would be subjected to the risk of suffering treatment prohibited under Article 3 ECHR. Accordingly, even if the State concerned is not the material author of the treatment contrary to Article 3, it nevertheless participates in such violation of the Convention in the case of the expulsion of an alien towards a country where there are concrete risks of being subjected to such treatment. Indeed, the expulsion, if implemented, would become a decisive step in the chain of events leading to treatment contrary to Article 3, whose violation, therefore, becomes imputable to the State that carried out the expulsion.

According to the Court's case law, this applies also to so-called indirect or 'chain *refoulement*': a State may be held responsible under Article 3 ECHR not only if it directly expels an individual towards a country in which he or she will be subjected to the risk of torture or inhuman treatment (direct *refoulement*), but also in cases of removal to an intermediate country, which, in turn, could expel him or her to a third country where the person concerned would face the risk of treatment contrary to Article 3 (indirect or chain *refoulement*).

The Strasbourg Court then enriched the level of protection of migrants against expulsion measures by extending, under certain conditions, the territorial scope of application of the ECHR in light of its Article 1, which lays down the fundamental obligation for States Parties 'to secure to everyone within their jurisdiction' the respect of human rights protected in the Convention. According to the ECtHR, although the notion of jurisdiction is to be considered as essentially territorial, in some exceptional circumstances and for the purposes of Article 1 ECHR, the State's conduct performed, or producing effects, outside the national

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Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford Monograph in International Law 2009).

<sup>49</sup> *MS v Belgium* App no 50012/08 (ECtHR, 31 January 2012) para 122.

territory may constitute an exercise of jurisdiction, thus potentially triggering its responsibility for possible violations of the Convention.

Among other areas, this has been applied in migration-related cases involving issues under the terms of Articles 3 and 4, Protocol no 4 to the Convention. It is intuitive that the potential extra-territorial scope of the application of the Convention is particularly relevant in the field of migration control and border management, where EU frontline Member States have increasingly resorted to practices aimed at offshoring control operations, intercepting and pushing-back migrants before their arrival in the national territory.

An emblematic example of the impact of the potential extraterritoriality of human rights obligations enshrined in the ECHR on States' migration and border control practices is provided by the leading case *Hirsi Jamaa and Others v Italy*,<sup>50</sup> concerning the interception of migrants on the high seas and their subsequent transfer to Libya by Italian authorities. The Grand Chamber of the ECtHR unanimously held that the applicants found themselves within the jurisdiction of the Italian State, observing that the events took place on board Italian vessels flying Italy's flag, the crew of which was entirely composed of Italian military personnel, with the consequence that the migrants concerned were *de jure* and *de facto* under the control of Italy.<sup>51</sup> In such circumstances, with regard to externalised border and migration controls carried out on the high seas, the Court clarified that, as to the State's exercise of jurisdiction for the purposes of Article 1 ECHR, 'the special nature of the maritime environment cannot justify an area outside the law',<sup>52</sup> so that fundamental principles such as the rule of law and protection of human rights must be respected.

Refusals of entry, non-admission practices, summary returns and push-back strategies have been detected and denounced also with regard to the external land borders of the EU, notably in the Eastern European area. More specifically, international organisations and NGOs have recently highlighted the worrying situation at the Croatian borders, repeatedly reporting *refoulement* practices and unlawful, collective expulsions of migrants to Serbia and Bosnia Herzegovina. The CoE Commissioner for Human Rights, in particular, in a letter addressed to the Prime Minister of Croatia in September 2018, specifically pointed out the issue of the compatibility of such practices carried out at borders with the rule

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<sup>50</sup> *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, Grand Chamber, 23 February 2012).

<sup>51</sup> *ibid.*, paras 76-82.

<sup>52</sup> *ibid.*, para 178.

of law and respect of the fundamental rights of migrants.<sup>53</sup> While, on the one hand, the Commissioner recognises ‘the challenges facing Croatia in the migration field’, the Commissioner on the other hand underlines that ‘all efforts to manage migration should be strictly in line with the rule of law and binding international legal principles.’<sup>54</sup> Similar concerns about systematic *refoulement* strategies put in place at the Croatian borders were expressed in 2018 by the FRA<sup>55</sup> and various international NGOs, such as, for example, Human Rights Watch.<sup>56</sup>

Despite the widely reported human rights violations repeatedly committed to the detriment of migrants and asylum seekers, the European Commission has recently welcomed Croatia’s efforts in the fulfilment of the necessary criteria to join the Schengen area.<sup>57</sup> Interestingly, in the assessment of the Croatian capacity to manage borders, there is no mention of the *refoulement* practices at the borders with Bosnia and Serbia, nor of the cases of collective expulsions, currently pending before the Strasbourg Court. On the contrary, the Commission has even commended Croatia for its efforts in ensuring respect of fundamental rights: ‘The commitments in particular concern the area of the judiciary and respect of fundamental rights. The Commission today confirms that Croatia continues to fulfil all of them’.<sup>58</sup>

Practices contrary to the rule of law, respect of human rights and the prohibition of *refoulement* have been recently reported and confirmed also in Hungary, especially, once again, with regards to the borders with Serbia. At the UN level, in particular, the UN Human Rights Committee, in its concluding observations of April 2018, expressed its serious concerns for push-backs being applied indiscriminately at the Hungarian borders without giving protection-seekers the opportunity to apply for asylum.<sup>59</sup> The UN Committee also noted the inadequacy of the legal system of protection of migrants, since the Hungarian normative regime ‘does not afford full protection against *non-refoulement*’.<sup>60</sup> The CoE Com-

<sup>53</sup> Letter from CoE Commissioner for Human Rights to the Prime Minister of Croatia (ref CommHR/DM/sf 080-2018, 20 September 2018).

<sup>54</sup> *ibid.*

<sup>55</sup> FRA, ‘Periodic Data Collection on the Migration Situation in the EU, March Highlights’ (February 2018); FRA, ‘Migration to the EU: Five Persistent Challenges’ (February 2018).

<sup>56</sup> Human Rights Watch, ‘Croatia: Migrants Pushed Back to Bosnia and Herzegovina’ (11 December 2018).

<sup>57</sup> European Commission, ‘Schengen Accession: Croatia on the Way to Join the Schengen Area’ (Press Release) IP/19/6140, 22 October 2019.

<sup>58</sup> *ibid.*

<sup>59</sup> UN Human Rights Committee, ‘Concluding Observations on the Sixth Periodic Report of Hungary’, CCPR/C/HUN/CO/6.

<sup>60</sup> *ibid.*, para 47.

missioner for Human Rights, following a recent visit and fact-finding mission to Hungary, concluded that 'currently, it is very difficult to access refugee protection in Hungary. Very few asylum seekers are able to exercise their right to apply for international protection'.<sup>61</sup>

Similar protection deficiencies and human rights issues have also occurred in Poland, where, in particular, continuing restrictions on access to the asylum procedure have been reported.<sup>62</sup> The ECtHR has been involved in *refoulement* cases, by indicating, according to Rule 39 of its Rules of Court, interim measures so that asylum seekers should not be refused entry at the Polish border crossing points. Such measures, however, have been disregarded by Polish authorities and border guards.<sup>63</sup>

Ignoring the decisions of the Strasbourg Court may be considered a further evident sign of non-compliance with the rule of law and the obligation to respect human rights. Additionally, pushing back migrants at borders and denying access to procedures which enable applications to be made for asylum represent practices that are particularly problematic in so far as they collide with the very essence of the principle of the rule of law, entailing basic precepts such as legality, prohibition of the arbitrary exercise of executive power and, especially, effective judicial protection and access to justice and legal remedies.

The issues of *refoulement* and access to asylum procedures at borders were also addressed by the Strasbourg Court in its recent judgment *MA and Others v Lithuania*.<sup>64</sup> The case concerned a Russian family of Chechen origin (two parents and five children), who, after presenting themselves at the Lithuanian borders and attempting to lodge asylum applications, were refused entry and consequently returned to Belarus. In its decision, the ECtHR – although by a majority of 4 votes against 3 – found a violation of Article 3 ECHR relating to the failure to allow the applicants to submit asylum applications and to their removal to Belarus, in the absence of any examination of their claim that they would face a real risk of ill-treatment. For the Strasbourg judges, in particular, national authorities bear the obligation not only to ensure that the country of removal offers sufficient guarantees in terms of Article 3 ECHR (especially when such a country is not a State Party to the Convention, which is the case of Belarus), but they must also assume a proactive ap-

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<sup>61</sup> Mijatovic (n 43) 8.

<sup>62</sup> FRA, 'Monthly Data Collection on the Migration Situation in the EU, January 2017 Monthly Report' (December 2016, notably para 11).

<sup>63</sup> FRA, 'Migration to the EU: Five Persistent Challenges' (n 55) 7.

<sup>64</sup> *MA and Others v Lithuania* App no 59793/17 (ECtHR, 11 December 2018).

proach, enabling potential asylum seekers to have access to the relevant procedures for international protection.<sup>65</sup>

What is more, concerning the restriction of access to asylum procedures at the borders, Judge Pinto de Albuquerque, in his concurring opinion in *MA and Others*, stressed that 'it is particularly important that the prohibition of *refoulement* is applicable to any form of non-admission at borders and that the effective protection of the asylum-seeker's rights is ensured'.<sup>66</sup> For the Portuguese judge, jurisdiction matters and extra-territorialisation of border and migration controls should not enable States to circumvent their human rights obligations, with the consequence that, on the contrary, 'all forms of immigration and border control' should be consistent with the human rights standards set by the ECHR and thus subjected to the scrutiny of the ECtHR.<sup>67</sup>

By way of conclusion, it is worth noting that push-back, non-admission and other *refoulement* practices may also take place inside Europe and between EU Member States. Indeed, while conduct amounting to violations of the principle of *non-refoulement* and Article 3 ECHR have been widely reported at the external borders of the European Union, similar practices consisting of push-backs and refusals of entry are also in place between EU Member States, as recently reported by the FRA, especially with regard to migrants being sent back to Italy at the French and Austrian borders.<sup>68</sup>

Additional issues in terms of *refoulement* and respect of migrants' rights and guarantees have been highlighted with regard to intergovernmental cooperation initiatives on asylum matters recently put in place between some EU Member States. Given the long-lasting controversies over the allocation of responsibility for asylum and the deadlock in the Dublin reform, some governments have been induced to act autonomously and to prefer bilateral measures rather than EU-wide solutions. Accordingly, in 2018, under Germany's initiative, a number of 'administrative agreements' were concluded by the German government with Portugal, Spain and Greece for the return of asylum seekers engaging in secondary movements within the EU, essentially introducing a fast track implementation of return procedures.

Article 36 of the Dublin III Regulation explicitly allows Member States to cooperate on a bilateral basis and conclude agreements for the

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<sup>65</sup> *ibid.*, paras 103-104.

<sup>66</sup> *ibid.*, concurring opinion of Judge Pinto de Albuquerque, para 21.

<sup>67</sup> *ibid.*, para 10.

<sup>68</sup> FRA, 'Migration to the EU: Five Persistent Challenges' (n 55) 7; FRA, 'Monthly Data Collection on the Migration Situation in the EU' (n 44) 87.

simplification of procedures and the shortening of time limits established in the regulation ‘in order to facilitate its application and increase its effectiveness’.<sup>69</sup> However, it has been argued that the mentioned ‘administrative agreements’ may actually qualify as international agreements, thus falling outside EU law and in this way circumventing its safeguards and guarantees.<sup>70</sup> The agreed procedures, indeed, would go way beyond the allowed administrative cooperation on ‘practical details’ under Article 36(1), introducing practices that, deviating from the Dublin rules, may potentially violate the procedural rights of asylum seekers (provided for in the Procedure, Qualification, Reception Conditions and Return Directives), as well as *non-refoulement* obligations.

In this regard, it has to be recalled that the Strasbourg Court has affirmed that Article 3 ECHR and the protection against *refoulement* are also fully applicable between EU Member States. This conclusion, in particular, has been reached in a number of ‘Dublin cases’ involving transfers of asylum seekers between EU Member States according to the EU Dublin rules setting down the criteria and the mechanisms for the allocation of competence for examining an application for international protection lodged in the EU. The ECtHR clarified that the EU rules governing the ‘Dublin transfers’ between EU Member States cannot be applied automatically and mechanically, that is to say, without previously conducting a proper assessment of the reception conditions of the receiving Member State, which may not be compatible with Article 3 ECHR.<sup>71</sup>

<sup>69</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31, Art 36, para 1.

<sup>70</sup> Stathis Poularakis, ‘The Case of the Administrative Arrangement on Asylum-Seekers between Greece and Germany: A Tale of “Para Dublin Activity”?’ (*EU Law Analysis*, 2018) <<http://eulawanalysis.blogspot.com/2018/11/the-case-of-administrative-arrangement.html>> accessed 28 August 2019; Constantin Hruschka, ‘The Border Spell: Dublin Arrangements or Bilateral Agreements? Reflections on the Cooperation between Germany and Greece / Spain in the Context of Control at the German-Austrian Border’ (*EUmigrationlawblog*, 2019) <<https://eumigrationlawblog.eu/the-border-spell-dublin-arrangements-or-bilateral-agreements-reflections-on-the-cooperation-between-germany-and-greece-spain-in-the-context-of-control-at-the-german-austrian-border/>> accessed 28 August 2019. See also ECRE, ‘Bilateral Agreements: Implementing or Bypassing the Dublin Regulation?’ Policy Paper 2018 5 <<https://www.ecre.org/wp-content/uploads/2018/12/Policy-Papers-05.pdf>> accessed 29 August 2019.

<sup>71</sup> *MSS v Belgium and Greece* App no 30696/09 (ECtHR, Grand Chamber, 21 January 2011). For analyses and comments on the case, see Jean-Yves Carlier and Sylvie Sarolea, ‘Le droit d’asile dans l’Union européenne contrôlé par la Cour européenne des droits de l’homme. À propos de l’arrêt *MSS c Belgique et Grèce*’ (2011) *Journal des Tribunaux* 357; Francesco Maiani and Néraudau, ‘L’arrêt *MSS c Grèce et Belgique* de la Cour EDH du 21 janvier 2011. De la détermination de l’état responsable selon Dublin à la responsabilité des états membre en matière de protection des droits fondamentaux’ (2011) *Revue du droit des*

EU Member States, thus, have an obligation, before executing a Dublin transfer, to concretely and effectively verify the potential specific risks for the aliens concerned of being subjected to conditions contrary to Article 3 in the Member State of destination.<sup>72</sup>

## 5 Collective expulsions of aliens

If the individual expulsion of an alien is permitted, although in compliance with certain substantive and procedural guarantees, States, on the contrary, encounter an absolute prohibition to expel aliens collectively. Indeed, as confirmed in the UN Memorandum on Expulsion of Aliens, while a State has and maintains the sovereign right to expel an alien individually, the collective expulsion of a group of aliens 'is contrary to the very notion of the human rights of individuals and is therefore prohibited'.<sup>73</sup> Collective expulsions, in this sense, represent an aggravated form of violation of human rights and are firmly and widely prohibited at the international level.<sup>74</sup>

The rationale of prohibiting the collective character of the expulsion lies, essentially, in avoiding that removals from a certain State take place without a proper examination of the individual and specific situation of the persons concerned. The core purpose, therefore, is to prevent

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étrangers 7. The approach of the ECtHR in *MSS* has also been followed by the Luxembourg Court: see Joined Cases C-411/10 and C-493/10 NS ECLI:EU:C:2011:865.

<sup>72</sup> *Tarakhel v Switzerland* App no 29217/12 (ECtHR, Grand Chamber, 4 November 2014).

<sup>73</sup> International Law Commission, 'Memorandum by the Secretariat, Expulsion of Aliens', UN Doc. A/CN.4/565 (2006) 2.

<sup>74</sup> At the regional level, collective expulsions are prohibited by the American Convention on Human Rights (Article 22(9)), the Arab Charter on Human Rights (Article 26(2)) and the African Charter on Human and Peoples' Rights (Article 12(5), which refers to 'mass expulsion of non-nationals'). At the EU level, collective expulsions are prohibited under Article 19(1) of the Charter of Fundamental Rights. At the global level, the prohibition of collective expulsion is provided for in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, with regard to those specific categories of migrants (Article 22). The UN Draft Articles on the Expulsion of Aliens, adopted in 2014 by the International Law Commission, expressly establishes that 'the collective expulsion of aliens is prohibited' (Article 9). On the prohibition of collective expulsions in the ECHR system, see Jean-Yves Carlier and Luc Leboeuf, 'Collective Expulsion or Not? Individualisation of Decision Making in Migration and Asylum Law', EU Immigration and Asylum Law Policy 8 January 2018 <<https://eumigrationlawblog.eu/collective-expulsion-or-not-individualisation-of-decision-making-in-migration-and-asylum-law/>> accessed 1 November 2019; Filippo Scuto, 'Aliens Protection against Expulsion and Prohibition of Collective Expulsion by the Jurisprudence of the European Court of Human Rights' *Federalismi.it*, Focus Human Rights 25 June 2018; Jean-Yves Carlier and Sylvie Sarolea, *Droits des étrangers* (n 47) 111; Francesco Luigi Gatta, 'The Problematic Management of Migratory Flows in Europe and Its Impact on Human Rights: The Prohibition of Collective Expulsion of Aliens in the Case Law of the European Court of Human Rights' in Giovanni Carlo Bruno, Fulvio Maria Palombino and Adriana Di Stefano (eds), *Migration Issues before International Courts and Tribunals* (CNR 2019) forthcoming.

States from removing aliens as a group, without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the expulsion measure.<sup>75</sup> So conceived, the prohibition of collective expulsion of aliens has an absolute character, which seems to be considered as a general principle of international law recognised by civilised nations.<sup>76</sup> In the light of these circumstances, therefore, a violation of the prohibition of collective expulsion of aliens appears as particularly serious in terms of respect of the principle of the rule of (human rights) law.

As the case law of the ECtHR on Article 4 of Protocol no 4 ECHR demonstrates, migration control practices put in place in frontline European States in the face of the so-called refugee crisis have raised complex issues in terms of respect of the prohibition of collective expulsions. Following its inclusion in the Convention in 1963, such a provision has remained 'inactive' for a long period of time, with only the moderate engagement of the Strasbourg Court during the decades. In contrast, litigation on collective expulsions has gained momentum in recent years, and notably since 2010 onwards, increasing in parallel with the growing migratory pressure in the Mediterranean and the consequent responses put in place by EU frontline Member States. In such a different scenario, States' practices of border control and migration management, such as externalised push-back operations or the interception of migrants on the high seas, have put the ECtHR in a position of dealing with new challenges.

Until that moment, in fact, the vast majority of cases relating to Article 4 of Protocol No 4 ECHR involved aliens who were already on the national territory of the State concerned: therefore, no question of territorial applicability arose.<sup>77</sup> The turning point was the *Hirsi Jamaa* case, in which the ECtHR unanimously concluded for the extraterritorial applicability of Article 4 of Protocol No 4, basing its interpretation on the concept of jurisdiction under Article 1 ECHR. What is particularly significant in the Court's reasoning, revealing a pragmatic and human rights-oriented approach, is the establishment of the link between the prohibition of collective expulsion and the types of border control practices put in place at that time by States. The ECtHR, drawing the picture of the evolving European migratory scenario, acknowledged that 'migratory flows in Europe have continued to intensify, with increasing use

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<sup>75</sup> *Hirsi Jamaa* (n 50) para 177.

<sup>76</sup> International Law Commission, 'Third Report on the Expulsion of Aliens by Mr Maurice Kamto, Special Rapporteur', UN Doc A/CN.4/581 (2007) para 115.

<sup>77</sup> See, for example, *KG v Germany* App no 7704/76 (European Commission of Human Rights, 11 March 1977); *Andric v Sweden* App no 45917/99 (ECtHR 23 February 1999); *Conka v Belgium* App no 51564/99 (ECtHR, 5 February 2002).

being made of the sea' and that 'the interception of migrants on the high seas and their removal to countries of transit or origin are now means of migratory control in so far as they constitute tools for States to combat irregular migration'.<sup>78</sup>

The Court followed the same approach in *Sharifi and Others v Italy and Greece*, concerning the deportation to Greece of migrants who had clandestinely boarded vessels for Italy.<sup>79</sup> The ECtHR condemned the immediate *refoulement* of the migrants arriving from Greece to the Italian port of Ancona, establishing the applicability of Article 4 of Protocol No 4 to cases of the refusal to allow entry to the national territory to persons arriving illegally. The Court did not consider it relevant to ascertain whether the migrants were expelled before or after physically reaching the Italian territory. In other words, the prohibition of collective expulsion is potentially applicable also when aliens have not concretely 'touched' the national territory of the State.<sup>80</sup>

The extraterritorial applicability of Article 4 of Protocol No 4 and the concept of State jurisdiction in migration control matters were addressed again in the case *ND and NT v Spain*.<sup>81</sup> The case concerned the immediate and allegedly collective expulsion of migrants intercepted in the attempt of crossing the Spanish-Moroccan borders in Melilla, a Spanish enclave situated on the North-African coast. As the Spanish government explained in its argumentations presented before the Strasbourg Court, this border crossing is made up of a total of three enclosures, two external barriers and a third, final internal fence. As the applicants did not succeed in climbing and passing through all the three protective structures, they had not physically entered the Spanish territory, with the consequence that the events had occurred outside the jurisdiction of Spain.

The Court did not share the government's argument. Following its previous approach, it considered it irrelevant and unnecessary to determine exactly whether or not the Spanish-Moroccan border crossing of Melilla was actually located in Spain. Rather, recalling its judgment in *Hirsi Jamaa*, the judges pointed out that what matters for the applicability of the Convention is the circumstance that control is exercised, *de jure* and *de facto*, by the State over the individuals concerned. In the *ND and NT* case, as the migrants were brought down from the barriers, arrested and then expelled by the Spanish *Guardia Civil*, for the Court the events

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<sup>78</sup> *Hirsi Jamaa* (n 50) para 176.

<sup>79</sup> *Sharifi and Others v Italy and Greece* App no 16643/09 (ECtHR, 21 October 2014).

<sup>80</sup> *ibid.*, paras 210-213.

<sup>81</sup> *ND and NT v Spain* Apps nos 8675/15 and 8697/15 (ECtHR, 3 October 2017).

fell within the jurisdiction of Spain for the purposes of Article 1 ECHR.<sup>82</sup> Accordingly, it unanimously declared that Spain violated Article 4 of Protocol No 4 to the Convention. Such a conclusion, however, may be denied and reformed as, following the judgment in *ND and NT*, the Spanish Government requested the case to be referred to the Grand Chamber, before which, at the time of writing, it is still pending.<sup>83</sup>

As already said, the case law on the collective expulsion of aliens is growing, involving an increasing number of States, and basically covering the whole perimeter of the European external borders. In fact, while frontline EU Mediterranean countries, such as Italy and Spain, have already been – or currently are<sup>84</sup> – involved in cases of collective expulsions due to their border control practices aimed at tackling maritime migratory flows, the case law on Article 4 of Protocol No 4 now encompasses a number of pending cases involving potential human rights violations occurring at the land borders of Eastern European States, such as Slovakia,<sup>85</sup> Croatia,<sup>86</sup> Latvia,<sup>87</sup> Poland<sup>88</sup> and Hungary.<sup>89</sup>

This scenario offers further confirmation of the potential repercussions of States' border policies on migrants' rights. The Strasbourg Court is aware of the existing friction between the competing interests of governments and migrants, acknowledging the serious difficulties faced by national authorities in dealing with increasing migratory flows. In particular, it has emphasised that 'States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers',

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<sup>82</sup> *ibid*, paras 49-55.

<sup>83</sup> A public hearing was held before the Grand Chamber of the ECtHR on 26 September 2018.

<sup>84</sup> As for Spain, at the time of writing, cases of collective expulsions of aliens allegedly carried out at the border crossings of Ceuta and Melilla are pending before the ECtHR: *Doumbe Nnabuchi v Spain* App no 19420/15, communicated to the Spanish Government on 14 December 2015, and *Balde and Abel v Spain* App no 20351/17, communicated on 12 June 2017.

<sup>85</sup> *Asady and Others v Slovakia* App no 24917/17, communicated to the Government on 26 September 2016, concerning the expulsion to Ukraine of 19 Afghan nationals.

<sup>86</sup> *MH and Others v Croatia* App no 15670/18, communicated to the Government on 11 May 2018.

<sup>87</sup> *MA and Others v Latvia* App no 25564/18, communicated to the Government on 10 May 2019.

<sup>88</sup> *MK and Others v Poland* App no 43643/17, communicated on 21 July 2017; *MA and Others v Poland* App no 42907/17, communicated on 3 August 2017; *DA and Others v Poland* App no 51246/17, communicated on 7 September 2017, all concerning the refusal of entry and the following removal to Belarus of migrants of various nationalities.

<sup>89</sup> *HK v Hungary* App no 18531/17; *Khurram v Hungary* App no 12625/17, both communicated to the Hungarian Government on 13 November 2017 and concerning the expulsion of aliens to Serbia.

and that it 'does not underestimate the burden and pressure this situation places on the States concerned'.<sup>90</sup> As for migration across the Mediterranean, the Court has affirmed that it is 'particularly aware of the difficulties related to the phenomenon of migration by sea, involving for States additional complications in controlling the borders in Southern Europe'.<sup>91</sup>

Having said that, the ECtHR, while reiterating, in general terms, the States' sovereign and legitimate right to control borders, at the same time affirms the necessity for national authorities to carry out migration control measures in full compliance with their international obligations arising from the Convention, even in cases of intense migratory pressure.

## 6 Detention and deprivation of liberty of migrants

Another significant human rights violation linked to securitisation and restrictive migration control policies put in place by frontline EU Member States is that of illegal detention. Unlawful and prolonged forms of detention of migrants and asylum seekers may be regarded as a further symptom of the breakdown of the principle of the rule of (human rights) law as applied and considered in the migration domain.

Evidence shows that illegal deprivation of liberty takes place in various forms at EU external borders, carried out in a manner incompatible with the rule of law understood as the obligation to respect basic principles such as lawfulness and protection against arbitrariness, transparency, full observance of substantive and procedural guarantees, access to justice and availability of effective remedies. Additionally, unlawful detention also involves minors and children, whose state of vulnerability requires States to observe and apply special attention.

Against this background, problematic cases of migrants unlawfully held in detention have emerged in the past years, especially with respect to Italy and Greece, the two countries mostly overloaded with migratory flows. In this regard, concerns have been expressed, in particular, with respect to the so-called 'hotspot approach', launched in 2015 and carried out in the two mentioned Member States with a view to better managing migratory pressure and the reception of the high numbers of incoming migrants.<sup>92</sup>

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<sup>90</sup> MSS (n 71) para 223.

<sup>91</sup> *Hirsi Jamaa* (n 50) para 122.

<sup>92</sup> On the hotspot approach, see, among others, Sergio Carrera, 'An Appraisal of the European Commission of Crisis' (CEPS 2019) 17; Sergio Carrera and others 'The EU's Response to the Refugee Crisis. Taking Stock and Setting Policy Priorities' (2015) CEPS, CEPS Essay no 20, 16 December 2015, 7; Sergio Carrera and Elspeth Guild, 'Can the New Refugee

More specifically, the intention of the European Commission was for the hotspot approach to represent a tool aimed at guaranteeing the more orderly and effective management of arrivals in the EU and of the related procedural phases, including identification, screening and registration of migrants, together with the proper functioning of the following prescribed processes in accordance with the EU asylum regime.<sup>93</sup> In other words, while Member States' responsibility for border control, maintenance of law, order and internal security remains unaltered (Article 72 TFEU), through the hotspot approach they receive EU financial (funds), operational (agency, such as Frontex and EASO) and technical (EURO-DAC) assistance and support for the orderly management of borders and arrivals of migrants on entry to the EU.

The experience of the hotspots has provoked a number of divergent opinions, generating controversies and problematic issues. For the EU institutions, it has all in all been a successful experience, which has contributed to the better management of migratory flows on the European southern external borders. For the European Commission, in particular, 'the setting up of hotspots in Greece and Italy is a tangible operational achievement and a concrete example of the principles of solidarity and responsibility in responding to the pressure faced by these Member States'.<sup>94</sup> The European Parliament, for its part, has expressed the need to ensure, at the same time, proper support to EU frontline Member States together with the respect of fundamental rights of all migrants.<sup>95</sup> The European Court of Auditors, in its special report on the budgetary management of the hotspot approach, concluded that, overall, it has positively contributed to the better management of migratory flows in the EU.<sup>96</sup>

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Relocation System Work? Perils in the Dublin Logic and Flawed Reception Conditions in the EU' (2015) CEPS, CEPS Policy Brief no 334, October 2015, 8; Danish Refugee Council, 'Fundamental Rights and the EU Hotspot Approach' (October 2017) <[https://drc.ngo/media/4051855/fundamental-rights\\_web.pdf](https://drc.ngo/media/4051855/fundamental-rights_web.pdf)> accessed 1 November 2019.

<sup>93</sup> According to the Commission, the hotspot is a 'platform for the agencies to intervene, rapidly and in an integrated manner, in frontline Member States when there is a crisis due to specific and disproportionate migratory pressure at their external borders, consisting of mixed migratory flows and the Member State concerned might request support and assistance to better cope with that pressure'. See Commission, 'Communication on Managing the Refugee Crisis: Immediate Operational, Budgetary and Legal Measures under the European Agenda on Migration' COM(2015)490 final, 5.

<sup>94</sup> Commission, 'Communication on Delivering of the European Agenda on Migration' COM(2017) 558 final 12.

<sup>95</sup> European Parliament, Resolution of 12 April 2016 on the Situation in the Mediterranean and the Need for a Holistic EU Approach to Migration (2015/2095(INI)) [2018] OJ C58, paras 84-85.

<sup>96</sup> European Court of Auditors, 'EU Response to the Refugee Crisis: the "Hotspot" Approach', Special Report no. 6/2017, pursuant to Article 287(4) second subparagraph, TFEU.

The hotspot approach has also been widely criticised. In particular, criticism has been expressed, on the one hand, with regard to the ways in which it has been put in place, lacking a clear legal basis and being outside a proper, transparent and democratic decision-making process (rule of law);<sup>97</sup> on other hand, also and especially, criticism has been levelled at the unlawful treatment and the recurring human rights violations of migrants in the Greek and Italian hotspot centres (rule of human rights law).

As for the latter aspect, concerns about the human rights situation of migrants held in the hotspot have been manifested within the EU, for example by the FRA,<sup>98</sup> and, at the international level, by several international organisations and bodies, as well as by various NGOs.<sup>99</sup> The FRA, in particular, in its 2016 Opinion on Fundamental Rights in Hotspots in Greece and Italy, highlighted a number of pressing issues, including, among the most serious, the prolonged duration of the deprivation of liberty, the poor detention conditions, the extreme situation of overcrowding, the inadequate level of care for vulnerable categories of migrants, including children and those with special needs. These findings had been confirmed by other international observers, including the UNHCR.<sup>100</sup>

In February 2019, in response to a request of the European Parliament, the FRA specifically issued an update of its 2016 Opinion, essentially concluding that, since then, no significant progress had been made with regard to the human rights situation of migrants and asylum seekers held in the Italian and Greek hotspot reception centres.<sup>101</sup> More

<sup>97</sup> On these issues, see, among others, Darren Neville, Sarah Sy and Amalia Rigon, 'On the Frontline: The Hotspot Approach to Managing Migration', Study for the European Parliament, Directorate-General for Internal Policies, Policy Department Citizens' (2016) Rights and Constitutional Affairs, Justice Freedom and Security, PE 556.942, May 2016, 30; Simone Penasa, 'L'approccio 'hotspot' nella gestione delle migrazioni: quando la forma (delle fonti) diviene sostanza (delle garanzie). Efficientismo e garantismo delle recenti politiche migratorie in prospettiva multilivello' in Fulvio Cortese and Gracy Pelacani (eds), *Il Diritto in Migrazione* (Editoriale Scientifica 2017) 395.

<sup>98</sup> FRA, Opinion of the European Union Agency for Fundamental Rights on Fundamental Rights in the 'Hotspots' Set Up in Greece and Italy, FRA Opinion5/2016 [Hotspots], 29 November 2016; FRA, Current Migration Situation in the EU: Oversight of Reception Facilities, September 2017; FRA, Periodic Data Collection on the Migration Situation in the EU, February 2018.

<sup>99</sup> See, among others, Amnesty International, 'Hotspot Italy. How EU's Flagship Approach Leads to Violations of Refugee and Migrant Rights' (EUR 30/5004/2016, 3 November 2016); Amnesty International, Report 2017/18. The State of the World's Human Rights, 2018 (POL 10/6700/2018) 211-214; Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'Preliminary Observations on the Visit to Greece (CPT/Inf, 2018)20.

<sup>100</sup> UNHCR, Greece Aegean Islands, Fact Sheet, 1/31 May 2018.

<sup>101</sup> FRA, 'Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on Fundamental Rights in the 'Hotspots' Set Up in Greece and Italy' FRA Opinion – 3/2019 [Hotspot Updates] Vienna, 4 March 2019.

specifically, the main challenges highlighted by the FRA in 2016, and still persisting today, concern: access to international protection, including issues such as the excessive length of procedures, information and proper assistance; child protection, especially with regard to insufficient assistance to unaccompanied minors; identification and treatment of vulnerable people, especially in terms of shortages of specific personnel such as doctors, psychologists and interpreters; security, involving a growing number of incidents, disorders, riots and clashes with police officers; return and readmission, with regard to human rights issues arising during the relative procedures.<sup>102</sup>

Besides the FRA, criticisms about the conditions of the hotspots have come from many other sources. The Italian hotspots, for example, have been criticised, among others, by the European Committee for the Prevention of Torture,<sup>103</sup> while those present on the Greek islands have led to a number of applications being lodged before the Strasbourg Court.<sup>104</sup> With regard to the current situation in Greece, UNHCR has recently urged the Hellenic Government to take action in order to properly deal with the overcrowding of the islands' reception centres, severely overloaded way beyond their capacity, defining the situation of those located in Lesbos, Samos and Kos as 'critical'.<sup>105</sup> The UNHCR has thus concluded that 'keeping people on the islands in these inadequate and insecure conditions is inhumane'.<sup>106</sup>

In this framework, the issue of the detention of migrants in the hotspots or other reception centres for aliens has been addressed by the Strasbourg Court, which has been involved in a growing number of cases of violation of Article 5 ECHR committed by frontline EU Member States with regard to migrants and asylum seekers. An example in this sense is the case *Khlaifia and Others v Italy*, where the Court found several violations of the right to liberty relating to the unlawful detention of

<sup>102</sup> *ibid.* In particular, in its 2016 Opinion, the FRA formulated 21 individual opinions to address the fundamental rights shortcomings identified in the implementation of the hotspot approach in Greece and Italy. In its 2019 update, the FRA concludes that most of the 21 identified issues still remain valid. More specifically, only three of them were properly dealt with, while in eight opinions, there were developments although they did not result in significant improvements on the ground. In 10 out of 21 opinions, there was no significant progress at all.

<sup>103</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Italian Government on the visit to Italy (CPT/Inf (2018)13).

<sup>104</sup> *JR and Others v Greece* App no 22696/16 (ECtHR, 25 January 2018); *Kaak and Others v Greece* App no 34215/16 (ECtHR, 3 October 2019). Previously, see also *Rahimi v Greece* App no 8687/08 (ECtHR, 5 April 2011).

<sup>105</sup> UNHCR, 'Greece Must Act to End Dangerous Overcrowding in Island Reception Centres, EU Support Crucial' (UNCHR, 1 October 2019).

<sup>106</sup> *ibid.*

Tunisian migrants held in degrading detention conditions in a reception centre on the island of Lampedusa and subsequently on ships moored in Palermo harbour.<sup>107</sup>

An example concerning Greece may be found in the recent judgment *Kaak and Others v Greece*, delivered on 3 October 2019, where the ECtHR dealt with the issues of the conditions and the lawfulness of the detention in the hotspot of Vial and Souda, on the Greek island of Chios, of 51 persons from Afghanistan, Palestine and Syria.<sup>108</sup> While the Court did not find that the detention conditions amounted to inhuman or degrading treatment contrary to Article 3, nor that the duration of the detention (one month) was excessive in the light of the circumstances of the case, it declared a violation of Article 5(4) ECHR with regard to the lawfulness of the procedures applied to the applicants. In particular, they did not have legal assistance, nor were they put in a position to understand information about their situation and, especially, the various legal remedies and appeal possibilities at their disposal.

Issues concerning migrants in detention have regarded not only Greece and Italy, but have also recently emerged with respect to cases located along the Eastern European land borders. Regarding Hungary, for example, concerns about the arbitrary deprivation of liberty of migrants and asylum seekers have been expressed, among others, by the UN Working Group on Arbitrary Detention<sup>109</sup> and the CoE Commissioner for Human Rights,<sup>110</sup> while the UN Subcommittee on the Prevention of Torture, already in 2017, urged Hungarian authorities to immediately address the issue of the systematic use of detention and to explore alternatives to it.<sup>111</sup>

The ECtHR, through its decisions, has certified the existence of significant issues in terms of migration control through detention: in its judgment in the case *OM v Hungary*, it held that there had been a viola-

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<sup>107</sup> *Khlaifia and Others v Italy* App no 16483/12 (ECtHR, 1 September 2015). The Chamber found a violation of Article 5 ECHR, with regard to its paragraphs 1, 2 and 4. It also found a violation of Article 3 ECHR with regard to the detention conditions in the reception centre on the island of Lampedusa. In its following Grand Chamber judgment, however, the Court, while confirming the violations of Article 5, under all the previously addressed profiles, did not find a violation of Article 3 ECHR. See *Khlaifia and Others v Italy* App no 16483/12 (ECtHR, Grand Chamber, 15 December 2016).

<sup>108</sup> *Kaak and Others* (n 104).

<sup>109</sup> UN Working Group on Arbitrary Detention, Report on the Mission to Hungary, 3 July 2014, A/HRC/27/48/Add 4.

<sup>110</sup> CoE Commissioner for Human Rights, Report Following the Visit in Hungary from 1 to 4 July 2014, 16 December 2014, CommDH(2014)21.

<sup>111</sup> UN Subcommittee on the Prevention of Torture, Hungary's Use of Detention in the Spotlight as UN Torture Prevention Body Concludes Visit, 31 March 2017.

tion of the right to liberty because of the arbitrariness of the detention of an Iranian asylum seeker who clandestinely crossed the Hungarian border from Serbia.<sup>112</sup> Moreover, while other cases are pending,<sup>113</sup> in 2018 the Strasbourg Court granted interim measures, ordering the Hungarian border authorities to provide food to asylum seekers who were deprived of it because they were challenging their detention in court.<sup>114</sup> As mentioned above, the issue of the non-provision of food in transit zones by Hungarian authorities has also induced the European Commission to take action, launching and carrying on an infringement procedure.

Serious issues in terms of the rule of law, the protection of human rights and respect of substantive and procedural guarantees emerge also and in particular with regard to the detention of migrant children. By way of example, concerns in this sense have been expressed by the CoE Commissioner for Human Rights with particular regard to Croatia, which is considered to be a transit country for unaccompanied migrant minors.<sup>115</sup> Further confirmation of the seriousness of the issue has come from the Group of Experts on Action against Trafficking in Human Beings (GRETA), which, in a recent report on Croatia, noted an increase in the number of unaccompanied migrant minors who disappeared from reception centres for asylum seekers, highlighting the risks in terms of possible exploitation and trafficking.<sup>116</sup>

## 7 Concluding remarks

The recent European migration crisis has contributed to an acceleration of the phenomenon of ‘rule of law backsliding’ in some EU Member States. Confronted with increasing migratory pressure, some governments, in the name of the emergency situation (but also sometimes for electoral purposes) have resorted to atypical and informal measures of migration governance. These have consisted of processes of securitisation of borders, restrictive approaches towards incoming migrants and, in cooperation with strategic non-EU countries, externalisation strategies in order to curb arrivals and prevent aliens from reaching European territory.

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<sup>112</sup> *OM v Hungary* App no 9912/15 (ECtHR, 5 July 2016).

<sup>113</sup> *WO and Others v Hungary* (n 45).

<sup>114</sup> European Parliament Resolution (2017/2131(INL)) para 67.

<sup>115</sup> CoE Commissioner for Human Rights, Report Following the Visit to Croatia, ComDH(2016)31, paras 110ff.

<sup>116</sup> GRETA, ‘Report Concerning the Implementation of the European Convention on Action Against Trafficking in Human Beings by Croatia’, GRETA(2015)33, 4 February 2016, paras 60ff.

Such restrictive migration policies raise serious issues as regards respect of the principle of the rule of law, under multiple perspectives. These issues arise first of all in terms of compliance with legal and procedural requirements and guarantees established under both EU law and national legislations. The proliferation of migration-related measures, which sound 'legal' without actually being so, represents a worrying trend in some EU frontline Member States, which have been increasingly resorting to informal and non-legally binding processes of migration management in order to avoid legislative, procedural and democratic frames. Such an approach ultimately appears as incompatible with essential components of the principle of the rule of law, such as legitimation, transparency, legal and procedural certainty, openness and democratic participation, coupled with gaps in judicial protection and issues in terms of accountability for potential violations of human rights.

Additionally, the responses put in place by EU frontline Member States appear to be problematic also in terms of compliance with the rule of (human rights) law, due to the serious repercussions on migrants' fundamental rights, protected under the relevant provisions of international and EU law. Some of them, such as the prohibitions of *refoulement* and of collective expulsions, have an absolute character and admit no derogations, with the consequence that their violation appears possibly as even more serious in terms of the rule of law, understood as the duty to observe relevant human rights obligations.

What response has been put forward in Europe to address such a 'crisis' of the rule of law? What reactions and remedies have been envisaged and adopted? At the EU level, the response has been mainly a political one. Among European institutions, initiatives have come especially from the European Parliament, which, in 2018, decided to trigger, for the first time, the rule of law mechanism under Article 7 TEU against Hungary. Many manifested doubts and scepticism about whether this initiative would lead to tangible and effective results for the protection of the principle of the rule of law.<sup>117</sup> Still, it raises awareness about serious rule of law issues that are arising in Europe, also with regard to the treatment of migrants and asylum seekers, showing the consequent intention to address them.

The CJEU, for its part, has done little to address the protection of migrants and the repercussions on their rights with regard to the external dimension of the EU's and Member States' migration policy.<sup>118</sup> While it has adopted and maintained quite a strong approach in the defence

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<sup>117</sup> Among others, see Carrera and Bard (n 30).

<sup>118</sup> Carlier and Crépeau (n 1).

of migrants' rights regarding their treatment inside the territory of the Union, it has proven to be rather lacking in the protection of migrants with regard to treatment outside Europe, even when such treatment is prompted by the external dimension of EU migration policy. The EU-Turkey Statement is the most emblematic example in this sense.

At the international level, besides the active criticism coming from various actors within the UN framework, as well as from several NGOs, the CoE, through its organisms and institutions, has particularly focused on the deterioration of the rule of law in Europe with regard to the migration domain. In addition to monitoring initiatives and periodic controls on the States' capacity to ensure respect of migrants' rights, a central role has been played by the Strasbourg Court, which, in striking a balance between the EU Member States' interest to control migratory flows on the one hand and the respect of human rights on the other, firmly stated the need to ensure an essential level of protection of aliens against unlawful conduct such as collective expulsions and *refoulement* practices.

The Court's voice sounds particularly significant and its careful vigilance against human rights violations by European States in the migration domain is highly valuable. This is especially so in times characterised by increasing xenophobic discourse, hostile attitudes, and restrictive and aggressive policies towards migrants.



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