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Editorial – Between Borders and Territories: Law or Migration

In the context of the international conference Time of Territories, held on the occasion of the 10 years of the research team, the EDEM organised a call for papers addressed mainly to PhD students. Having received a great number of proposals, we were able to organize two Young Researchers' Workshops. The workshop format resulted in rich exchanges among peers and senior academics on the broad topic of Law and Migration. For many of the researchers we hosted in Louvain-la-Neuve, this was the first chance to meet in person. We have now invited the Workshop participants to contribute to two consecutive Special Issues of the *Cahiers de l'EDEM*. In thanking all the contributors, we hope that it was an opportunity to nourish their research projects and further develop their own's research skills. We also thank the members of EDEM who supported us during the Workshops and during the coordination of the Special Issues.

While the first Special Issue was dedicated to the topic of vulnerability, this second Special Issue focuses on the notion of border. Understood in its legal, geographical and philosophical dimensions, the border can define who is in and who is out of the European Union territory, implementing dynamics of inclusions and exclusion from access to certain rights. Pushbacks, hot returns, fiction of non-entry, a-territoriality, transit areas are some of the concepts discussed in this Issue.

The first contribution explores the interrelationship between poor accountability for human rights violations at the borders and the inadequacy of national systems in ensuring human rights enforcement while presenting a critical reading of the European Commission's proposal under the

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Les Cahiers de l'EDEM ont vu le jour dans le cadre du projet de recherche fonds européen pour les réfugiés – UCL.

Screening Regulation (**Gabriel Almeida**). Most of the contributions look at Member States' practices as an illustration of controversial border regimes – and in particular pushbacks – starting with the bottom-up influence of Spain on the ECtHR in the creation of an exception to Article 4 of Protocol No. 4 ECHR in the context of land pushbacks at the Moroccan-Spanish border (**Clara Bosch March)**. A legal ethnographic analysis of the consequences of the reintroduction of border controls at the internal borders between Italy and France follows and discusses the "ambiguous territorial space near the borderline and exclusionary bordering processes" (**Bastien Charaudeau Santomauro**). The case of internal border controls in France is further explored in its relationship with the role of discretion in the decisions of the French administrative authorities (**Claire Bories**). Another contribution focuses on how the legal fiction of non-entry is implemented in a number of domestic legal frameworks as well as in EU law while examining how the New Pact on Migration and Asylum institutionalises the fiction of non-entry at the EU external borders (**Francesca Rondine**). Finally, the issue of pushbacks at the border is presented in its less known "digital" aspect through the practice of asylum refusal decisions and entry and residence bans between States Members of the Schengen area through the Schengen Information System (**Romain Lanneau**).

Underlying that the contributions hosted in this Special Issue are part of ongoing research projects, we hope that they will foster further exchanges and contacts among researchers. Comments and feedback are more than welcome.

On behalf of the *EDEM*,
Zoé CRINE, Eleonora FRASCA and Francesca RAIMONDO

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ECtHR – Art. 4 Additional Protocol No. 4 – Prohibition of collective expulsion – Pushbacks – Hot returns – Ceuta – Melilla – *N.D. and N.T. v. Spain* – Bottom-up influence.

The jurisprudential U-turn in the case of N.D. and N.T. v. Spain *was heavily criticised, among other things, for its lack of predictability. Indeed, the ECtHR was accused in this case of inventing all sorts of new limitations to Article 4 of Protocol No. 4. However, as I argue in this paper, these new limitations may not have been invented by the ECtHR, but rather drawn from Spain—the first State in the Council of Europe to implement and to legalise land pushbacks, and also the one which convinced the ECtHR to create an exception to Article 4 of Protocol No. 4. Far from what may seem at first sight, this is a crucial—and problematic—difference. Indeed, it would suggest an atypical "bottom-up" influence from the State level to the ECtHR which would raise, in turn, a series of substantive and methodological issues with regards to the ECHR. This is an avenue worth exploring because it may cast a new light on the case of* N.D. and N.T. *and help fully grasp the real extent of the Grand Chamber's U-turn. Therefore, the question explored is structured in three parts: Part I outlines the relevant Spanish framework; Part II discusses the bottom-up influence of this framework on N.D. and N.T. from a substantive point of view; Part III approaches it from a methodological point of view. The paper concludes with some final remarks on this influence from below.*

Legal marginalization – Border – Territory – Migrant Rights – Asylum – Schengen.

It has been more than six years since France reintroduced controls at its internal borders, thus derogating from Schengen's ordinary rules. A new border regime has emerged from this situation, one characterized by frequent reports of migrants' rights violations. Combining legal ethnography at the French-Italian border and legal theory, this article explores the notion of "legal margin" to understand what happens between the border and the territory. This concept shows that the borderline affects how legal norms are applied within the territory next to it. It further unfolds through two ideas. Firstly, the maintenance of legal indeterminacies by the State updates and reinforces in an original way a fiction of a-territoriality—people apprehended near the border are considered as if they were not in the territory—which places migrants outside the protective dimension of the law. Secondly, the regime of admission (the refusal of entry) is applied without the corresponding detention procedure (the waiting zone), thus allowing for what appears to be extralegal detention practices. The concept of margin seeks to enable legal theory to grasp what transpires in the ambiguity of the territorial space near the borderline and further explain exclusionary bordering processes.

Frontières de l'Union européenne – Territoire – Police aux frontières – Pouvoir discrétionnaire – Zone d'attente – Droits des étrangers aux frontières.

De Röszke au large de Lesbos, en passant par l'enclave de Ceuta, la forêt de Białowieża ou la zone de Calais, les décisions de construction de murs ou de clôtures destinés à empêcher le passage des migrants créent un malaise. Il en va de même dans les zones d'attente et aéroports français : les décisions souvent discrétionnaires des agents aux frontières, les conditions parfois précaires de maintien des migrants et demandeurs d'asile et l'hétérogénéité des pratiques administratives et policières créent un malaise. Ces situations sont de plus en plus fréquentes et contrastent, non sans malaise, avec l'accueil des réfugiés ukrainiens dont la singularité avec les précédentes vagues de populations mérite toute notre attention.

1. ACCOUNTABILITY AT BORDERS: BETWEEN RESTRICTIVE EUROPEAN BORDER GOVERNANCE AND FRAGMENTED NATIONAL LANDSCAPES FOR HUMAN RIGHTS PROTECTION

Gabriel Almeida,
(European Network of National Human Rights Institutions, Belgium)

Introduction

Systematic and gross human rights violations at European borders have been well-documented by a variety of credible actors, such as journalists, civil society organizations, national bodies, and international actors. While not all violations are recorded, the available evidence suggests that these are not sporadic events, but rather signs of a systemic issue in human rights protection both at internal borders and at the external borders of the European Union (EU).

Behind this persistent issue are the increasingly restrictive asylum, migration, and border governance in the European Union, which to a large extent have been accompanied by a disregard for human rights law and procedural safeguards at borders. In some cases, practices have been preceded or followed by legislative or policy reforms at the national or regional levels. For example, there has been widespread concern about the impact that the different legislative proposals by the European Commission (EC) under the "EU Pact on Migration and Asylum" would have on human rights protection at borders, such as in relation to access to effective remedies and immigration detention.

In this context, there is increased interest in "human rights monitoring" at borders, often framed as a solution to the disregard for national and international human rights law, as well as refugee law, taking place daily across the EU. Monitoring at borders became a hot topic in 2020, particularly in relation to the European Commission's financing for border management in Croatia, which included funds for the delayed and heavily criticised setting up of a monitoring mechanism for the Croatian border management. This led to an investigation by the European Ombudsman on how the European Commission fails to ensure that the Croatian authorities respect fundamental rights in the context of border management operations financed by EU funds, concluded in February 2022. The issue took a much bigger proportion when the European Commission included under Article 7 of its proposal for a Screening Regulation that "[e]ach Member State shall establish an independent monitoring mechanism", in brief, to investigate allegations of non-respect for fundamental rights and ensure compliance during the screening.

While the EC proposal is analysed further in section 3, it is important to stress that, despite the growing interest in human rights monitoring mechanisms at borders, there is incipient academic research on the topic. In this regard, this article contributes to bringing closer two strands of literature: one on human rights violations and accountability at borders (among others, CARRERA and STEFAN, CAMPESI, STEFAN and CORTINOVIS, JAKULEVIČIENĖ, GKLIATI, LANNEAU) and the other on domestic mechanisms for monitoring implementation of human rights law (among others WELCH, CARVER, MEUWISSEN, WELCH, DEMERITT and CONRAD, DE BECO, GOODMAN and PEGRAM, MURRAY). Further research on this topic can contribute to policy and legal actions that better respond to known challenges and gaps in European human rights governance.

Key for this article is also the concept of "accountability" as an essential component of the human rights framework. While there is no universal definition of accountability, it has been broadly understood as the system that governs the relationship between "duty bearers" (actors who have an obligation or responsibility to respect, promote and fulfil human rights obligations and to abstain from human rights violations) and "rights holders" (individuals or social groups that have entitlements in relation to duty-bearers). In a legal sense, accountability is also understood in relation to access to effective remedies, complaints mechanisms and investigations, which are firmly grounded in national, EU and international law. Most notably, Article 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter for Fundamental Rights impose positive obligations on states to, among others, ensure that a remedy must be effective in practice as well as in law in cases of alleged violations. Recently, different organizations have explored the specificities of human rights accountability at borders (for instance, ECRE in relation to Frontex and ENNHRI's observations on existing gaps).

With this background in mind, **Section 1** provides a brief overview of the diverse landscape in the EU of national bodies contributing to further human rights accountability at borders, paying specific regard to the role of National Human Rights Institutions (NHRIs) and National Preventive Mechanisms (NPM). **Section 2** explains why they are relevant to stronger protection of migrant's human rights, building on existing literature on the nature and effectiveness of domestic institutions. Yet, their potential is not fully explored. To illustrate this argument, **Section 3** advances a critical perspective of the EC proposal in relation to "border monitoring mechanisms". It argues that it reflects a limited understanding of accountability at borders and fails to learn from previous EU fundamental rights initiatives in the field of migration. It also analyses how it partially relates to trends at the EU level of a "new human rights governance" focused on domestic implementation of human rights standards, challenged by the question of EU competence.

In the conclusion, the author places this problem in a wider debate about gaps in the domestic implementation of human rights standards. If at first sight discussing the potential of national human rights bodies can seem theoretical, it is argued that building this missing link could contribute substantially to better accountability for migrants' human rights violations at borders.

1. Diversity of national frameworks for human rights protection in the EU

Domestic bodies are key elements of the international human rights regime. They embody the very essence of this regime: while states abide by human rights obligations under international treaties, they must implement them at the national level. Without the link between the global and the local, human rights become purely theoretical. Significant developments in the past decades indicate a trend of "domestic institutionalisation" of human rights, where national-level institutions are created to contribute to bridging the gap between human rights commitments and reality (JENSEN, LAGOUTTE and LORION).

At the national level, a multitude of actors contributes to the protection and promotion of human rights, and to accountability where violations occur, albeit in different ways - from civil society organizations (CSOs) and lawyers to parliaments, local authorities, and courts, among many others. This article focuses on two bodies established under national law with a relevant human rights

mandate, particularly National Human Rights Institutions (NHRIs) and National Preventive Mechanisms (NPM).

National Human Rights Institutions (NHRIs) are state-mandated bodies, independent of government, with a broad mission to promote and protect human rights. They are established and internationally accredited with reference to the Paris Principles, which were adopted by the United Nations General Assembly (Resolution 48/134). In practice, they take on different forms: the majority of European NHRIs are Ombuds institutions with a human rights mandate, while others are Commissions or Consultative Commissions, and some are institutes or have a hybrid mandate. Their specific mandates, resources and priorities vary depending on the country, and the UN Paris Principles constitute the common thread and set the minimum requirements that must be observed by all NHRIs, such as independence, a broad mandate, pluralism, and cooperation with civil society.

There is much more to be said about NHRIs and, while there is growing academic interest in them, it remains an under-explored topic. The existing literature on NHRIs provides a good basis for their history and specific nature (DE BECO and MURRAY; WELCH), the diversity of models (CARVER), their engagement at the international level (ZIPOLI), and regional perspectives (MEUWISSEN). It has been pointed out that more research is needed on NHRI's effectiveness (WELCH, DEMERITT, CONRAD) and their contribution to specific human rights areas (JAGERS, LORION).

More research on NHRIs could better inform the rise of their recognition at the UN level, in the Council of Europe, and the European Union, not to mention the central role they play nationally. For the purposes of this article, it is most important to stress that NHRIs have been key actors for the protection of the human rights of migrants at European borders, particularly in the last decade (UN Special Rapporteur on the Human Rights of Migrants, European Parliament, ENNHRI). Some examples of their work, depending on their mandate, can include monitoring and reporting on the situation at borders, advising parliaments and governments on how to ensure a human rights-based approach to migration and border governance, training border guards on human rights obligations, submitting cases to the Constitutional Court, handling individual complaints, and facilitating access to justice.

Most EU countries have a NHRI in place. Some have been accredited as fully complying with international standards (A-status) while others are partially compliant (B-status). In other countries, existing institutions are either seeking accreditation or would require legislative reforms to align their mandate with that of an NHRI. In the European Union, the most notable examples of countries without an NHRI are Italy and Malta.

Another key domestic actor for the promotion and protection of human rights are **National Preventive Mechanisms (NPMs),** which are established with reference to the Optional Protocol to the UN Convention Against Torture (OP-CAT). While NHRIs have a broad mandate to engage in all human rights, NPMs are specific bodies aimed at preventing torture and other cruel, inhuman, or degrading treatment or punishment. They have the power to visit and inspect all places of deprivation of liberty, without prior warning. The UN Subcommittee on Prevention of Torture has clarified that this mandate must be interpreted in a broad fashion and includes unofficial places of detention and any facilities or vehicles where people may be deprived of their liberty. In addition to

unannounced and unimpeded access to places, they also have the power to inspect documents and reach the concerned people.

If one considers the growing resort to immigration detention – and, more broadly, different practices that deprive migrants of their liberty for short or long periods –, it is not surprising that the work of European NPMs has become even more important. They monitor detention centres at borders and airports, hotspots, reception centres, and forced returns, among others. They address recommendations to governments, parliaments, and other actors to call for the respect for applicable regional and international standards, and to prevent violations from occurring.

While NPMs are not periodically accredited to assess their compliance with international requirements (which is the case for NHRIs), their functioning is also entrenched in the international and regional human rights framework. At the UN level, the Subcommittee on Prevention of Torture (SPT) assists and advises NPMs in their work, for instance through guidelines and other tools. In Europe, the European Committee on the Prevention of Torture (CPT), as a specialised independent monitoring body of the Council of Europe, promotes relevant standards and cooperates with NPMs.

The regional landscape of European NPMs is also diverse: most EU countries have NPMs in place, which can take the form of different bodies (from specialised institutions to being part of a centralised multi-mandated body) and will be allocated different degrees of resources. The scope and amount of work in relation to migration also seem to vary among NPMs.

Based on the overview provided by the Association for the Prevention of Torture, out of the 39 NPMs in wider Europe, around two-thirds are housed within NHRIs, which will have the NPM function alongside its broad human rights mandate (and potentially other functions).

This brief panorama of NHRIs and NPMs across the EU is a microcosm of the rich and diverse environment of national frameworks related to the implementation of international human rights obligations. As part of this macrocosm are Equality Bodies, forced return mechanisms, Ombuds institutions, regional bodies, and various thematic and specialised institutions – they can all contribute to the protection of human rights in the field of migration, albeit in different ways. There are no clear guidelines nor sufficient research on the preferred set-up at national level of domestic institutions: some countries opt for a more centralized approach (with one institution holding on to various functions and mandates), while in other countries the trend has been of fragmentation (CARVER). The diversity of national frameworks in the EU reflects legal, political, and social developments at the national level. Regional and international advancements, for instance, the ratification of an international treaty, can also trigger changes in the institutional set-up domestically.

2. Why do national frameworks matter?

Domestic institutionalization in the human rights system should be regarded as a technical exercise: beyond meeting formal requirements, the existence of national frameworks should contribute to further human rights compliance. In this light, when we consider the need to respond to poor accountability for human rights violations at borders, why do national human rights frameworks matter?

Even if there is scope for further research on the effectiveness of NHRIs and NPMs, the value and impact of their work have been recognised by international and regional organizations, parliaments, scholars, and courts, among others. The effectiveness of NHRIs will depend on several factors, such as their specific powers, performance, and legitimacy (ICHRP). Still, it has been generally found that NHRIs increase the (perceived) costs of repression, decrease the probability of the most egregious violations, contribute to human rights treaty compliance, and are associated with improved human rights behaviour (see references in WELCH, DEMERITT, CONRAD).

In the field of migration, NHRIs and NPMs have an important role in preventing pushbacks (Council of Europe Committee of Ministers, CM/AS(2020)Rec2161), monitoring forced returns (European Parliament, 2019/2208(INI)), promoting a human rights based-approach to border governance, and promoting and protecting the human rights of migrants in general (ENNHRI). NHRIs are also an indicator of respect for the rule of law and are key actors in the national system of checks and balances (EC Rule of Law Report).

The work of NHRIs and NPMs on migration is even more important when governments blatantly reject or discredit the reports of NGOs and journalists. As state bodies, their recommendations and findings carry particular weight. They also make use of their privileged access to parliament and the international fora to strengthen or complement the findings of other actors. The legal anchoring of these bodies in legislation or even the Constitution also makes it harder for national authorities to hinder their work at borders, for instance by impeding access to crossing points or detention centres.

In addition to their contribution nationally, NHRIs and NPMs also help ensure independent scrutiny and to report on what happens at borders to the regional and international levels. In the case of NHRIs, this can include periodic reports to UN Treaty Bodies, interventions before regional courts, and cooperation with other actors. In fact, the "strength of NHRIs lies in their multi-layered engagement with state and non-state actors at home and abroad which offers a plethora of avenues to strategically gather information and share recommendations and advice" (MEUWISSEN).

It is important to note, however, that NHRIs have faced several challenges when working in the field of migration (ENNHRI). Among others, they have reported being insufficiently funded to dedicate financial and human resources to this issue, border officials rejecting access to documents or facilities, and a lack of cooperation from authorities when working on migration vis-à-vis other topics. Therefore, despite their unique status, NHRIs have not been exempted from the shrinking democratic space in the region, weakening the system of checks and balances.

As recommended by the Council of Europe Committee of Ministers, States "should implement the recommendations of NHRIs and are encouraged to make it a legal obligation for all addressees of NHRI recommendations to provide a reasoned reply within an appropriate time frame, to develop processes to facilitate effective follow-up of NHRI recommendations, in a timely fashion and include information thereon in their relevant documents and reports" (CM/Rec(2021)1).

Yet, the potential of NHRIs and other national frameworks is not fully exploited either by national authorities or by regional organizations. Even where strong national frameworks exist, alone they cannot bring about the change necessary to guarantee human rights protection and accountability at borders. National authorities are the duty bearers and remain responsible for ensuring that legislation, policies, and practices comply with human rights law. In turn, regional actors such as EU

institutions could rely more often on the work of NHRIs when assessing states' respect for international or EU law, support them financially or politically, and work with them to monitor and promote human rights.

The importance of national frameworks has gained centre stage also in the field of migration, particularly after the European Commission's Proposal for a Screening Regulation, under which Article 7 proposes that "[e]ach Member State shall establish an independent monitoring mechanism". This proposal, thus, is part of the broader context of the rich landscape of national human rights frameworks in the EU (identified in Section 1) and reflects the trend of relying on domestic institutions to contribute to stronger respect for human rights obligations (Section 2).

However, does the EC proposal sufficiently take into account existing national frameworks in the EU? Does it build on lessons learned from other EU initiatives in the direction of "domestic institutionalization"? Is it part of a broader dissociation between EU law and the wider human rights regime? Section 3 provides initial reflections on these points.

3. A critical analysis of the EC proposal on monitoring mechanisms at borders

The EC proposal regarding monitoring mechanisms at borders was overall positively received, even if NGOs, NHRIs, and international organizations provided further recommendations and had some concerns, for instance in relation to independence guarantees and the mechanism's scope (see ECRE, ENNHRI, UNCHR). Yet, there is widespread agreement that, with appropriate safeguards, monitoring could contribute to better accountability for and prevention of violations at borders.

Despite the proposal being still under scrutiny and negotiation by the EU co-legislators, there is some academic work on this topic on the context influencing the proposal and its main features, as well as some initial reflections (see JAKULEVIČIENĖ, STEFAN and CORTINOVIS, LANNEAU, FOTIADIS). However, more academic research is needed. Due to its limited scope, this article does not provide an overview of the proposal and directly proceeds to a critical analysis.

First, it can be argued that an underlying assumption of the Commission when proposing that *monitoring* mechanisms are put in place is that the main issue at borders is the lack of information on human rights violations taking place. While there is certainly scope for stronger monitoring, this is a fallacy: in fact, independent actors have produced credible reports of human rights violations at borders. It can be affirmed that the issue at the EU internal and external borders is not one of insufficient knowledge of violations, but rather a lack of legal and political accountability. With this approach, the EC risks opening space for the EU Member States to discredit existing reports, findings, and recommendations from actors that are not part of monitoring mechanisms.

In this sense, the EC proposal reflects a limited understanding of accountability. Monitoring in itself is unlikely to bring about a positive change at borders. It must be part of a broader system that ensures that monitoring and reporting lead to access to justice and effective remedies, the revision of legislation and policies that result or contribute to breaches of human rights, and actions to prevent future violations. While Article 7(1) establishes that "Member States shall adopt relevant provisions to investigate allegations of non-respect for fundamental rights in relation to the screening", it fails to develop the linkage between the work of the monitoring mechanism and accountability at the national or regional levels. A better understanding of the challenges and needs

of existing national human rights bodies would have contributed to an approach focused on the outcome (i.e., human rights being protected at borders) rather than the process (i.e., through monitoring).

Second, the EC proposes the *establishment* of a monitoring mechanism at borders. While there is no clarity on whether this means the creation of a new body, or of a legal mandate that can be assigned to an existing body, the language of the proposal seems to point to a new framework being established (for example, Article 7(2) refers to FRA's possible guidance "on the *setting up* of such mechanism and its independent functioning", emphasis added). It is acknowledged that the proposal mentions that "Member States may invite relevant national, international and non-governmental organisations and bodies to participate in the monitoring", but the EC still fails to sufficiently recognise that *there are* already national bodies with a broad mandate to promote and protect human rights, including that of migrants at borders.

Instead of developing an approach that would acknowledge, support, strengthen, and mobilize existing domestic frameworks for human rights protection (such as NHRIs and NPMs), the EC opted for the creation of new bodies with a very specific, and arguably unclear, mandate. The risks of this approach are numerous: it can lead to inefficiencies and lack of complementary with existing monitors, funding and political support being diverted from existing bodies, authorities discrediting the reports of actors that are not part of the formal mechanism, and the creation of bodies that better suit political interests. These risks do not seem to have been fully considered by the European Commission, adding another concern to the already fragile environment for human rights work across the EU.

Third, the proposal *leaves to Member States' discretion* the exact composition and other elements of the monitoring mechanism, while pointing to the possibility of seeking support from FRA. On the one hand, this gives leeway to create mechanisms that fit each Member State's specific legal framework – as explained in Section 1, the landscape in the EU is very diverse and a one-size-fits-all solution would not be appropriate. On the other hand, the EC fails to acknowledge that most Member States are unwilling to create bodies that can independently monitor authorities' behaviour at borders, particularly where violations are well-known or encouraged. The difficulty in establishing, maintaining, and strengthening effective and independent NHRIs is an example of this tension.

In this regard, the EC could have benefitted from the lessons learned in relation to the "forced-return monitoring system" under the EU's Return Directive. Under this Directive, EU Member States were called to "provide for an effective forced-return monitoring system", without specifying conditions, standards, or appropriate set-up to this system. As a result, it has been found that these mechanisms vary widely across the EU and do not ensure consistent safeguards of the rights of migrants being returned (MARTIN). A Comparative Study funded by the European Commission in 2011 provided lessons learned in this regard even if its recommendations were considered to be limited from a human rights perspective (MARTIN). FRA has also regularly monitored and reported on the functioning of return monitoring systems, alerting them to widespread inefficiencies and lack of independence in their practical operation, despite being provided by law. Serious concerns in this regard were raised by the European Parliament in its 2020 Resolution on the implementation of the Return Directive (2019/2208(INI), para. 35).

Therefore, one could reasonably ask why the European Commission expects that the case will be different in relation to its proposal on monitoring mechanisms at borders. Regrettably, the experience so far does not provide a reason for optimism when it comes to entrusting the Member States to set up national frameworks, particularly where few requirements are set out in advance. This should not be taken as a criticism of the potential of national frameworks (which has been demonstrated in Section 2), but as a call for caution about initiatives aimed at creating new bodies without prior sufficient safeguards and periodic evaluation of their effectiveness and independence.

It is important to acknowledge, however, that the European Commission has restricted scope for action in this regard in view of its limited competence and respect for the principle of subsidiarity. This reflects the "inherent tension between the doctrine of allocation of competences and the dynamics of fundamental rights protection" at the EU level (MUIR). More research is needed on the relation between this tension and the EU's reliance on national bodies in this field, and how much this reflects the elements of "new governance" in the human rights system (cfr. JÄGERS and LORION).

To a certain degree, the three critical reflections above seem to be shared by some Members of the European Parliament (MEPs) involved in shaping the European Parliament's position on the Screening Regulation. For instance, the Rapporteur on the file, MEP Birgit Sippel (S&D) proposes stronger provisions on the link between the monitoring and steps for accountability, the *obligation* to involve "national human rights institutions, national ombudspersons, international organisations or relevant non-governmental organisations in the management and operation of the mechanism" or to closely cooperate with them, and Member States' requirement to respect the mandate of the mechanism (thus reflecting the challenges of existing national frameworks). Some of the proposed amendments by other MEPs also go in this direction.

While the EP's Committee on Civil Liberties, Justice and Home Affairs has not yet voted on a final report, it can be affirmed that the European Parliament seems to demonstrate a better understanding of the diverse landscape for human rights protection in the EU. Consequently, it appears better equipped to set out the necessary conditions that need to be in place for new or existing mechanisms to contribute to human rights protection at borders.

Unsurprisingly, the compromised position reached at the level of the Council of the European Union asks for the removal or watering down of the (few) safeguards found in the European Commission's proposal in relation to the potential mechanisms' powers and independence.

Conclusion

The European Commission proposal exposes the need for more academic research on the apparent excursion by the EU into the broader trend of "domestic institutionalization", under which national bodies are created to contribute to bridging the gap between international commitments and national practice. In the field of fundamental rights, the examples of National Equality Bodies under the EU legislative framework, National Rapporteurs on Anti-Trafficking under the EU Anti-Trafficking Directive, Forced-Return Monitoring Systems under the EU Return Directive, and Border Monitoring Mechanisms under the proposed Screening Regulation, could provide more knowledge regarding this trend.

As one of the few additional safeguards in relation to human rights under the EU Pact on Migration, the idea behind the proposal for "monitoring mechanisms" at borders should be welcomed. There is no doubt that monitoring can contribute to better human rights protection if the necessary safeguards are in place to ensure independence, effectiveness, and corresponding accountability. However, the proposal also took attention away from broader questions regarding national human rights frameworks, and how the EU supports and engages with them.

Regardless of the outcome of the negotiations under the Screening Regulation, existing public bodies such as NHRIs and NPMs will continue to perform their work – within their mandates and constraints – to promote and protect the rights of migrants at borders. So far, the EU has failed to shift the debate from the inclusion or exclusion of a new mechanism to a comprehensive and inclusive approach that would allow it to rely on the expertise, findings, and recommendations of existing bodies, such as NHRIs and NPMs. Ultimately such an approach would contribute to better implementation of the EU Charter of Fundamental Rights, and to more synergies across the human rights system's multiple layers.

Embedding this discussion in the broader debate about gaps in the implementation of international standards (and the role of the EU in this regard) could lead to longer-term solutions that build on existing national frameworks for human rights protection. This article hopes to contribute to bringing the discussion in this direction.

Suggested Readings and Selected Bibliography:

This article references and put forward suggestions for further reading, linked in the text and ranging from academic research to recent analysis by civil society organizations. In particular, the materials below are recommended for further reading:

On pushbacks, accountability at borders, and developments at the EU level:

J.-Y. CARLIER, F. CRÉPEAU, A. PURKEY, From the 2015 European "Migration Crisis" to the 2018 Global Compact for Migration: A Political Transition Short on Legal Standard, *McGill International Journal of Sustainable Development Law and Policy*, September 2020.

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2. LAND PUSHBACKS AT THE MOROCCAN-SPANISH BORDER: FROM ILLEGAL STATE PRACTICE TO ENDORSEMENT BY THE EUROPEAN COURT OF HUMAN RIGHTS. A TURN OF EVENTS "MADE IN SPAIN"

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A. Introduction

Few jurisprudential U-turns in the history of the European Court of Human Rights ("ECtHR" or "the Court") have triggered as much criticism as the one in the case of *N.D. and N.T. v. Spain.* This case, adjudged by the Chamber (Third Section) in October 2017 and then overruled by the Grand Chamber in February 2020, was the first where the Court was called on to pronounce itself on the "burning issue" of land pushbacks. These are described as "measures taken by States […] which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory […] from where they attempted to cross or crossed an international border".

The case originated from the applications of two Sub-Saharan individuals who claimed to have been subjected to a collective expulsion of aliens such as those prohibited by Article 4 of Protocol No. 4 of the European Convention on Human Rights (ECHR) on 13 August 2014. Indeed, on that day, the applicants tried to gain irregular access to Spain from Morocco by jumping the Melilla fence together with some other 600 individuals. In the process, they were intercepted by Spanish officials, handcuffed and immediately handed over to the Moroccan authorities, who were waiting on the other side of the fence. Neither did they undergo an identification procedure or have the opportunity to put forward any reasons against their expulsion, never mind to be assisted by lawyers and interpreters.

In a first judgment, the Chamber decided in favour of the applicants, unanimously ruling that Spain had violated Article 4 of Protocol No. 4 ECHR. It was an applauded but also an expected judgment. Indeed, the facts of the case were so "straightforward" that it would have been difficult to picture a different outcome. However, the Spanish Government requested a referral to the Grand Chamber under Article 43 ECHR. This is a provision under which a party may, under exceptional circumstances, request a judgment by the Grand Chamber "if [a] case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance". The panel of judges of the ECtHR which was in charge of assessing the requests made by the parties under Article 43 ECHR considered that this was the case, and accepted the request to refer the application to the Grand Chamber. In fact, the later noted that there were "important issues […] at stake […], particularly concerning the interpretation of the scope and requirements of Article 4 of Protocol No. 4 with regard to migrants who attempt to enter a Contracting State in an unauthorised manner by taking advantage of their large numbers". This led the Grand Chamber to hear the case. The outcome was another ruling by unanimity, but surprisingly in the opposite direction: Spain had not violated Article 4 of Protocol No. 4.

This striking U-turn was met with extraordinary "shock" for two reasons. On the one hand, it significantly curtailed the rights of migrants attempting to irregularly enter into the territory of a

Contracting State by creating a brand-new exception to Article 4 of Protocol No. 4. Until then, this provision was supposed to be a procedural guarantee that applied to all non-citizens coming under the jurisdiction of a State, regardless of the circumstances of entry. However, after the Grand Chamber's reversal of *N.D. and N.T.*, the protection of this provision became contingent on three criteria (namely, the conduct of the migrants, the existence of effective channels of legal entry, and the cogent reasons for not using the latter). On the other hand, and most importantly for the purposes of this paper, this U-turn was impossible to predict based on the ECtHR's case-law. Indeed, the problem was not so much that the ECtHR departed from its own (established or expected) jurisprudence, but that it did so in the absence of compelling legal grounds that justified it. In fact, none of the criteria that led to the U-turn in *N.D. and N.T.* existed previously in the ECtHR's jurisprudence (with the exception, perhaps, of the conduct, which had been used before, although only twice and in a totally different way).[1] For this reason, the Grand Chamber was accused of "inventing" new limitations to Article 4 of Protocol No. 4 in order to reach its judgment.

Of course, as I have argued elsewhere, the fact that the ECtHR had to come up with such an awkward argumentation based on new (or repurposed) criteria could imply that "there were not enough legal grounds" to back up that U-turn. The creative effort of the Grand Chamber could only be, hence, interpreted as an attempt to produce a suitable legal reasoning to match a predetermined outcome. This is certainly striking, as I have also explained there, because it would mean that "it was not the legal reasoning which led to the outcome, but the outcome which led to the reasoning". However, the conclusion that the Grand Chamber "invented" such limitations to Article 4 of Protocol No. 4 simply because they have no basis in the previous ECtHR case-law may not be entirely accurate. Indeed, as I contend in this paper, these limitations may not have been invented by the ECtHR, but rather drawn from the law and practice of Spain—interestingly enough, the first State in the Council of Europe to implement land pushbacks, as well as the first to legalise them.

This is a crucial—and problematic—difference. Indeed, it would suggest an atypical "bottom-up" influence from the State level to the ECtHR which would raise, in turn, a series of substantive and methodological issues. As such, it is an avenue worth exploring because it may cast a new light on the case of *N.D. and N.T.* and help fully grasp the real extent of the Grand Chamber's U-turn. For this reason, it is the question that I examine in this paper, which I have divided in three parts: Part I outlines the relevant Spanish background and framework in terms of law and practice; Part II discusses the bottom-up influence of this framework on the Grand Chamber's ruling in N.D. and N.T. from a substantive point of view; Part III approaches this bottom-up influence from a methodological

[1] The first time was in the partial decision as to the admissibility of *Berisha and Haljiti v Former Yugoslav Republic of Macedonia*, a case concerning a married couple from Kosovo who had jointly claimed asylum in Macedonia. In this case, the ECtHR held that "the fact that the national authorities issued a single decision for both the applicants, as spouses, was a consequence of their own conduct", in that they had lodged their asylum claim together. The second time was in *Dritsas and Others v. Italy*. In this case, the applicants had refused to produce their identity cards to the police when requested to do so. Hence, the ECtHR considered that the Government could not be held responsible for the lack of an individual decision. In N.D. and N.T., the Grand Chamber considered that the lack of examination of the personal circumstances of the applicants in the former cases was attributable to the applicants' "lack of active cooperation with the available procedure" (para. 200). According to it, the same principle had to apply to "situations in which the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety" (para. 201). However, as pointed out here, there was a big difference: in the first two cases, the authorities had at least attempted to examine the individuals' personal circumstances; in N.D. and N.T., "the authorities [were] unwilling to carry out an individualised examination as a matter of principle".

point of view. The paper concludes with some final remarks on the implications of this influence from below.

B. Discussion

1. Spanish law and practice

- Background and origins of a dubious State practice

The only land borders of the entire European Union—and, by extension, of the Council of Europe—with the African continent are located in Ceuta and Melilla, two small Spanish cities of around 83,000 inhabitants each located in the north of Morocco. Historically, since the incorporation of these cities to the Spanish Crown around the 16th century, these borders had been totally permeable to transit.[2] However, after the country's accession to the European Union (1986) and to the Schengen area (1991), Spain was "compelled" to seal them against irregular migration. The purpose was not so much to contain the irregular entry of Moroccans, but of nationals from all over Africa—especially Sub-Saharans—who sought to clandestinely reach Spain via Morocco. This resulted in the construction of two fences, one around Ceuta and the other one around Melilla, at the end of the 1990s.

The creation of the fences gave rise to a new "problem"—how to proceed when a migrant was apprehended while trying to jump them. Indeed, the attempts to do so emerged almost simultaneously with the finalisation of the construction works at the end of 1998. As it came to light much later, it seems that it was around 1999 that the Spanish authorities started to informally and immediately push migrants back to Morocco. The practice continued over the years and grew into a widespread, systematic one in 2005 as a response to the first mass, coordinated storms of the fences where several hundred individuals attempted to irregularly overcome them at the same time (examples here, here, and here). However, at that moment, no one really knew what was happening at the fences. Indeed, land pushbacks were a clandestine State practice. This practice is commonly known in Spanish as "devoluciones en caliente" (hot returns), and consists in immediately returning migrants as they attempt to cross, or have just crossed, the border, without even conducting an identification procedure.[3] Over time, as the practice intensified along with the number of irregular arrivals, it became increasingly difficult to conceal it, and civil society started denouncing it. Yet, the Spanish authorities systematically denied any accusation in this regard. Eventually—not before 2014, though—they admitted that pushbacks could be happening, but only in "isolated cases". However, they tried to keep them secret for as long as they could, for example, by denying journalists access to the area where they were taking place.

- Between the grey area, illegality and legalisation

For around 15 years, between 1999 and 2014, pushbacks at the fences were a *de facto* State practice not regulated in Spanish law. The domestic immigration law then in force established three different procedures for the removal of migrants. All of them—and, in particular, one which specifically governed the removal of migrants apprehended while entering into the country irregularly—included, at least, an identification procedure, free legal assistance and the services of an interpreter

[2] With the exception of a 1-metre high wall built in 1971 to contain an outbreak of cholera in Morocco.
[3] Footage showing how these operations are typically carried out can be found here.

whenever needed. The Spanish law did not, hence, foresee the possibility of informally removing individuals without any procedural guarantee, e.g., by opening the nearest gate of the fence in the case of Ceuta and Melilla. However, it did not rule it out explicitly either. Therefore, it could be argued that the practice—at the very best—fell within a grey legal area, at least initially.[4]

In fact, until 2009, the practice of the Spanish authorities was not contrary to Protocol No. 4 ECHR either—not because it did not violate the prohibition on the collective expulsion of aliens (which it presumably did), but because Spain was not a party to this instrument. In fact, Spain signed the Protocol in 1978, shortly after the country's accession to both the Council of Europe and the ECHR in 1977, but held off on its ratification for 31 years. Therefore, for a very long time, Spain could not have even been brought before the ECtHR for a violation of Article 4 even if it had conducted a practice clearly contrary to it. However, the situation completely changed in 2009, when Spain ratified Protocol No. 4 but failed to discontinue the practice. On the contrary, the storms at the fences became increasingly frequent and violent over the following years, and so did the response of the Spanish officials when repelling the illegal entries. Still, the practice remained clandestine and denied by the authorities—with the difference that it was arguably no longer in a legal grey area, if it ever was, but clearly illegal.

From the above, it appears that Spain was able to implement pushbacks in a clandestine manner for at least 15 years. However, some tragic facts that took place on 6 February 2014 unexpectedly changed the course of events. That morning, a group of around 90 individuals attempted to cross from Morocco to Ceuta, not by jumping the fence, but by swimming alongside it.[5] The Spanish authorities tried to discourage their arrival by using abundant antiriot material. The operation concluded with 15 of the migrants dead and with the 23 survivors who arrived on the Spanish side of the beach being *de facto* and immediately returned to the Moroccan officers, from whom "they had escaped" and who were "claiming them back", as stated by the then Spanish Minister of Interior. These events, known as the tragedy of "El Tarajal", attracted so much public attention that they made it impossible for the Spanish Executive to keep denying the practice. This prompted an unexpected reaction from the Spanish Executive, who, instead of discontinuing it, decided to undertake a frenetic "headlong rush" which led them to (1) justify it, (2) "own" it publically, and (3) legalise it.

- *Analysis of the Spanish law on pushbacks*

Pushbacks were legalised roughly one year later, in March 2015, under the name of "rejections at the border". They entered the Spanish legal order through a provision consisting in three paragraphs, which are worth examining. The first one read as follows:

> "1. [a]liens attempting to penetrate the border containment structures in order to cross the border unlawfully, and whose presence is detected within the territorial demarcation lines of Ceuta or Melilla, may be returned in order to prevent their unlawful entry into Spain." [6]

This paragraph said, amongst others, two things. The first is that the practice would be geographically restricted to the fences of Ceuta and Melilla—as if that made it less illegal. Indeed, if Article 4 of

[4] Other authors argue, in the contrary, that the practice was "radically illegal" from the beginning, insofar as it did not correspond to any of the procedures established in domestic law. For more information, please see ibid. pp. 5-6 and 28-30.
[5] This is easier to understand by looking at this map.
[6] Translation into English taken from the judgment of *N.D. and N.T.*

Protocol No. 4 was an "absolute" prohibition, as stated by the Grand Chamber in the decision as to the admissibility of *Slivenko and Others v. Latvia* in 2002,[7] such an exception would not have been allowed. In fact, any exception to Article 4 of Protocol No. 4 would have been, by definition, contrary to the ECHR, insofar as absolute rights (be they procedural or substantive) admit no limitation or balancing whatsoever against other rights or interests. This would apply even if it was a restricted or occasional exception—such as limiting it to the bare 20 km of the land border of Ceuta and Melilla—and *justified*—e.g., based on the "geographical singularity" of these cities. It is true that the ECtHR has not been too revealing regarding this alleged "absolute character" ever since and that, in fact, the subsequent treatment of Article 4 of Protocol No. 4 by the ECtHR (*inter alia*, in *N.D. and N.T.)* may suggest the contrary. However, it is out of the scope of this paper to examine this question in further detail. Suffice it to say, for the purposes of this analysis, that the Spanish law was creating an exception initially not foreseen in Article 4 of Protocol No. 4. The second thing is that the rejections at the border would target those apprehended while jumping the fences to cross the border irregularly. It must be said, however, that former versions of this paragraph that were proposed before the Spanish Congress were more explicit (or, perhaps, more specific). Indeed, they referred to "the unauthorised crossing of the border in a clandestine, violent or flagrant manner" (first version) and "as a group" (second version).

The mere intent of legalising this practice—since the very moment in which the first version was tabled in late 2014—triggered an extraordinary wave of criticism coming from all sectors of society, including 130 NGOs, the Spanish Ombudswoman, and the Catholic Church, as well as the European Parliament, the UNHCR, and the Council of Europe. None of this criticism seemed to discourage the Spanish Executive from pursuing its roadmap towards the legalisation of pushbacks. However, the social and institutional pressure triggered the inclusion of two additional paragraphs after this one, not initially foreseen, intended as human rights safeguards. The first read:

> "2. [t]heir return shall in all cases be carried out in compliance with the international rules on human rights and international protection recognised by Spain."

At first sight, this addendum created high expectations (see some positive reactions here and here). Nonetheless, it sufficed to reflect on its content to realise that it was "contradictory" by itself. Indeed, the provision at hand was, arguably, legalising a practice inherently contrary to Article 4 of Protocol No. 4 (at least, as interpreted by the ECtHR at that moment). Moreover, just like in any collective expulsion, there was no way to know in advance whether, in practice, the prohibition of *non-refoulment* was being violated too during a rejection at the border.[8] Therefore, the guarantee introduced in this new paragraph was, to say the least, quite a challenging one to comply with, especially considering that no guidance was provided on how to do it—assuming it was possible at all. Indeed, for the practice to be carried out in compliance with international rules, it should arguably involve, amongst others, an identification procedure, legal assistance and access to an interpreter, as requested by the UNHCR. In other words, to be compliant with international rules, *rejections at*

[7] In this case, the ECtHR said that it had to examine whether the removal of the applicants from Latvia "was compatible with the absolute prohibitions stipulated by Articles 3 and 4 of Protocol No. 4 or whether it amounted to an unjustified interference with their rights under Article 8 of the Convention" (para. 72).

[8] From a legal point of view, however, it would be necessary to invoke Article 3 ECHR before the ECtHR for the latter to establish a violation of the prohibition of non-refoulment.

the border should not be rejections at the border.[9] Regardless, the following paragraph further specified that:

> "3. [a]pplications for international protection shall be submitted in the places provided for that purpose at the border crossings; the procedure shall conform to the standards laid down concerning international protection."

As such, this last paragraph emphasised the possibility of seeking asylum at the border. This provision was accompanied, in practice, by the opening of two border asylum offices, one in Ceuta and one in Melilla,[10] both in March 2015. By doing this, the Spanish Government reportedly wished to highlight Spain's commitment to migrants' human rights and, in particular, to asylum. This provision did not mention, however, that the Ceuta office would barely be operative after its inauguration,[11] and that the Melilla one—as revealed during the hearing of *N.D. and N.T.*—would not be accessible in practice for Sub-Saharan migrants. Still, even assuming all migrants (including Sub-Saharans) had a genuine possibility of seeking asylum at these border offices, that would still not justify—or make up for—an earlier collective expulsion carried out elsewhere at the border.

2. Bottom-up influence (substantive level)

- Parallels between the Spanish law and N.D. and N.T. v. Spain

If we take a closer look at the provision above—which, as stated earlier, was introduced in Spanish law in 2015—and we compare it with the Grand Chamber's assessment in N.D. and N.T. that came out 5 years later, it is possible to draw some parallels between both. In fact, it is possible to identify certain phrases originally used in Spanish law being reproduced, almost word by word, by the ECtHR. Indeed, paragraph 1 of the Spanish law, which reads:

> "1. [a]liens attempting to penetrate the border containment structures **in order to cross the border unlawfully**, and whose presence is detected within the territorial demarcation lines of Ceuta or Melilla, may be returned in order to prevent their unlawful entry into Spain" (emphasis added) [prior versions: **"the unauthorised crossing of the border in a clandestine, violent or flagrant manner"** and **"as a group"** (emphasis added)],

translated into the Court's assessment in N.D. and N.T. as:

> "201. [i]n the Court's view, the same principle must also apply to situations in which **the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force**, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety […]" (emphasis added).

On the other hand, paragraph 3 of the Spanish law, which establishes that:

[9] In fact, they should be like the procedure already existing in Spanish law governing the removal of migrants apprehended while entering irregularly into the country. See here (p. 164).
[10] In this case, an asylum registration office had already been set up before the creation of the actual opening of the new office in 2015. See here (p. 199).
[11] With the exception of one occasion in August 2019, when around 150 individuals managed to file their asylum requests. After this, the office closed again and did not reopen until one year later, in August 2020. However, the Ceuta office, as opposed to the one in Melilla, has not received almost any application ever since.

> "3. **[a]pplications for international protection shall be submitted in the places provided for that purpose at the border crossings**; the procedure shall conform to the standards laid down concerning international protection" (emphasis added),

translated into the necessity for the ECtHR to look at whether the Contracting State had provided channels of legal entry and, as chance would have it, border procedures:

> "201. […] In this context, however, […] **the Court will, importantly, take account of whether** […] **the respondent State provided genuine and effective access to means of legal entry, in particular border procedures** […]" (emphasis added).

All the above allowed the Grand Chamber to conclude, in paragraph 231 of the judgment, that "it was in fact the applicants who placed themselves in jeopardy by participating in the storming of the Melilla border fences on 13 August 2014, taking advantage of the group's large numbers and using force" (the culpable conduct), that "[t]hey did not make use of the existing legal procedures for gaining lawful entry to Spanish territory" (the existence of genuine channels of legal entry) and that, as a consequence, "there ha[d] been no violation of Article 4 of Protocol No. 4 ECHR".

Last but not least, the ECtHR arguably relied on the disclaimer present in paragraph 2 of the Spanish law:

> "2. [t]heir return shall in all cases be carried out **in compliance with the international rules on human rights and international protection recognised by Spain**" (emphasis added)

and turned it into a similar—and, arguably, equally evasive—one:

> "232. [h]owever, it should be specified that **this finding does not call into question** […] **the obligation** […] **for the Contracting States to protect their borders** […] **in a manner which complies with the Convention guarantees, and in particular with the obligation of *non-refoulement*** […]" (emphasis added).

- Substantive issues with regards to the ECHR

In light of the above, it seems difficult to maintain that the ECtHR "invented" in the abstract the new limitations to Article 4 of Protocol No. 4—namely, the culpable conduct and the existence of genuine channels of legal entry—as well as the obligation to nonetheless comply with the ECHR, in particular with Article 3. Indeed, it appears that these requirements were drawn, to a great extent, from Spanish law and practice. This is certainly striking because it means that the first State of the Council of Europe to implement and legalise land pushbacks was also the one which, with a domestic framework clearly contrary to Article 4 of Protocol No. 4, convinced the ECtHR to drastically change its approach towards this provision. However, this is all the more puzzling from a substantive point of view. Indeed, the bottom-up race from the Spanish domestic framework to the ECtHR judgment in *N.D. and N.T.* may raise substantive issues regarding, at least, two ECHR articles.

The first one is Article 1 ECHR. This article dictates, amongst other things, that the State in question must make sure that "its legislation is consistent with the Convention". Of course, this implies that national laws should evolve in accordance with the ECHR and the ECtHR jurisprudence, and not the other way round. In this case, however, the opposite occurred. This is certainly something infrequent—if it ever happened at all—and all the more surprising coming from Spain. Indeed, in

Spain, the ECHR and its Protocols are hierarchically superior to domestic law, falling only below the Spanish Constitution. This means, basically, that no Spanish law can be contrary to the ECHR or its Protocols, as interpreted by the ECtHR. As such, whenever the ECtHR has found in the past that Spanish law was contrary to the ECHR, Spain has amended the offending legislation in order to bring it into conformity with the ECHR. Indeed, Spain has even modified its domestic laws following ECtHR cases concerning other States.[12]

However, when it came to land pushbacks, the situation was totally different. Indeed, Spain did not, in the first place, bring its State practice in conformity with Protocol No. 4 (i.e., it did not discontinue the hot returns at the Ceuta and Melilla borders) before or upon ratification in 2009. What is more, it created law arguably contrary to the ECHR by legalising the practice in 2015, once it was already a party to Protocol No. 4. However, the most striking was when, at a later stage, the Grand Chamber came to hear the case of *N.D. and N.T*. and did not compel Spain to align its laws with the ECHR. On the contrary, it created jurisprudence *consistent with Spanish law*.

In fact, by doing so, the ECtHR carved an exception to the guarantees provided by Article 4 of Protocol No. 4 under certain circumstances. As such, the U-turn in *N.D. and N.T.* may also be problematic with regard to Article 53 ECHR. This provision, intended as a "safeguard for existing human rights", is supposed to ensure that the ECHR is not used as a pretext to lower the level of protection recognised elsewhere (e.g., in the domestic laws of a State or in another international instrument). At the same time, the level of protection guaranteed by the ECHR is supposed to be the "minimum standard" across States. As such, it would arguably be not possible for States to go below it—let alone for the ECtHR. However, in this case, not only did the ECtHR not require Spain to bring up its protection level—which was arguably below what was required until then—but actually lowered the ECHR protection standard, bringing it down to the State level.[13]

3. Bottom-up influence (methodological level)

Let us analyse now whether the bottom-up influence of Spain on *N.D. and N.T*. is also problematic from a legal methodology point of view. In order to do that, we will focus on the two main contributions that this U-turn has arguably made to the ECtHR jurisprudence—i.e., creating an exception to Article 4 of Protocol No. 4 and influencing the later jurisprudence around this provision—and try to make sense out of them in light of two of the main interpretative tools of the ECtHR: the margin of appreciation doctrine and the evolutive interpretation.

- Margin of appreciation

The first contribution of this U-turn, the creation of an exception to Article 4 of Protocol No. 4, invites to examine it by reference to the doctrine of the margin of appreciation (see references in this regard here and here). Indeed, this is a flexible doctrine, closely linked to the principle of subsidiarity, that the ECtHR often uses to justify "restrictions on rights".[14] Essentially, this doctrine rests upon the

[12] For a more comprehensive view of Spain's reception of the ECHR system, and for concrete examples where Spain has amended its laws following the ECtHR jurisprudence, see this chapter.
[13] However, this judgment cannot be regarded as endorsing the practice of hot returns, which "was and remains illegal", no longer under Article 4 of Protocol No. 4, but under Article 3 ECHR.
[14] Now, the margin of appreciation doctrine is explicitly mentioned in the ECHR, following the reform of Protocol No. 15.

presumption that States are better placed than the ECtHR to assess their own domestic realities and to strike a balance amongst ECHR rights, or between ECHR rights and other interests. In this case, it could be argued that the ECtHR might have relied on interests such as border management or State security to leave the case up to Spain's margin of appreciation.[15] The Grand Chamber did not make any explicit mention of this doctrine in its ruling. However, as pointed out here, the Grand Chamber seemed to "blindly" apply it when accepting the Spanish Government's argument that the applicants had "genuine and effective access to Spanish territory" and "to Spanish embassies and consulates where, under Spanish law, anyone could submit a claim for international protection" (*N.D. and N.T.,* para. 222), in spite of strong evidence on the contrary. This argument was, in fact, what allowed the Grand Chamber to create the exception to Article 4 of Protocol No. 4, and to rule that no violation had taken place. However, there are arguably a couple of reasons why the exception to Article 4 of Protocol No. 4 could not easily be framed in the doctrine of margin of appreciation.

The first reason is the way in which the doctrine would have been applied. Indeed, when presented with a margin of appreciation case, the ECtHR *usually* proceeds as follows:

(1) it establishes the (personal and substantive) scope of the rights affected,

(2) it analyses whether there has been an "interference" in the former, and

(3) it assesses the necessity or reasonableness of such interference through the proportionality test.

It is only in this third step—and not before—that the margin of appreciation doctrine often comes into play,[16] in order to establish whether the interference in the scope of the right was justified or not. As such, the scope of the rights itself "remains unaffected by the doctrine". However, this is not what happened in *N.D. and N.T.* Indeed, in this case, the Grand Chamber created an exception to Article 4 of Protocol No. 4 straight away in the first step and did not proceed further. In this way, the ECtHR did not find any "justified interference" in Article 4 of Protocol No. 4, first and foremost, because it found no interference at all.

The second reason is related to the outreach of *N.D. and N.T.* Certainly, it could be argued that the repercussions of this judgment were unusually strong for a margin of appreciation case. Indeed, unlike in regular margin of appreciation cases, the ECtHR did not limit itself to rule in favour of the State by recognising it did not exceed its margin of appreciation when limiting a right on a particular instance. Instead, the ECtHR bought Spain's arguments, turned them into sort of a protocol (the "culpable conduct test") and applied it to subsequent Article 4 of Protocol No. 4 cases originating in other States (see, e.g., here, here, and here). These reasons arguably suffice to conclude that, if the U-turn in *N.D. and N.T.* were to be regarded as an exercise of the margin of appreciation doctrine, it could only be considered, at most, as a *sui generis* one.

[15] Indeed, as pointed out here, the Italian Government, as a third-party intervening in *N.D. and N.T.,* implicitly pointed towards to Spain's margin of appreciation when situating the case "within the sphere of the security policy and sovereignty of States" (*N.D. and N.T.*, para. 151).

[16] Although not always. See, e.g., the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (para. 67), where the Court used the margin of appreciation doctrine to determine the extent of rights, as distinct from assessing the proportionality of any infringement.

- Evolutive interpretation

The second contribution of *N.D. and N.T*. to the ECtHR jurisprudence was the evolution—understood simply as a *change*—of the interpretation of Article 4 of Protocol No. 4. Hence, it could be analysed, in principle, through the lens of the evolutive interpretation. This approach is based on the idea that the ECHR is a "living instrument" and allows the ECtHR to adapt it to "contemporary standards". Indeed, there are "two primary ways" in which it may be used, and the jurisprudential U-turn in N.D. and N.T. could arguably fit in both.

The first would be to amend the meaning initially given to a provision by its drafters or the ECtHR. In this sense, it could be considered that Article 4 of Protocol No. 4 was drafted and formerly interpreted as including no exceptions, but that the ECtHR decided to attach a series of limitations to it at some point in view of the "new challenges" faced by States when it comes to migration. The second would consist in adapting a provision to circumstances that did not exist or could not be foreseen at the time of drafting, and for which there is no "settled understanding". In this sense, it could be argued that *N.D. and N.T*. was the first case where the ECtHR dealt with land pushbacks—a phenomenon which certainly did not exist when the provision was adopted in 1963—and that, hence, it needed to adapt Article 4 of Protocol No. 4 to new scenarios. It would not be the first time, after all, that the ECtHR used the evolutive interpretation to adapt Article 4 of Protocol No. 4 to contemporary situations.[17] Actually, the procedural guarantees that the ECtHR deduces from Article 4 of Protocol No. 4 are themselves the result of an evolutive interpretation.

However, there is a major objection that could be made to the use of the evolutive interpretation in *N.D. and N.T.* Indeed, this approach has normally been used in a progressive way, i.e., to expand rights. In the specific case of Article 4 of Protocol No. 4, the evolutive interpretation had allowed the ECtHR to guarantee effective access to the asylum procedure and, thus, to condemn pushbacks in the past. However, in this case, it served rather the contrary purpose, since it created a "default" exception to Article 4 of Protocol No. 4. This is an "extremely rare" use of the evolutive interpretation, and could even be "contrary to [the] object and purpose" of the ECHR. However, technically, there is nothing that prevents the ECtHR from "restricting the accepted scope of a particular guarantee". Therefore, the jurisprudential U-turn in *N.D. and N.T.* could, perhaps, be attributed to an unusual exercise of the evolutive interpretation.

C. Conclusion

In any event, what the Grand Chamber did in *N.D. and N.T.* was to place *certain* irregular migrants—those who entered irregularly, "especially […] by taking advantage of their large numbers and using force"—outside the protection of Article 4 of Protocol No. 4. Ironically, this is what Spain had been doing since the very moment it ratified Protocol No. 4, and the reason why it was brought before the ECtHR. Yet, the Grand Chamber not only failed to condemn Spain, but turned this exclusion into the new ECHR protection standard. From our analysis, it seems safe to conclude that it did so by importing the Spanish Government's submissions—which derived, in turn, from two decades of

[17] An example of this can be found in *Hirsi Jamaa and Others v. Italy*. Here, the Grand Chamber expanded the meaning of "expulsion" so as to include "non-admission" because if "Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory […], a significant component of contemporary migratory patterns would not fall within the ambit of that provision" and, therefore, it would be "ineffective in practice with regard to such situations, which, however, are on the increase" (para. 177). On the evolution of the ECtHR jurisprudence, see, amongst others, here.

Spanish law and practice originally contrary to the ECHR—into its own jurisprudence. Hence, what has been branded as the "N.D. and N.T. exception" appears to be the result of an obvious bottom-up influence of Spain on the ECtHR. Now, whether the ECtHR accepted that influence because it genuinely believed Spain's legal reasoning was sound or because of political pressure from the States, only the Grand Chamber knows—but that is a topic for another discussion.

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3. THE LEGAL PRODUCTION OF THE MARGIN: MIGRANTS BETWEEN BORDER AND TERRITORY

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A. Introduction

Since 2015, hundreds of migrants—men, women, and children—attempt to cross the Alpine border from Italy to France every week. They are pushed back to Italy by French border guards in disregard for fundamental rights enshrined in domestic, European and international law. This occurs even though the French-Italian border is internal to the Schengen area of free movement, and should not be subject to systematic migration controls. In European Union law (EU law), articles 1 and 22 of the Schengen Borders Code (hereinafter, SBC) provide for the absence of controls at internal borders – i.e., between the EU Member States – and lay down rules for controlling external borders – i.e., between an EU Member State and a third country. Nevertheless, first in the framework of the COP21 and then after the Paris terrorist attacks on 13 November 2015, France activated provisions contained in the SBC that allow for the "exceptional" and "temporary" reinstatement of controls at its internal borders (with Italy, Spain, Belgium, Germany, Luxembourg and Switzerland). Six years later, France's internal borders were still subject to this derogation from the Schengen rule. The subsequent governments indeed renewed the measure every six months on the variable grounds of terrorist threats, the COVID-19 pandemic and, occasionally, "secondary movements" and the "situation at external borders". Even in a situation of internal borders subject to border controls, migrants are entitled to their fundamental rights, including asylum, the right to family life and the right not to be arbitrarily deprived of their freedom of movement. Fieldwork carried out at the French-Italian border in the Briançon area shows that these rights are quasi-systematically infringed upon by French border guards. The police tend to pushback all third-country nationals (hereinafter, TCNs) intercepted in the border area regardless of their individual situation. Migrants scarcely have the chance to ask for France's protection. This observation is sustained by the work of international, national and local NGOs which have been monitoring the border since 2015 (such as Amnesty International, Human Rights Watch, ECRE, Anafé, Médecins du Monde, Tous Migrants, Roya Citoyenne) as well as reports from independent public institutions (*Commission nationale des droits de l'homme*, *Contrôleur général des lieux de privation de liberté*) and the Council of Europe. Administrative courts have equally condemned non-admission procedures analogue to pushbacks in individual cases (see, for instance, *Conseil d'État*, 8 July 2020, N°440756; Nice administrative court, 28 January 2018, N°1800195; 25 April 2022, N°2003638; 10 June 2022, N°2100537; 30 June 2022, N°2004754; Marseille administrative court, 8 July 2021, N°1809222).

This situation gave rise to an ongoing sociolegal controversy opposing public authorities and civil society around the legality of internal controls and the scope of migrant rights at the border. Consequently, this border became a laboratory of the law on internal border controls where different actors seek to assert their interpretation of French and EU law on the matter. One of the

characteristics of this newly installed border regime is that public authorities continuously justify, through a legal discourse, the border police practices disregarding migrant rights. A rather simple question arises from this: how can a legal discourse systematically support the deprivation of migrant rights that are embedded in international, European and French law? This article offers a conceptual exploration of the two legal categories that are at the heart of this issue: border and territory. Indeed, throughout the unfolding controversy, the problem of the applicable legal regime has crystalized around the ambiguous relationship between these two categories, and more specifically, the question of their delimitation: when and where does one end and the other begin? This ambiguity prompts us to think about the *margin* that connect these two notions.

The methodology of the research from which this article is derived combines legal ethnography, doctrinal analysis and legal theory. Firstly, legal ethnography consists of observing the manifestations of law in the field from a participatory position within migrant rights associations. This means that observations were not only made from an external point of view, but also from an internal point of view. The researcher himself practiced law at the border and provided legal counsel to NGOs and migrants. He was therefore confronted with the functioning of the law, its discourses and its effects. Legal ethnography unveils the interpretative indeterminacies that constitute the controversy and helps understand how they emerge and what they produce on the ground. Secondly, doctrinal analysis, which is more common for jurists, gives an account of the legal rationality at work and untangles the indeterminacies. It analyzes the controversy by grasping the technicality of the law and by interpreting the norms based on legal principles and logic. Finally, legal theory aims at identifying or constructing concepts that allow us to understand what is at stake in the interpretative struggles. It articulates empirical data, corresponding socio-legal knowledge, and doctrinal knowledge to elaborate an interdisciplinary theory of law on the politics of exclusion at borders. The central concept developed here is that of "legal margin" to shed light on the relationship between border and territory. After acknowledging the complexities of the border and the need for a supplemental concept (B.1.), the article examines two ways in which this unfolds on the ground (B.2.).

B. Discussion: Between Border and Territory

1. The Complexities of the Border

a. The Border in Law and its Limits

The question of the regime applicable to border controls is linked to the legal understanding of the territory. Having a defined territory is one of the four criteria of statehood in international law. Because it conditions State sovereignty, it is subsequently defined as the space within which the legal system of one State applies to the detriment of another. The territory is therefore often a category of applicability of the law, for instance, through the territorial competence of an institution or the principle of territoriality as a criterion for the implementation of a legal regime. This functionality makes it imperative for lawyers to be able to strictly define the territory's boundaries to determine what legal regime – and, internationally, what domestic legal system – applies in a given area. This is why international law consistently defines the border – or boundary – as a simple geopolitical line dividing State territories and sovereignties. In this regard, territorial disputes in front of the

International Court of Justice often focus on the delimitation of boundaries between two States. This leads the law to seize the question of the border and the territory through a binary perspective. Since the national territory is determined by a line marking the limit of State sovereignty, someone is either inside or outside of territorial space. Clearly and strictly delimiting State territories with an imaginary line is the primary function of the legal notion of the border.

In contrast, other social sciences – specifically in the field of critical border studies – tend to comprehend the border as a space, often thick and dynamic. Such works highlight that rather than fixed lines, borders are akin to "lines in the sand": they are represented according to a linear imaginary, but the line is constantly shifting. Borders are thus depicted as adaptive. For instance, Tugba Basaran has shown that the borders of policing tend to stretch out while the borders of rights tend to shrink. As a legal scholar, Marie-Laure Basilien-Gainche argues that migrants themselves eventually embody the border. Indeed, the technologization of immigration control and the multiplicity and variability of legal categories set the limits between inclusion and exclusion on the *person* rather than on the borderline. Ultimately, far from the acceptance of the geopolitical line, several social scientists refer to "thickness" to describe the border as a space that is wide and dense. These ambiguities of the border are also reflected in legal terms in the field. Firstly, from a geographical point of view, in the mountains, it is not always obvious whether one is in France or in Italy. The law must deal with this uncertainty. Secondly, the mere presence of the border line has consequences on the way the law is applied. For example, humanitarian aid to foreigners is allowed in France as long as it is not aid to cross the border. In theory, citizens can provide such assistance to migrants as long as they are in France. However, at the French-Italian border, any rescue operation is carried out near the borderline. In the framework of criminal proceedings, the doubt remains: when French citizens are stopped by the French police for helping migrants, the criminal justice system will ask, *inter alia*, whether this operation started in Italy – it would be illegal – or in France – it would be legal. During the investigation and the subsequent trial, the prosecutor will support the possibility of a border crossing by elaborating a "set of clues" (*faisceau d'indices*): the location of the arrest, which, inevitably will be close to the borderline; the potential contact that the defendant has had with Italians (such as cellphone calls); prior trips to Italy; the fact that the defendant's cellphone activated an Italian cell tower, etc. In other words, the set of clues that allow authorities to prosecute migrant rights activists and humanitarian volunteers is deeply intertwined with the mode of existence of any border resident. The border produces ambiguity, which in this case, translates into the *potentiality* that the help started in Italy. In practice, this works against any humanitarian aid operation, even those limited to the French territory. These complexities invite the legal scholar to explore what transpires between the border and the territory. The notion of "margin" can help to think about these forms of "in-between" and grasp how they play out in terms of legal operations.

b. Thinking Beyond the Line: The Margin

Among the several meanings covered by the notion of margin, at least two can be productive for legal theory. First, starting from the mid to late 14th century, and echoing its Latin origin *margo*, margin refers to a *space* established by the edges of an entity. While the contemporary border marks the strict separation of the inside and the outside, in this case by a geopolitical line, the margin designates a space which is located inside but characterized by its contiguity with the outside. It is

thus relative to both the inside which contains it and the outside which it integrates in a referential way. The use made of it as a printing technique perfectly illustrates this quality: the margins of this text are indeed part of the page, but they signal its borders and thus propose a zone that visually marks the distinction between the text of this page and its term. The second meaning that margin takes on from the 18th century is that of latitude available within certain limits. This is exemplified in the expressions "to have a margin of error" and "margin of appreciation", which illustrate a relatively plastic dimension. This second meaning is instrumental to question the possible liberties taken by certain legal actors when they act and interpret the law in this space adjacent to the border. It should be noted that the margin is a challenging notion for legal thought because the borderline is essential to determine which State has jurisdiction over a piece of land. But by conceptualizing the margin, we can maintain the crucial role that boundaries take in international law, while thinking about the junction of the inside and outside of the legal system and questioning what nests in-between.

2. The Manifestation of the Margin

a. The Terms of the Controversy at the French-Italian Border

In French immigration law, hints of a legal in-between first arise in the regime of external border controls which is based on the fiction that individuals presenting themselves at the border have not yet entered France, even if they are physically on French territory. This is what we have called a "fiction of aterritoriality" which founds the detention regime at France's external borders, namely waiting zones. Foreigners held in a waiting zone are considered not to have entered France as a result of being notified a refusal of entry during the (non-)admission procedure. This fiction marks the distinction between two regimes that capture the potential irregular standing, in the broad sense, of a foreigner in France: the regime of stay and the regime of entry (or admission). Regarding irregularity, the first regime involves return decisions and administrative detention centers, while the second regime includes refusals of entry and waiting zones. If, in any case, the legal framing of irregularity always limits the freedoms and the rights of migrants, it should be underlined that the regime of entry is more limited than the regime of stay as regards fundamental rights. To give just one example, the appeal against a return decision is suspensive, whereas the appeal against a refusal of entry is not. In other words, foreigners who are refused admission to the territory can be effectively deported within a very short time, or even immediately. A request for asylum can delay or prevent deportation in some cases.

The temporary reintroduction of internal border controls raises many questions about the relevant procedure. EU law makes a strict distinction between external and internal borders. This is reflected by the Court of Justice of the European Union (hereinafter, CJEU) in a judgement of 19 March 2019 in which it refused to equate the two notions, even in the event of the reintroduction of controls (Arib, § 62). It is therefore disputable that the French admission regime, intended for external borders, immediately applies to internal borders when controls are re-established. What is the legal status of an internal border and how is it delimited? This brings us back to the legal understanding of territory: do interceptions of migrants on the French side of the boundary take place on French territory or "at its border"? Since the border is legally defined as a line, or even circumscribed for controls at crossing points, it should in essence be extremely limited – in the case

of crossing points – or even fleeting – in the case of a line. What is at stake is the determination of the applicable legal regime, between stay and admission, with all the consequences that this entails. Among these, the fate reserved for the fiction of aterritoriality is at the forefront. Indeed, the way in which the border area is apprehended by the law will determine the regime for assessing the regularity or irregularity of third-country nationals arriving in France from Italy by land. The choices made will have implications, as we shall see, on the establishment of this marginal space that characterizes border contiguity.

b. The Edge: A Revamped Fiction of Aterritoriality

At first, following the reintroduction of border controls in November 2015, pushbacks were justified – but not legally grounded – by the French state of emergency (2015-2017). The Nice administrative court occasionally sanctioned these practices when they concerned minors. Concomitantly, public authorities decided to almost systematically refuse entry to third-country nationals arriving from Italy, thus favoring the admission regime over the regime of stay. The refusals of entry were initially issued in an irregular manner, as French law only provided for them in case of *external* border crossings. By an Act of 10 September 2018, the government legalized this procedure by inserting article L. 213-3-1 in the Code for Entry and Stay of Foreigners and the Right to Asylum (hereinafter, CESEDA; codification prior to 1 May 2021). This article provided that, in the event of the reinstatement of controls, a decision to refuse entry may be delivered to a TCN who has crossed an internal land border and has been "controlled in an area between that border and a line drawn ten kilometers away." This provision carries out two operations. The first de facto assimilates controlled internal borders to external borders by applying the same deportation procedure. Correspondingly, the fiction of aterritoriality started to apply to the French-Italian border. TCNs arriving in France by this route are since considered not to have entered the national territory. The second operation extends this regime, and therefore the fiction, to an entire area constituted by a ten-kilometer strip along the borderline. The fiction of aterritoriality is thus renewed, because it applies, in an unprecedented way, to a substantial piece of the territory rather than to a crossing point as is the case for external borders. This virtually materializes the notion of legal margin, a space within the national territory that extend the exclusionary function of the border while still being distinguished from it.

The application at internal borders of the regime of admission through the procedure of refusal of entry was called into question by the French *Conseil d'État* (Council of State) in a decision of 27 November 2020. Several associations had produced an appeal for excess of power aimed at having the implementing decree of the September 2018 Act annulled. Among the contentious provisions was the insertion of article R. 213-1-1 emanating from article L. 213-3-1. Building on the CJEU *Arib* decision, the Council of State determined that the issuance of refusals of entry at internal borders is not in compliance with EU law. Indeed, as an internal border cannot be equated with an external border, the provisions of the "return" directive (regime of stay) must be applied to France's internal border – or more precisely, to the territory nearing the borderline. This decision directly challenges article L. 213-3-1 by invalidating the corresponding provision of the implementing decree. In doing so, it contradicts the two operations carried out by the 2018 Act: the application of the

admission regime at internal borders and, at the same time, the extension of this regime to a ten-kilometer strip.

Despite the Council of State ruling, observations made in the field at the French-Italian border and the work of the associations show that controls continued to result in the daily issuance of entry refusals after 27 November 2020. In addition, a new type of decision has been introduced into administrative practice: the obligation to leave French territory (*obligation de quitter le territoire français*, hereinafter, OQTF). The OQTF stems from the regime of stay as it transposes the "return" directive into French law. As a result, the prefecture and the border guards apply two contradictory regimes to identical situations, the crossing of an internal border by a third-country national. The refusal of entry and the OQTF are mutually exclusive, as the former can only be issued to an individual who is not considered to have entered France, while the latter applies to someone who is illegally residing on French territory. This contradiction echoes the ambiguities of the Council of State itself, which has recognized, in other decisions, that people stopped at the French-Italian border cannot be considered as being on the territory (5 July 2017, *Anafé et autres*, N° 411575, §6), or that the issuance of a refusal of entry to a TCN who present themselves at the border is not manifestly incompatible with EU law (23 April 2021, N°450879, §18-19). In future works, a detailed examination of the ambiguities in the Council of State's interpretations of this issue must be carried out. For the time being, it should be noted that these legal developments in the jurisprudence and administrative practice maintain a considerable degree of indeterminacy, since the oscillation between the two regimes still characterizes the law of internal border control, more than six years after the temporary reinstatement of controls.

These indeterminacies are not trivial. On the contrary, it is possible to argue that they are even structural vis-à-vis the constitution of the margin. They play out in such a way that they enable state actors to arrange their practice in an innovative manner.

c. A Leeway: Uncertain Legal Qualifications

This leads us to the second meaning of the notion of margin, which characterizes the latitude available between certain limits. On the border between France and Italy, this latitude is linked to the maintenance of legal indeterminacies. In order to illustrate this mechanism, we will take the case of migrant detention on the premises of the border police of Menton Pont-Saint-Louis and Montgenèvre.

In French law, detention is strictly regulated, as it constitutes, in itself, a serious restriction on many fundamental freedoms. With regards to immigration law, the structure of the CESEDA distinguishes between the detention associated with illegal stay (administrative detention centers) and that associated with non-admission (waiting zones). This goes back to the distinction between the regime of stay and the regime of entry. The procedural and substantive rules and guarantees differ from one regime to the other. Since the reintroduction of controls, the French administrative authority has not placed third-country nationals in administrative detention centers. It has given preference to the admission regime. However, waiting zones have not been used as a legal framework either, although they are linked to the admission regime. The waiting zone, much like the refusal of entry, was only intended for the crossing of external borders by rail, sea or air. Thus, the government and, in some respects, the legislator supported the application of the regime of refusal

of entry at internal borders without matching it with the associated regime of detention: that of the waiting zone. In the law, this was reflected in the adoption of article L. 213-3-1 which provides for the issuance of entry refusals at internal borders, but not for the establishment of waiting zones. In practice, however, the control procedure does incorporate detainment of TCNs within the premises of the border police.

The legal qualification of these proceedings remains unresolved. Between 2017 and 2019, the State has been qualifying these spaces as a "provisional detention zone" (*zone de rétention provisoire*), a *sui generis* category that does not have any legal basis. On 5 July 2017, the Council of State considered that third-country nationals could be detained for a maximum of four hours while their non-admission was being processed (*Anafé et autres*, §6). NGOs noted that detainees were often being kept for more than four hours and demanded the closure of these spaces. Secondly, they asked to be able to access them in the same way they can access administrative detention centers and waiting zones. In response, since 2019, the French government began to use an alternative qualification, that of a "sheltering space" (*espace de mise à l'abri*) rather than a space for detention. This was ultimately brought to court as NGOs contested the notion of shelter to qualify unconsented detainment. In its latest decision, on 21 April 2021, the Council of State ruled that there is no need to close these detention spaces. It acknowledges that the border police premises are used both for sheltering and detention (N°450879, 450987, §13). Concerning the latter, the judges reaffirmed that these facilities are neither administrative detention centers nor waiting zones as one applies to undocumented TCNs on national territory and the other at external borders. They equally recognized that these spaces are not based on any legal text and are *sui generis* (§13). They nonetheless refused the associations' request for closure on the grounds that these spaces meet three objectives: sheltering, preservation of public order and the implementation of an effective removal policy (§20). While allowing for the perpetuation of the detention procedure, this decision does not resolve the issue of the legal qualification of *sui generis* detention spaces that do not have any legal founding.

To take the wording of the Marseille administrative court, these detention premises "do not obey any of the [existing] statuses and their legal nature remains to be determined" (N°2102047, §12), a statement which holds true to this day. This indeterminacy is problematic from a legal point of view in general, and that of fundamental rights in particular. Indeed, the subjective rights of detainees are only guaranteed by specific mechanisms provided for in existing detention regimes. For example, in waiting zones, detention is monitored by the judiciary (*juge des libertés et de la détention*), and migrants can have their right to asylum enforced in front of an administrative court, although this system is already strongly restrictive. The absence of clear categories underlying the border control procedure thus nurtures the latitude given to the law in the border area. This latitude seems to play out through the maintenance of indeterminacies, specifically regarding legal categories of detention.

C. Conclusion: Parajuridical Arrangements?

The notion of a legally established margin aims to explore how the borderline affects the way in which legal norms are applied and interpreted on the territory next to it. Building on two meanings of the term "margin", this article examined how bordering practices and law-making can both extend the exclusionary function of the border to the national territory (refusals of entry and the revamped fiction of aterritoriality) and facilitate a leeway in the daily implementation of border controls (the

unqualified detention spaces). The nature of this latter phenomenon must be further explored in later works. One lead consists in understanding this procedure as being made of parajuridical arrangements, in both senses of the prefix. "Para-juridical" is what is articulated *around* the law, on its margins, but also, sometimes, *against* the law. Border controls and migrant detention sometimes take on the trappings of one regime, sometimes the other, and finally, they tend to constitute a parajuridical practice of law. Courts seem unable to rule out the general economy of these legal practices. One could hypothesize that the composite form of these arrangements allows judges to invalidate parts of it, but not their overall functioning. These arrangements thus tend to become a mode of migration governance by the margin of the law. It is as if the indeterminacy inherent in the maintenance of a laconic derogatory legal regime makes it possible for a State to derogate from certain fundamental rights and administrative procedures that should apply.

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4. MALAISE AUX FRONTIÈRES, FRONTIÈRES DU MALAISE. DES DROITS LIMITÉS ET DES PRATIQUES DISCRÉTIONNAIRES AUX FRONTIÈRES DES ÉTATS MEMBRES DE L'UNION. L'EXEMPLE DE LA FRANCE

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A. Introduction

Nous sommes le 4 décembre 2020 et depuis plus de dix jours, une demandeuse d'asile séropositive est enfermée en zone d'attente de l'aéroport Roissy-Charles de Gaule (ci-après « Roissy CDG ») sans accès à un traitement antirétroviral, malgré ses demandes réitérées. En cette période de pandémie de Covid-19, celle-ci doit être considérée comme extrêmement vulnérable du fait de son infection au VIH qui affaiblit son système immunitaire. Cette vulnérabilité se voit encore augmentée en raison des multiples refus d'accès au traitement en temps opportun. Malaise aux frontières de la France.

À côté de cela, la décision du juge des référés du Conseil d'État français qui estime, non sans malaise, qu'il est possible de loger « décemment » les demandeurs d'asile sous des tentes en cas d'épuisement des capacités d'hébergement, y compris en période de baisse des températures saisonnières[1]. À nouveau, malaise aux frontières de la France. Ce malaise est également intrinsèquement lié au lieu d'enfermement lui-même, qui ne répond pas toujours aux normes minimales européennes[2]. De fait, « des modalités d'accueil sous forme de tentes ou d'autres installations comparables » (décision du Conseil d'État n°344286) peuvent servir d'hébergement pour les demandeurs d'asile en cas d'épuisement des capacités de logement normalement disponibles. Autour de nous – on le constate pour la Grèce, mais c'est vrai aussi en Belgique, en Italie et aux Pays-Bas, l'enfermement dans des lieux informels de ce genre, qui sont, par nature, « plus difficiles à recenser » (TASSIN, p. 40), s'est généralisé et perfectionné dans le cadre de l'approche dite des « *hotspot* » (centres de crise), mise en œuvre en 2015 pour aider les États membres à faire face à une pression migratoire intense[3] (*COM(2016)* 141 final).

B. Discussion

Ces différentes situations qui génèrent aux frontières de la France, État membre de l'Union européenne (ci-après « UE), un « état, [un] sentiment de trouble, de gêne, d'inquiétude »[4] sont moins le point de départ de notre analyse qu'un problème à clarifier. Pour ce faire, nous procèderons comme suit : observer d'abord la fermeture des voies d'accès *à* et *dans* l'UE, dont la signification sur

[1] Voy. aussi à ce sujet, C. POULY & S. SLAMA, « Des demandeurs d'asile sous tentes en plein hiver : la protection de l'effectivité du droit d'asile par le juge administratif ne va toujours pas de soi », *Dalloz*, n°44, Janvier 2010, p. 2918 ; F. JULIEN-LAFERRIÈRE, « Que reste-t-il de l'obligation d'héberger les demandeurs d'asile », *Dictionnaire permanent droit des étrangers*, Bulletin n°196, Janvier 2011.

[2] V. notamment en matière d'asile, les directives « Accueil », « Procédure d'asile », « Qualification », « Retour » ; ainsi que les règlement Dublin III et Eurodac.

[3] Voy. Rapport de la Commission

[4] *Le Petit Larousse illustré 1991*, Librairie Larousse, 1990, p. 592, voy. « malaise ».

le plan de la protection des droits des étrangers est tout aussi inédite que perturbante (**1**), examiner ensuite les différentes pratiques et « manières de voir » (A. SPIRE, 2008, p. 66) qui sont appliquées aux frontières par l'administration et la police (**2**).

1. La fermeture des frontières de l'UE : un inédit perturbant pour les droits des étrangers

Qu'est-ce qu'il y a « d'entièrement nouveau »[5] (**1.1**) et de troublant en matière de protection des droits des étrangers (**1.2**) dans le fait que le « manège des frontières »[6] au sein de l'espace Schengen avance d'un pas certain sur la voie du retour des frontières nationales ?

1.1. Le retour inédit des frontières dans l'espace Schengen

Le « manège » des frontières en Europe se veut simple sur le papier : d'une part, chaque État de l'espace Schengen sécurise sa part de « frontière extérieure » dans l'intérêt des autres avec l'aide de l'Agence européenne de garde-frontières et de garde-côtes (Frontex). D'autre part, des millions d'européens peuvent voyager sans passeport entre les frontières internes de cet espace Schengen. Tout ceci est effectif grâce à l'application du principe de la libre circulation des personnes, si fondamental au fonctionnement de l'UE[7], et la levée des contrôles à l'intérieur de cet espace. Ainsi donc, le passage d'une « frontière intérieure » pour un citoyen européen ou pour un ressortissant de pays tiers résidant légalement dans l'Union n'est plus une expérience d'attente et de contrôle « tatillons » et arbitraire, du moins en principe.

Nous disons « en principe », car il est toujours possible pour un État de l'espace Schengen de rétablir les contrôles à ses frontières nationales. Cette possibilité est explicitement prévue aux articles 25 à 35 du Code frontières Schengen mais doit être exceptionnelle et temporaire. Exceptionnelle, en ce qu'elle doit se limiter aux cas « de menace grave pour l'ordre public ou la sécurité intérieure d'un État dans l'espace sans contrôle aux frontières intérieures » (article 25, §1) et ne peut se faire « qu'en dernier recours » (article 25, §2). Temporaire, car le rétablissement des contrôles doit être limité à « (…) une durée maximale de trente jours ou pour la durée prévisible de la menace grave si elle est supérieure à trente jours » (article 25, §3). Toutefois, « la durée totale de la réintroduction, y compris toute prolongation (…), ne peut excéder six mois » (article 25, §4)[8]. Chaque fois que de telles

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[5] P. ROBERT, *Le Petit Robert : dictionnaire alphabétique et analogique de la langue française*, Paris, Le Robert, 1990, p. 899, voy. « inédit ».

[6] Pour reprendre l'expression utilisée dans l'ouvrage coordonné par Pinar SELEK et Daniela TRUCCO, v. ObsMigAM, Le *manège des frontières. Criminalisation des migrations et solidarités dans les Alpes-Maritimes*, Paris, Le passager clandestin, coll. « Bibliothèque des frontières », 2020.

[7] Consacrée par le traité sur l'Union européenne (article 3), la liberté de circulation est également garantie par la Charte des droits fondamentaux (article 45) et par la jurisprudence de la Cour de justice. Sur la consécration de ce principe, voy. H. LABAYLE, « La suppression des contrôles aux frontières intérieures de l'Union », *in* C. BLUMANN (dir.), *Les frontières de l'Union,* Paris, Bruylant, 2013, pp. 18-53, spéc. pp. 23-34.

[8] À ce cadre général de réintroduction temporaire des frontières intérieures au titre de l'article 25 du Code Schengen, s'ajoutent les deux procédures spécifiques des articles 28 et 29 du même Code. La première donne la possibilité aux États membres d'« immédiatement » réintroduire les frontières intérieures « lorsqu'une menace grave pour l'ordre public ou la sécurité intérieure (…) exige une action immédiate » (article 28, paragraphe 1). La deuxième permet de réintroduire les frontières intérieures « dans des circonstances exceptionnelles mettant en péril le fonctionnement global de l'espace sans contrôle aux frontières intérieures du fait de manquement graves persistants [dans l'exécution du] contrôle aux frontières extérieures »[8] (article 29, paragraphe 1). Pour plus de précisions quant à la durée et aux conditions de ces dernières, voy. les articles 28 et 29 du Code Schengen.

décisions sont envisagées, « la portée et la durée de la réintroduction temporaire du contrôle (…) [ne doit pas excéder] ce qui est strictement nécessaire pour répondre à la menace » (article 35, §1).

Ces conditions très strictes aux exceptions du principe de la libre circulation s'expliquent par la position centrale et l'importance symbolique dont ce principe dispose au sein de l'UE. Rétablir des frontières internes sur le long terme transformerait, sinon bouleverserait les flux de voyageurs « incarné[s] dans un espace ouvert » (M. FOUCHER, 2016, p. 16) (**1.2**).

1.2. Le fait et l'effet perturbants du retour des frontières pour les étrangers

Le retour des frontières intérieures sur la base des dispositions du Code Schengen s'est d'abord traduit par une « réintroduction temporaire du contrôle aux frontières intérieures » (Chapitre II du Code Schengen). Par exemple, l'Allemagne a rétabli la vérification des passeports à ses frontières le temps du Mondial de Football de 2006, ainsi que l'Espagne lors d'une réunion de la Banque Centrale européenne en 2012 et l'Estonie lorsqu'elle recevait Barack Obama en 2014[9]. La lutte contre le terrorisme a également justifié le rétablissement des contrôles aux frontières intérieures[10]. Après les attentats du 13 novembre 2015, la France déclarait ainsi l'état d'urgence et rétablissait les contrôles d'identité à ses frontières nationales. Une décision reconduite depuis tous les six mois au motif d'une menace terroriste jugée grave pour l'ordre public et la sécurité publique, qu'elle « demeure la même ou qu'il s'agisse d'une nouvelle menace »[11]. Ainsi, la dernière décision de renouvellement « (…) pour une nouvelle période de six mois allant du 1er mai 2022 au 31 octobre 2022, est fondée sur les menaces liées au risque terroriste, à la pandémie de covid-19, aux mouvements secondaires de migrants et aux risques générés par le conflit ukrainien sur le territoire français en matière de criminalité organisée et de trafic d'êtres humains, cette dernière menace étant nouvelle par sa nature »[12].

Ensuite, sous l'effet de la pression migratoire, le retour des frontières dans l'UE a pris une nouvelle dimension puisque plusieurs pays européens ont pris la décision de « fermer » de manière littérale leurs frontières par la construction de murs ou de clôtures de plusieurs mètres de haut, surmontés de barbelés, afin d'empêcher le passage des étrangers. En 2022, l'Europe de Schengen compte ainsi, non sans malaise, ses « murs anti-immigration ». Onze au total (A. RUIZ BENEDICTO et *al.*, pp. 16-17). L'on peut citer l'enclave de Ceuta et ces huit kilomètres de fil de barbelés serti de *concertinas* (lames de rasoirs) qui séparent l'Espagne du Maroc ; les deux clôtures métalliques, hautes de 4 mètres et espacées de 6 mètres l'une de l'autre, chacune couronnée d'une épaisse couche de barbelés, qui sont érigées le long des 175 kilomètres qui séparent la Hongrie de la Serbie ; le mur de 40 kilomètres entre la Grèce et la Turquie ou, plus récemment, le mur anti-migrants de 186 kilomètres (divisé en quatre section) voulu par Varosvie et encore en construction, supposé empêcher les instrusions de migrants en provenance de la Biéolorussie. Enfin, il nous faut mentionner le mur « anti-intrusions »

[9] Voy. à ce sujet, J.-Y. LECONTE et A. REICHARDT, *Rapport d'information*, n°499, Session ordinaire de 2015-2016, spéc. « Chapitre I – La situation de l'espace Schengen », pp. 7 et s. ; A. POUCHARD et M. VAUDANO, « Le retour des contrôles aux frontières en Europe signe-t-il la mort de l'espace Schengen », *Le Monde*, 2015.
[10] I. MAGNIEN, « Schengen et la lutte contre le terrorisme », *Toute l'Europe.eu,* 2022.
[11] Voy. à ce sujet, C.J, arrêt du 26 avril 2022, *Bezirkshauptmannschaft Leibnitz*, (aff. jointes C-368/20 et C-369/20), spéc. point 81 ; et Conseil d'État (France), », décision n°463850 du 27 juillet 2022, spéc., point 5.
[12] *Ibid.*, point 6.

construit en 2016 à Calais et ayant pour objectif d'empêcher les migrants de monter clandestinement dans des camions à destination du Royaume-Uni.

Enfin, pour la première fois en mars 2020, suite à l'émergence de la Covid-19, des raisons sanitaires justifient le retour des frontières. Deux choses se produisent : premièrement, la plupart des États de l'espace Schengen ferment leurs frontières nationales, et les premières décisions de confinement des populations et de restriction des déplacements aux frontières tombent en cascade. Ainsi qu'en a jugé le Conseil d'État français, ce risque lié à la pandémie peut être regardé comme une menace nouvelle permettant de justifier la prolongation des contrôles aux frontières intérieures de la France, dès lors « [qu']elle est d'une nature différente de celles des menaces précédemment identifiées, [ou que] des circonstances et évènements nouveaux en font évoluer les caractéristiques dans des conditions telles qu'elles en modifient l'actualité, la portée ou la consistance » (décision n°463850, point 5)[13]. Deuxièmement, la Commission européenne annonce la décision exceptionnelle de fermer les frontières extérieures de l'UE pour une période de 30 jours. De telles mesures ont impacté la protection des droits des étrangers à trois niveaux. Tout d'abord, au niveau de l'entrée sur le territoire puisque la délivrance des visas Schengen de court séjour ou de long séjour fut suspendue. Ceci a eu pour conséquence que « tous les ressortissants étrangers de pays non-membres de l'Union européenne, de l'espace Schengen ou du Royaume-Uni, qui n'ont pas de raison impérative de se rendre en Europe et en France, [se sont vus] refuser l'accès [au] territoire [français] » (Instruction du Premier ministre du 18 mars 2020, n°6149/SG, p. 1). Ensuite, au niveau du séjour en lui-même, les États ont prévu non seulement de prolonger la durée de validité des documents de séjour arrivés à expiration – ce qui va dans le sens d'une meilleure protection – mais aussi de suspendre toutes les procédures d'accueil aux personnes étrangères concernées. Ainsi donc, les étrangers dont l'état de santé nécessitait une prise en charge médicale urgente se retrouvèrent entre le 12 mars et le 24 mai 2020 dans l'impossibilité d'enregistrer leur demander d'admission au séjour pour soins. Enfin, au niveau de l'éloignement, « les conditions de rétention ne permett[ai]nt absolument pas de respecter les consignes sanitaires pour limiter la propagation du virus : promiscuité et surpopulation, absence de protection (masques, gants, gel …) pour les personnes retenues (…). Le risque de contamination [était] très élevé » (Question écrite n°15230 de L. COHEN au Sénat français).

Ce « tour de manège » mettant en lumière le sentiment de malaise aux frontières de l'UE ne serait pas complet si l'on ne mentionnait pas les usages du pouvoir discrétionnaire aux frontières, en particulier dans les zones d'attente et aéroports (**2**).

2. Le pouvoir discrétionnaire aux frontières de l'UE : un dédale d'embûches pour les étrangers

Lorsque l'on observe les rapports entre l' « administration des étrangers »[14] et les étrangers en France, il ressort que « le pouvoir discrétionnaire est chose essentielle » (R. BONNARD, p. 363). Les personnes maintenues en zones d'attente sont soumises à la discrétion de ceux qui décident de leur parcours administratif et juridique à la frontière (**2.1**). La rhétorique de la fraude et du soupçon est

[13] Voy. aussi l'arrêt de la Cour de justice de l'Union du 26 avril 2022 (aff. jointes C-368/20 et C-329/20).
[14] Selon l'expression consacrée par Alexis SPIRE, laquelle se rapporte à « tous les maillons de la chaine bureaucratique [qui adoptent les] règles conçues pour régir le statut de ceux qui n'ont pas la nationalité du pays dans lequel ils résident à des cas particuliers », voy. A. SPIRE, *Étrangers à la carte: l'administration de l'immigration en France (1945-1975)*, Paris, Bernard Grasset, 2005.

utilisée comme un véritable « argument fédérateur » (A. SPIRE, 2008, p. 53), enfermant les personnes placées en zones d'attente dans un véritable dédale d'embûches (**2.2**).

2.1. Mille et une pratiques discrétionnaires lors du maintien en zones d'attente françaises

Dans les dictionnaires usuels, le terme « discrétion » renvoie à « discernement, pouvoir de décider »[15] et l'expression « s'en remettre à la discrétion de quelqu'un » signifie « s'en rapporter à sa sagesse, à sa compétence » et « à son jugement »[16]. Les ouvrages juridiques, eux, précisent qu'un pouvoir est « discrétionnaire » lorsque leurs titulaires, les agents de l'État par exemple, « dispose[nt] d'une certaine liberté d'appréciation et d'action dans l'exercice de [leur] compétence »[17]. Et même si son utilisation implique toujours une relative imprécision, le pouvoir discrétionnaire s'analyse comme une marge de choix légale car légalement défini. « *Like the hole in a doughnut, [discretion] does not exist except as an area left open by a surrounding belt of restriction* » (R. DWORKIN, p. 31), pour reprendre la métaphore de Ronald Dworkin. Toute la difficulté est alors de rendre compte *juridiquement* de cette liberté d'action qui, contrairement à l'arbitraire dont les décisions ne puisent leur justification qu'en elles-mêmes, trouve sa limite dans la *règle*.

Ainsi, dans le cadre de la légalité, le discrétionnaire peut trouver à s'exercer à tous les niveaux d'élaboration technique du droit, de sa création à son interprétation et son application. Fort de ce constat, il apparaît que les contrôles des étrangers aux frontières des États membres, en particulier à l'aéroport, sont investis par des choix discrétionnaires. La police aux frontières est « seule juge des situations à ce stade » (Rapport d'observation de l'ANAFÉ dans les zones d'attente 2016-2017, p. 42) que ce soit en première et en deuxième ligne. En première ligne lorsqu'elle vérifie les conditions d'entrée des ressortissants de pays tiers se présentant aux aubettes de contrôle. En deuxième ligne lorsqu'elle décide de procéder ou non au placement dudit voyageur « dans certains espaces des territoires des États membres devenus des lieux privilégiés de contrôle » (M.-L. BASILIEN-GAINCHE, p. 62), telles que les zones d'attente destinées aux personnes venant d'arriver en France (titre IV du CESEDA). Le pouvoir discrétionnaire des gardes-frontières est d'autant plus fort qu'ils « [peuvent] ne pas faire confiance à l'action d'autres agents de contrôle intervenus précédemment (par exemple, les agents consulaires) ou émettre des doutes sur la légalité ou la véracité des conditions d'accès au territoire (par exemple, s'il y a un problème de visa, la réservation de l'hôtel, les moyens de subsistance, ou si les intentions de la personne ne sont pas clairement établies) » (A. CROSBY et A. REA, n°41). Le cas suivant illustre cette situation : un ressortissant de pays tiers entre pour la première fois dans l'UE et est emmené au contrôle de deuxième ligne, alors même qu'il est en possession d'un visa Schengen. Les raisons de cette décision sont d'une part qu'il n'a réservé que trois nuits d'hôtel sur les huit qu'il doit passer au Portugal et d'autre part qu'il n'a pas suffisamment d'argent liquide en sa possession. Alors que le voyageur indique à l'officier pouvoir retirer de l'argent avec sa carte de crédit, l'officier de garde lui réplique qu'il est en droit, en vertu du Code Schengen, de lui refuser l'accès à l'espace de transit en raison du manque d'argent liquide (A. CROSBY et A. REA, n°19). Dans d'autres cas, les agents de la police aux frontières (ci-après, « PAF ») maintiennent dans leurs locaux pendant la durée nécessaire au transit par leur territoire le ressortissant de pays tiers présentant

[15] P. ROBERT, *Le Petit Robert, op. cit.*, p. 490, voy. « discrétion ».
[16] *Le Littré [en ligne]*, voy. « discrétion ».
[17] S. BISSARDON, *Guide du langage juridique : vocabulaire, pièges et difficultés*, 4ème édition, Paris, LexiNexis, 2013, p. 483, voy. « discrétionnaire ».

selon eux un « risque migratoire »[18], à savoir celui qu'ils soupçonnent de vouloir compromettre son transit pour rester en France. De même, dans la limite du cadre légal, il leur arrive de procéder au renvoi dans la même journée d'une personne non-admise sans que celle-ci puisse exercer son droit « au jour franc » (art. 352-3 et 333-2 du CESEDA) ; faute, sans doute, d'en avoir connaissance.

De manière plus spécifique, dans les zones d'attente, les personnes se voyant refuser l'entrée sur le territoire français ont également des difficultés à enregistrer leur demande d'asile avec garantie de confidentialité. Ainsi, dans la zone d'attente de Beauvais, les entretiens avec l'Office français de protection des réfugiés et des apatrides (ci-après, « OFPRA ») se font depuis le téléphone placé dans la salle de surveillance de la police. Et même à Roissy CDG, où l'entretien réunit dans la même pièce l'officier de protection, le demandeur d'asile et son accompagnateur le cas échéant, les interprètes ne se déplacent jamais (Rapport d'observation de l'ANAFÉ dans les zones d'attente 2016-2017, spéc. pp. 14 et s.). La traduction s'effectue donc systématiquement par téléphone, ce qui n'est pas sans ajouter « des complications d'ordre techniques, avec les conséquences possibles sur la qualité de l'entretien et les potentielles incompréhensions, demandes de répétitions ou encore malentendus qui peuvent nuire à la fluidité de l'échange » (Rapport d'observation de l'ANAFÉ dans les zones d'attente 2016-2017, p. 17). Prenons l'exemple d'Éric : « Éric est homosexuel et a fui le Cameroun en raison de persécution liée à son orientation sexuelle. Le lendemain de son arrivée, le 25 mars 2012, à l'aéroport de Lyon-St Exupéry, il dépose une demande d'admission sur le territoire au titre de l'asile. Le même jour a lieu son entretien avec un agent de protection de l'OFPRA. Celui-ci se déroule par téléphone dans le bureau de l'officier de (…) la PAF, en présence de quatre policiers masculins » (ANAFÉ, *Le dédale de l'asile à la frontière. Comment la France ferme ses portes aux exilés*, p. 9), loin des garanties de confidentialité.

Les personnes maintenues sont confrontées donc la tendance de l'administration des étrangers à donner la priorité au soupçon et à la fraude plutôt qu'au respect des droits des personnes (**2.2**).

2.2. Une seule et même rhétorique de la fraude tout au long du maintien en zones d'attente françaises

« Soupçonner quelque fraude » (T. BRU, p. 61). C'est une formulation qui fait figure d'« antienne » au sein des agents de la PAF et qui traduit l'émergence d'une rhétorique du soupçon de la fraude. Utilisée dans de nombreux domaines, elle permet de « légitimer la non-application d'une loi jugée trop généreuse et de justifier le fait que les agents qui la mettent en œuvre, y ajoutent toute une série d'obstacles » (A. SPIRE, p. 4). En matière des étrangers, la rhétorique de la fraude « prend la forme d'une opposition entre "vrai" et "faux" qui s'applique à toutes les qualités susceptibles d'ouvrir des droits » aux étrangers (A. SPIRE, 2008, p. 53). Vrai conjoint, faux mineur, vrai réfugié, faux malade, … les figures de l'imposteur vont en se diversifiant. Par voie de conséquence, tout est matière à soupçons : la régularité du séjour, le lien de filiation, la nationalité, la véracité du récit mais aussi l'authenticité d'un document ou la fiabilité d'un certificat médical sont examinés avec attention. Si le contexte est à la suspicion, tout devient alors affaire de preuves à charge, selon un principe

[18] L'analyse du « risque pour la sécurité intérieure et des menaces susceptibles de compromettre la sécurité des frontières extérieures » (considérant 8 du Code frontières Schengen) est un élément central du contrôle aux frontières, et, sans être véritablement encadrée, conduit à des décisions discriminantes voire arbitraires. Voy. en ce sens, le rapport d'observation de l'ANAFÉ dans les zones d'attente 2016-2017.

général de droit administratif, de l'étranger. « Grâce au soupçon » – Julien Bricaud ayant tout particulièrement choisi ses mots, celui qui est jugé l'est en fonction « de [s]es impostures probables » (J. BRICAUD, p. 10). Dans ce cas-ci, *à cause* du soupçon – nos mots étant également choisis avec précision – l'on entretient auprès des étrangers un climat d'insécurité juridique les exposant plus fortement à la méfiance de l'administration et au « risque d'inégalité des armes [probatoires] » (N. KLAUSSER, n°164).

S'agissant plus particulièrement des mineurs étrangers non accompagnés, ceux-ci sont « quasiment systématiquement considérés comme des fraudeurs » (Rapport sur le respect effectif des droits de l'Homme en France, p. 80)[19]. Cela implique que la logique de protection des mineurs s'efface au profit d'une logique de contrôle. Par exemple, lorsqu'un enfant arrive à la frontière française, sa minorité peut être remise en cause par les services de la PAF chargés de « procéder à toutes les investigations nécessaires visant à établir clairement [la preuve de l'âge] » (Circulaire n°CIV/01/05, 1.1). S'en suit alors souvent un test osseux, moyen de détermination de l'âge pourtant très décrié. Plusieurs cours d'appel françaises ont d'ailleurs précisé à ce propos que la validité d'un acte d'état civil ne peut être remise en cause par des expertises osseuses[20]. Le cas suivant illustre ces propos : « Arrivée à Roissy [CDG], Gabrielle se présente comme mineure et dépose une demande d'asile. Le document avec lequel elle voyage, bien que considéré comme faux par la police, est utilisé pour la déterminer majeure. [Pis encore, le juge] estime qu'un test osseux n'est pas nécessaire car, selon son faux passeport, elle est née en 1984 ce qui "correspondait mieux à son âge physique" » (Rapport d'observation de l'ANAFÉ dans les zones d'attente 2016-2017, pp. 23-24)

Sur le plan pratique, une question demeure : comment adhérer à cette « cohésion idéologique » (A. SPIRE, 2008, p. 41) de la fraude et du soupçon à l'endroit des étrangers ? Pour Alexis Spire, son adhésion dépend certes « des représentations de l'immigration véhiculées par les personnalités politiques et les médias » mais, aussi et surtout, de l'« apprentissage quotidien de normes pratiques qui se diffusent d'un même bureau et d'un service à l'autre » (A. SPIRE, 2008, p. 42 et p. 46). Seules des enquêtes ethnographiques fondées sur l'observation des pratiques et des activités des agents publics peuvent permettre d'en prendre la mesure. Alexis Spire a mené, de 2003 à 2007, plusieurs enquêtes par observation portant sur les acteurs chargés, en préfectures, de la police des étrangers. Il en ressort que dans la manière d'investir la mission du maintien de l'ordre national, tout le pouvoir discrétionnaire de ces agents réside dans leur capacité à endosser soit le rôle de « l'entrepreneur de morale » (A. SPIRE, 2008, pp. 67-71), soit le rôle du « réfractaire » (A. SPIRE, 2008, pp. 71-75), soit le rôle du « pragmatique » (A. SPIRE, 2008, pp. 75-79). Dans le rôle du premier, l'agent conçoit son activité comme un travail de moralisation de l'immigration supposant la transmission de valeurs et la mise en œuvre d'une socialisation professionnelle permanente. En bon entrepreneur de morale investi d'une « croisade morale contre la fraude » (C. GABARRO, p. 32), il va chercher à associer d'autres agents, moins convaincus, à sa mission. Le réfractaire, lui, applique les instructions

[19] Voy. en ce sens, J. BRICAUD, *Accueillir les jeunes migrants. Les mineurs isolés étrangers à l'épreuve du* soupçon, Chronique sociale, coll. « Comprendre la société », 2017, pp. 47-75, spéc. p. 50 : « les doutes existent bel et bien et entourent l'accueil et la protection des mineurs isolés de manière persistante ».

[20] Voy. notamment, CA Lyon, 26 avril 2004, N°0400060 : « La fiabilité de la méthode Greulich et Pyle pour déterminer l'âge est extrêmement douteuse, notamment pour les populations d'origine africaine » ; CA Paris, 13 novembre 2011, Arrêt n°441 : (…) qu'une expertise des urgences médico-judiciaires (…) concluant qu'il avait l'âge osseux égal ou supérieur à 18 ans n'est pas suffisante pour contredire valablement cet acte de naissance » ; CA Versailles, 21 février 2014, N°13/00241 : « (…) le refus de se soumettre à un test osseux ne peu[t] renverser la présomption de validité [des actes civil] ».

transmises par la hiérarchie mais se refuse à adhérer à une vision de l'immigration associant l'étranger à une menace contre l'ordre national. Il aura tendance à privilégier l'écoute au détriment de l'efficacité. Enfin, l'agent pragmatique ne résiste ni n'adhère véritablement aux normes qui lui sont dictées, il est indifférent. Finalement, comme une sorte de *boîte à outils* (*discretionary toolkit*) à la manière de Céleste Watkins-Hayes, le pouvoir discrétionnaire les *aide* à se décider, à instruire les dossiers « sur le mode de l'intransigeance, de la compassion ou de l'indifférence » (A. SPIRE, 2009, p. 123).

C. Conclusion

De leur arrivée à l'aéroport jusqu'à leur libération, leur placement en zone d'attente ou leur refoulement, les ressortissants de pays tiers sont très vulnérables. Cette vulnérabilité est liée à l'incompréhension, l'opacité et le discrétionnaire qui régissent la prise de décision. En effet, les pratiques administratives et policières restent très souvent opaques dans ces lieux d'enfermement aux frontières et les personnes enfermées ne sont en général pas en mesure de faire entendre leur voix. Cette quasi-impossibilité de dénoncer les dérives dont elles sont victimes fait naître chez les personnes concernées un sentiment d'impunité et d'insécurité qui participe au sentiment de malaise général. De même, l'invisibilité de ces zones favorise le développement de pratiques irrégulières : le défaut d'information sur les droits et les procédures, la non-reconnaissance de la minorité, les difficultés d'interprétariat, le non-respect du « jour franc ».

Ce malaise se fait ressentir également au-delà des frontières de la France. Il en est ainsi quand l'ONG Médecins Sans Frontières (ci-après « MSF ») quitte la région frontalière entre la Pologne et la Biélorussie suite au blocage des organisations portant assistance aux milliers de demandeurs d'asile – homme, femme et enfants en provenance du Moyen-Orient. Ceux-ci se retrouvent alors dépourvus d'abris, sans accès à la nourriture, à l'eau ou à des soins médicaux adéquats et exposés à des températures glaciales. Il en est encore ainsi quand la Hongrie est le seul pays de l'UE à refuser d'accorder la protection temporaire aux « apatrides, et (…) ressortissants de pays tiers autres que l'Ukraine, qui peuvent établir qu'ils étaient en séjour régulier en Ukraine avant le 24 février 2022 [date à laquelle les forces armées russes ont lancé une invasion à grande échelle de l'Ukraine] sur la base d'un titre de séjour permanent en cours de validité délivré conformément au droit ukrainien, et qui ne sont pas en mesure de rentrer dans leur pays (…) dans des conditions sûres et durables » (art. 2, §2 de la décision d'exécution 2022/382). Ces refus de protection par la Pologne ou par la Hongrie ne sont-ils pas des refus dont l'objectif poursuivi est d'organiser les flux migratoires, de les maîtriser et de les hiérarchiser ? Une question se pose alors : à mesure que ces « états d'inquiétude » aux frontières des États membres de l'UE se diffusent, n'est-ce pas le repli répressif et sécuritaire de la question du traitement de l'immigration qui se précise ... à la frontière du malaise ?

D. Pour aller plus loin

Législation :

Circulaire du 14 mars 2020 relative à l'adaptation de l'activité pénale et civile des juridictions aux mesures de prévention et de lutte contre la pandémie COVID-19*, JUSD2007740C.*

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5. BETWEEN PHYSICAL AND LEGAL BORDERS: THE FICTION OF NON-ENTRY AND ITS IMPACT ON FUNDAMENTAL RIGHTS OF MIGRANTS AT THE BORDERS BETWEEN EU LAW AND THE ECHR.

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A. Introduction

The fiction of non-entry is a legal fiction allowing a disarticulation between the physical presence and the legal entitlement of a person to enter and stay on the national territory.[21] Generally, it is employed when a person crosses a border being devoid of an authorisation to do so. This has specific consequences on the legal framework applicable to unauthorised migrants at the borders, as it allows for the application of a completely different legal regime to migrants at the borders from those, legally or even irregularly staying, within the national territory.

States justify the application of such a different legal regime arguing that unauthorized migrants at the borders did not "enter" the national territory for legal purposes since they are devoid of a formal authorization to do so. This legal technique is one of the main strategies that States employ to manage migration flows and human mobility, and is generally employed at a country's national borders (See J. C. HATHAWAY).

In the European context, both the Court of Justice of the European Union and the European Court of Human Rights have dealt with the issue of migrants' rights at the States' borders. Both have addressed the consequent legal regime applicable, especially from the perspective of detention regimes, non-admission and expulsion at the borders and access to asylum.

In this light, the aim of this paper, structured as follows, is to analyse the issue of migrants' exclusion at the borders from the perspective of the so-called fiction of non-entry. Firstly, the topic of the fiction of non-entry is presented. Secondly, the paper examines the issue from the perspective of the ECtHR jurisprudence on migrants at the borders, with special attention to the topic of detention and protection from expulsion. Thirdly, the paper focuses on EU law. In addition, it compares the relevant EU law provisions with the would-be amendments proposed within the EU New Pact on Migration and Asylum.

B. Discussion: From extraterritoriality to the fiction of non-entry in migration law

As critically assessed by a considerable body of literature, in liberal democracies a border is not only a physical border but also a legal border (*ex plurimis*, G. AGAMBEN, T. BASARAN, J. APAP, S. CARRERA). As such, it serves the function of defining the legal framework applicable to persons holding a certain status in a specific territory, governed by a specific authority. It distinguishes, first and foremost, between citizens and non-citizens (See T. BASARAN, J. C. HATAWAY, T. GAMMELTOF HANSEN).

[21] According to the Merriam-Webster dictionary, a legal fiction is "something assumed in law to be fact irrespective of the truth or accuracy of that assumption"; The Collins dictionary defines it as "an acceptance of something as true, for the sake of convenience".

Interestingly, the meaning we nowadays attach to the idea of the border has totally embraced the divisive declination of the French word *frontière* rather than the dimensions of proximity and interdependence attached to the idea of the border by the quasi-synonym Latin word *confinis*, (composed by the prefix *cum,* and the word *finis*) standing as *common limit* (see C. BLUMANN). Under this reading of the notion of "border", exclusion does not stand as an exception in liberal States and in the rule of law. Rather, it becomes a mechanism which is structural to States' politics, and in the construction of the inside-the-border *vs.* outside-the-border dichotomy. Because the border also serves the function of filtering and managing mobility, by means of selecting those who are entitled to enter and stay on the territory, border areas are assigned a peculiar status and function, being at the same time manufactured as "inside" or "outside" the national territory depending on the subjects crossing them (T. BASARAN, *id*.).

Historically, there have been at least two ways of constructing such an idea of inside and outside throughout the concept of the border: the idea of "extraterritoriality" (1.1) and the fiction of non-entry (1.2).

1.1 ***The idea of extraterritoriality***

The idea of extraterritoriality originates from the peculiar status that the States attach to certain portions of their territories, usually their borders. It is based on the exclusion of a part of their territory from the exercise of their jurisdiction. Through such a fictional excision, States have argued, for example, that airport transit areas were not part of the national territory and that, therefore, a different set of laws and rights would apply to them as opposed to the one applying to the State's territory. In the case of airport transit areas, this assumption is roughly based on the fact that they enjoy a particular legal status on the ground of agreements related to the facilitation of the transit of goods and, sometimes, of persons. The most common example consists in the ease of international transit at airports, allowing passengers in transit to board a second flight avoiding customs and immigration border controls (see T. W. BELL).

This was precisely the French government's position in the case of *Amuur v. France*. In *Amuur* the European Court of Human Rights (hereinafter: ECtHR) dealt with the *de facto* detention in the transit zone of the Charles De Gaulle airport of ten asylum seekers fleeing Somalia who reached France from Syria. *In casu*, the French authorities maintained that the airport transit zone enjoyed extraterritorial status and that France, therefore, lacked jurisdiction over that area. As a result, according to the French Government, French law would not apply. The legal regime applicable to the transit zone consisted of a number of administrative decrees and circulars, as MAILLET explained, devoid of a legal basis in national law and was in force until 1992, the year when the Law on Waiting Zones was adopted. Such a legal regime established that asylum applications made at the airport transit area were subjected to an admissibility evaluation from the Ministry of the Interior. In case the request was deemed admissible, the applicant was authorised to enter the territory and subjected to the ordinary asylum procedure. Applicants awaiting the admissibility decision were not allowed to move freely on the territory nor in the transit area. They were placed under the constant supervision of the authorities without legal assistance. Such a *de facto* detention was not subjected to judicial scrutiny nor the applicants had the possibility to have a Court review their detention (*Amuur*, §§ 45-47). However, the French Government argued that this legal void was justified by the extraterritorial

status of the airport transit area: since applicants waiting for the admissibility decision were not deemed to be on the French territory, French law would not apply (§ 26).

The ECtHR, however, rejected the French Government's argument affirming that transit zones are part of the State's territory and that they fall within its jurisdiction. This meant that the State was bound to apply the human rights set by, *inter alia*, the European Convention on Human Rights (ECHR). As a consequence, the applicants' detention was devoid of a proper legal basis. Moreover, no judicial review of the detention was afforded to the applicants, which made them devoid of means of judicial protection. In sum, national law did not safeguard the human rights of the applicants. (§§ 50-.54). Following the *Amuur* judgment, France adopted the Law on the Waiting zones, applicable to land, sea and air borders. On the one hand, this law provided the administrative practice with a proper legal basis. However, it also institutionalised a differential treatment for those at the borders as compared to irregular non-citizens on national territory, through the establishment of the fiction of non-entry in national law.

1.2. ***The fiction of non-entry***

The new French legislation introduced the so-called fiction of non-entry and normalised its application to "border cases". The thereby newly established legal framework is structured around three main elements: the presumption of non-presence on the territory until a decision on admission is taken (*i.e.* the fiction of non-entry); the possibility of automatically detaining those awaiting admission; and the immediate return of non-citizens who are refused admission at the borders.

Unlike extraterritoriality, the fiction of non-entry does not rely on a fictive excision of the territory and on the manipulation of the State's jurisdiction. It justifies the exclusion of non-citizens exploiting the disarticulation between their physical and legal presence at the border. In this regard, the fiction of non-entry revolves around the idea that a person, despite being physically present on the national territory, is legally considered to be outside of the State as long as she is devoid of a formal authorisation to enter and reside. As BASARAN frames it, «mere physical presence on the territory is insufficient, and only lawful admission amounts to entry and hence the right to benefit from constitutional protection» (p. 64). As an example, under the new French legal framework, detention of border applicants is significantly longer than the detention of ordinary applicants (*i.e.* applicants admitted to the territory undergoing the ordinary asylum procedure) (Article L.342-4 Code de l'entrée et du séjour des étrangers et du droit d'asile CESEDA). This differential treatment is indeed justified by the "unauthorised" status of border applicants.

Another country employing such a legal fiction on a regular basis is Germany, at its air and land borders. Indeed, the "*Fiktion der Nichteinreise*" (fiction of non-entry), was introduced in the 1997 German Residency Law (Aufenthaltsgesetz), in paragraph 13, section 2, which provides that a migrant is considered to be on German territory only once he or she has been legally admitted to the country. Such fiction remains applicable until a decision on the third-country national's stay is taken, even if the individual is transferred "inside" the national territory. Interestingly, when the border is a Schengen external border, the non-admitted individual will be considered as never having entered the State's territory or the Schengen area (see K. SODERSTORM).

However, States experience a number of constraints in the application of such legal fictions due to, *inter alia*, their international obligations. The following section analyses how the ECtHR has limited the State's power on the matter, despite having endorsed this legal fiction in some of its case law.

2. The fiction of non-entry in the ECtHR jurisprudence

The ECtHR dealt with the issue of transit areas multiple times over its jurisprudence. As mentioned in the previous section, in *Amuur* the Court firmly rejected the extraterritorial argument and found that France had full territorial jurisdiction over the transit area. *In casu*, this meant that the human rights guaranteed under the ECHR were fully applicable and that France did not act in conformity with the ECHR. The Court held its position consistently in several judgments dealing with migrants' access to the territory. Beyond *Amuur*, the Court stated in its recent Grand Chamber judgment in *N.D. and N. T. v. Spain* (dealing with a land border) that «the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system […]. [T]he Convention cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction» (§ 110), as well as that the State's territorial jurisdiction is triggered « at the line forming the border» (§ 109) (see also ECtHR, 12 February 2009, *Nolan and K. v. Russia*, req. no. 2512/04, § 95; 24 January 2008, *Riad and Idiab v. Hungary*, req. no. 29787/03 and 29810/03, § 79). This entails that States cannot create areas «outside the law where individuals are covered by no legal system capable of affording them the enjoyment of the rights and guarantees protected by the Convention» (*N.D. and N. T*. § 110)

However, when confronted with the concept of "admission on national territory", the Court retains a degree of ambiguity. In such cases, the issue is no longer related to jurisdiction, but lies with the applicability of "ordinary" human rights guarantees. An example may be detected in the jurisprudence related to Article 5 ECHR and the issue of detention. More specifically, Article 5(1)(f), first period, allows "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country". The uncertainty surrounding the definition of "unauthorised entry" was at the centre of another Grand Chamber judgment in *Saadi v. UK*, related to detention upon arrival of an Iraqi asylum seeker. *In casu,* the applicant maintained that, because he immediately applied for asylum once arrived in the country, he was not seeking to make an unauthorised entry, and he was acting in *bona fide* (§ 28).

Both the Chamber and the Grand Chamber established that under Article 5 States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not. In this regard, the Grand Chamber agrees « with the Court of Appeal, the House of Lords and the Chamber that, until a State has "authorised" entry to the country, any entry is "unauthorised" and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so can be, without any distortion of language, to "prevent his effecting an unauthorised entry"» (§ 65). In the case of *Saadi*, the entry of the applicant remained unauthorised well beyond the space of the border (see ECRE). As COSTELLO observes, «the applicant in *Saadi* was not only physically present in the UK, but participating in the asylum process» (p. 143). Still, his legal presence remained "unauthorised" and his mere physical presence was not sufficient to grant the applicant an evaluation of the necessity and proportionality of his detention.

The Court did not deem that the applicant's detention violated Article 5. The fact that the applicant was an "unauthorised entrant" made him automatically detainable, with no burden on the State to prove the necessity of this measure nor the proportionality of the aim pursued. On the contrary, the Court considered that the detention measure was in line with the objective of guaranteeing him a swift asylum procedure. The assessment of legality and non-arbitrariness of detention in cases falling under Article 5(1)(f) is based on a number of factors, such as the conditions of detention and its duration, which have to be appropriate to its aim. Of course, detention must have a legal basis in national law. However, no assessment of necessity and proportionality is required, as the status of an unauthorised entrant triggers the applicability of detention (see COSTELLO, id.; ECRE, id.; *Saadi*, § 65; see ECtHR, 15 November 2011, *Longa Yonkeu v. Latvia*, req. no. 57229/09, § 119; 13 December 2011, *Kanagatnam and others v. Belgium*, req. no. 15297/09, § 80; 23 July 2013, *Suso v. Malta*, req. no. 42337/12, § 89-90; 21 November 2019, *Z. A. and others v. Russia*, req. nos. 61411/15, 61420/15, 61427/15 and 3028/16 § 159).

The judgment in *Saadi* was a widely contested one and included a joint partly dissenting opinion endorsed by six judges (*ex plurimis*, see V. MORENO-LAX). However, the Court subsequently reiterated that detention of unauthorised entrants is a necessary prerogative of a State's power to control entry and stay of aliens in several cases where detention itself was incompatible with the Convention. In *Z.A. v Russia*, the ECtHR's Grand Chamber held that, in the absence of other significant factors, the situation of an individual applying for entry and waiting for a short period for the verification of his or her right to enter cannot be described as deprivation of liberty imputable to the State. In such cases, the State authorities have undertaken « vis-à-vis the individual no other steps than reacting to his or her wish to enter by carrying out the necessary verifications » (§144). What counts, in the Court's words, is whether procedural guarantees concerning the processing of the applicants' asylum claims, protection against *refoulement* and domestic provisions fixing the maximum duration of their stay in the transit zone existed and whether they are applied (see ECtHR, *Z.A.* § 145; but also ECtHR, 21 November 2019, *Ilias and Ahmed v. Hungary*, req. no. 47287/15, §§ 58 ss). *In casu*, detention was found devoid of a legal basis in national law and was patently not in line with the aim of speedy processing of the applicants' asylum claims. The three applicants were held in a transit zone for seven, five and seven months respectively, denied access to international protection and expelled from Russia with no chance of having their claims examined.

Importantly, however, the Court has stressed that a State cannot deny access to the national territory to irregular asylum applicants, especially when they are able to make an arguable claim under Article 3 ECHR (ECHR, 23 July 2020, *M.K. and Others v. Poland*, req. no. 40503/17, 42902/17 and 43643/17, §§ 166 ss; 30 June 2022, *A. B. and others v. Poland*, req. no. 42907/17, §§ 34 ss). As a result, in such a context a State cannot deny access to the territory to a person who alleges that he or she would be subjected to ill-treatment in the receiving country. In these cases, therefore, a State has to grant the person access to his territory in order to duly assess his or her asylum claim (*id*.).

Thus, as long as the law provides for a legal basis and for the existence of procedural guarantees, and the applicant is able to have his asylum claim assessed, deprivation of liberty is permissible when the person is an "unauthorised entrant". On the one hand, by rejecting the extraterritorial argument the Court has refused the existence of a State's power to artificially restrict its jurisdiction and denied the applicability of human rights, namely of the ECHR. On the other hand, endorsing the fiction of non-

entry, it has simultaneously accepted that States may apply a detrimental legal system to non-admitted foreigners.

In the light of the foregoing, we argue that this legal construction is functional to protect States' sovereign right to control entry on their territory, outweighing the individual's right to personal liberty. This conceptualisation of "entry" allows instituting a different legal framework applicable to those non-admitted (See M. STARITA), although present, making them detainable *per se*.

Furthermore, it grants the authorities significant discretion in the application of the measure, as it explicitly admits that the "administrative convenience" (see H. O'NYONS) of granting a fast-track procedure is sufficient *per se* to detain irregular asylum applicants. In these terms, it creates an openly imbalanced relationship between the State and the foreigner.

3. The fiction of non-entry in EU law

As seen above, in the context of the ECtHR, the fiction of non-entry has an impact mainly on the right to personal liberty. EU law, by contrast, might be interpreted as providing an entirely different – "exceptional" – legislative discipline to procedures taking place at the EU external borders.

The Schengen Border Code

The first relevant provisions are found in the Schengen Borders Code (SBC hereafter). The SBC provides that third-country nationals with a short-term visa issued under the EU Visa Code shall fulfil a number of requirements listed under Article 6(1) in order to cross an external border and be admitted into the Schengen area. The fulfilment of such requirements is verified by border guards upon entry into the Schengen area. If the border check is successful, then the third-country national is granted entry. Still, the SBC does not explicitly mention the fiction of non-entry. However, it is arguable, *a contrario*, that for the duration of the border checks and until the third-country national is allowed entry, the person will not be considered as having entered the Schengen area. This is supported by the joint reading of Article 6 on entry conditions with Article 14 SBC concerning the refusal of entry. The latter provision, in paragraph 4, states that «[t]he border guards shall ensure that a third-country national refused entry does not enter the territory of the Member State concerned». The consequence of a refusal of entry is the immediate removal of the unadmitted third-country national. Annex V part A(2)(a) of the SBC provides that the responsible authority shall order the carrier to take charge of the third-country national and transport him to the relevant third country (more specifically «to the third country from which he or she was brought, to the third country which issued the document authorising him or her to cross the border, or to any other third country where he or she is guaranteed admittance, or to find means of onward transportation». Annex V part A(2)(a)).

Ensuring non-entrance on the territory entails two implicit elements. On the one hand, it reinforces the idea that entry amounts to formal admission. On the other, it inherently imposes on third-country nationals who have been refused entry a certain degree of limitation of freedom of movement, which might also amount to a deprivation of liberty. The SBC is not clear on this point, giving Member States room to decide on the measure they deem fit for the purpose.

The Return Directive

The discretion left by the SBC is in line with other provisions of EU migration law. In fact, although the consequences of a refusal of entry amount, *de facto*, to a case of "return", the Return Directive allows the Member States to exclude "border cases" from its application. Under Article 2(2)(a) of the Return Directive:

> «Member States may decide not to apply this Directive to third-country nationals who: (a) are subject to a refusal of entry in accordance with Article 13 (now Article 14) of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State»..

As the European Court of Justice (hereinafter: ECJ) noted in *Affum* (C-47/15) the purpose of such a system is to permit « the Member States to continue to apply simplified national return procedures at their external borders, without having to follow all the procedural stages prescribed by the directive, in order to be able to remove more swiftly third-country nationals intercepted when crossing those borders » (§ 74). More specifically, third-country nationals falling under Article 2(2)(a) of the Return Directive do not have a right to stay on the territory pending their appeal under the SBC and the details of the return procedure are determined by the Member State concerned.

The Asylum Procedures Directive

The legal framework applicable to asylum seekers at the border has its basis in the border procedure provided in Article 43 of the Asylum Procedures Directive (APD hereafter). The border procedure allows the Member States to decide on the admissibility or the substance of asylum applications "at the border", in certain well-defined cases listed in the Directive. The above-mentioned provision stipulates that if a decision on the application is not taken within four weeks the applicant shall be granted entry to the territory of the Member State. Again, we can argue *a contrario* that as long as the four weeks period has not expired, the asylum applicant has not legally entered the national territory.

At this stage, two issues need to be examined: first of all, the status of asylum seekers, especially "at the border"; and secondly, whether Article 43 APD imposes a form of limitation on the applicant's personal liberty in border cases.

With regard to the first question, namely the entry of asylum seekers, a number of provisions of the SBC safeguard the respect of the principle of *non-refoulment*, fundamental rights and Member States' humanitarian obligations. As such, Article 3(b) SBC clearly states that the SBC shall be applied «without prejudice to the rights of refugees and persons requesting international protection, with special attention to the principle of *non-refoulement*». Article 4 similarly re-states that the Member States shall act in full respect of fundamental rights and of the principle of *non-refoulment* as enshrined in the Charter and in the 1952 Geneva Convention.

The above constitutes the foundation of the derogation established in Article 6(4) SBC on entry conditions, which allows the entry of third-country nationals not fulfilling the entry conditions on humanitarian grounds or for international obligations, which is precisely the case for asylum seekers.

Do asylum seekers have a full right to enter the Schengen area, then? The answer is not clear-cut. Under Article 9 APD, an asylum applicant has the right to remain on the territory until the determining authority has made a decision on the asylum application and Article 3(1) APD makes clear that the directive shall apply to asylum requests made in Member States territory, *including the borders*. Nevertheless, in *ANAFE* (C-606/10) the ECJ denied that a temporary residence permit issued for the purpose of the asylum procedure grants a right to re-entry to the Schengen area, as « the issue of a temporary residence permit or temporary residence authorisation is an indication that it has not yet been determined whether the conditions for entry into the territory of the Schengen area or for the grant of refugee status have been met» (*ANFE*, § 68). However, in *Gnandi* (C-181/16) the Court ruled that even though the right to remain does not constitute an entitlement to a residence permit, «it is nevertheless apparent […] that […] prevents an applicant for international protection from being regarded as 'staying illegally'» (§ 40).

Drawing upon the foregoing, asylum seekers do not enjoy a full right to enter the territory within the meaning of the SBC, as they cannot be considered as fulfilling the entry requirements under the SBC. Rather, they have a right *not to be expelled* and *not to be considered* "illegally staying on the territory" pending their asylum application.

With regard to detention, the wording of Article 43 APD implicitly imposes on border applicants a form of limitation of their freedom of movement (see G. CORNELISSE, M. RENEMAN). Detaining an applicant in order to decide on his right to enter the territory is indeed permissible under Article 8(2)(c) of the Reception Conditions Directive (RCD henceforth).

However, it remains that under EU law any form of limitation of personal liberty shall fulfill the necessity and proportionality requirements, and shall be resorted to only when less restrictive measures are deemed ineffective (see ECJ, 30 May 2013, *Arslan,* C-534/11, EU:C:2013:343). The obligation to evaluate the necessity and proportionality of the measure was stressed by the ECJ in a number of recent judgments involving Hungary. In particular, in *Commission v Hungary* (C-808/18) the Court clarified that the detention of asylum applicants under Article 43 shall be strictly connected to the aim of verifying the grounds mentioned in the same provision (*i.e.* it underlined the optional nature of the border procedure). Border detention shall not be established as an automatic measure for all asylum seekers illegally entering the Member States (§ 176-185; see also 14 May 2020, *FMS*, Joined Cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:367). These conclusions were recently reiterated in *M.A.* (C-72/22), where the Court ruled that EU law does not allow the detention of asylum applicants for the sole reason that they entered the territory of the Member States irregularly (§§ 56 ss). In addition, this reading is supported by the obligation incumbent on the Member States not to detain a person on the exclusive ground that he or she is an applicant for international protection, provided in Article 26(1) APD.

In the light of the foregoing, the fiction of non-entry constitutes the basis of the functioning of the Schengen system and of the admission procedures at the borders of third country nationals. This is particularly relevant in the case of third-country nationals who *entered* the Union territory irregularly and were refused entry at the border under Article 14 SBC. For this category of persons, EU law provides for a specific legal framework concerning detention and return which is partly different from the one applicable to third-country nationals irregularly *staying* on the territory. Moreover, under

Article 5(1)(f) ECHR a sufficient ground for detention is that the person is an "unauthorized entrant", regardless of whether he or she is an asylum seeker or an irregular migrant. However, EU law frames detention as a measure of last resort, restricting the power of States to render it a generalized measure. Furthermore, the "humanitarian" derogation under Article 6(4) SBC secures respect for the principle of *non-refoulement* and of the fundamental rights guaranteed by the ECHR, especially with regard to Article 3 ECHR.

4. The New Pact on Migration and Asylum 2020

Admittedly, the logic of exclusion underlying the fiction of non-entry applied to asylum seekers is rather exceptional in EU law. In spite of this, the would-be provisions advanced by the European Commission in the New Pact on Migration and Asylum of 2020 seem to institutionalize it[22]. The New Pact aims at creating "an integrated border procedure", which is composed of three phases: (a) entry checks upon a third country national's arrival; (b) the asylum border procedure; and (c) expulsion at the border consequent to a refusal of entry.

In this framework, the fiction of non-entry becomes the juridical condition upon which the new Regulation for pre-entry screening relies. The pre-entry screening would encompass preliminary screening concerning a) vulnerability assessment; b) identity checks; c) registration of biometric data; d) health screening (the only actual novelty introduced, as not provided so far under the SBC). This would apply to all third-country nationals not fulfilling the entry conditions crossing external borders.

The latter Regulation implicitly mentions the fiction of non-entry in multiple instances. On p. 5 the Explanatory Memorandum states that «during the screening, meaning during the checks to determine the appropriate following procedure(s), *the third-country nationals concerned should not be authorised to enter the territory of the Member States*» (emphasis added) (p. 5). The pre-entry Regulation shall be read in conjunction with the relevant provisions of the Amended Proposal for a Procedures Regulation (APR), which amends part of the border procedure and introduces a procedure of "rejection and return at the border" for those whose asylum border procedure was unsuccessful.

The new border procedure provided in Article 41 of the APR shall take place following the screening procedure and «provided that the applicant *has not yet been authorised to enter Member States' territory* » (Article 41(1)), in cases of, *inter alia*, an application made at an external border crossing point or in a transit zone (Article 41(1)(a)). In this context, the applicant shall be kept in proximity of the external border (Article 41(13)). The third phase of the integrated border procedure consists of the "border returns" of third-country nationals whose application is rejected, under the new Article 41a APR. The provision also explicitly mentions the fiction of non-entry, underlying that third-country nationals undergoing the procedure shall not enter the territory of the Member State (Article 41a(1)).

One of the implicit consequences of such an integrated procedure lies in the wide margin of appreciation given to the Member States to implement detention measures aimed at preventing the entry of applicants. Although in this context the non-entry fiction relies on the alleged short duration

[22] The New Pact on Migration and Asylum was issued in 2020. It aims at reforming the Common European Asylum System and the legal framework concerning the management of migration and external borders by introducing a ''comprehensive approach'' to migration management.

of the procedure, it introduces a generalized use of deprivation of personal liberty of third-country nationals at the border. Moreover, a number of concerns are raised in relation to the pre-entry screening. In fact, the requirements of necessity and proportionality of the detention of asylum seekers still apply to those subjected to the new asylum border procedure. However, third-country nationals undergoing the pre-entry screening appear to be left in a juridical limbo with no clear legal framework applicable, as the screening would precisely serve the function of defining third-country nationals' legal status (see L. JAKULEVIČIENĖ).

In conclusion, despite the fact that the New Pact was presented as introducing brand new measures and procedures, we argue that it expresses a general trend toward the institutionalization of already existing exceptional measures (see G. CORNELISSE, J. FEREJOHN, P. PASQUINO,). In this light, it does not solve the loopholes already existing in EU migration law. Instead, it deepens the discretion left to the Member States, shrinking the human rights protection of third-country nationals at the EU external borders (on the multiplication of the physical and legal spaces for migrants' informal detention, see G. CAMPESI).

C. Conclusion

This contribution had the objective to analyse how the legal fiction of non-entry is implemented within the arenas of EU law and ECtHR jurisprudence and how it affects the way that fundamental rights are framed at the borders.

The fiction of non-entry relies on the disarticulation between the physical and legal presence of unauthorized migrants at the borders. Such a disarticulation allows States to implement a different set of rights for those at the borders, normalizing the idea that those not legally admitted to the territory might receive detrimental treatment compared to those already (legally or even illegally) present on the territory.

While in the context of the ECtHR, the implementation of the fiction of non-entry is limited to Article 5 ECHR, in EU law it constitutes the basis of the functioning of the Schengen system. In this regard, a number of concerns emerge in relation to third-country nationals not fulfilling the entry conditions under the SBC who are refused entry under Article 14 SBC. Indeed, they are subjected to a "simplified return procedure" which may reduce their procedural rights, while asylum seekers, even when they are unauthorized entrants and are subject to the border procedure, enjoy a right to stay on the territory (*i.e.* a right not to be expelled) pending their application for international protection. In this regard, the New Pact on Migration and Asylum sheds a worrying light on the respect for migrants' fundamental rights. In addition, this tendency to transform the exception into the rule is not new in EU law, as it has been argued that informal procedures at the EU external borders have served as laboratories for new EU policies (*ex plurimis*, R. ANDRIJASEVIC). For example, the hotspot approach well illustrates this trend (see, A. SCIURBA).

This relationship between the rule and the exception emerges from the legislative setting of the New Pact on Migration and Asylum of 2020. In this context, the fiction of non-entry would be implemented in all procedures related to irregular third-country nationals and asylum seekers at the external borders. This change in the framework, which would result in a shift from the exception to the rule, has the ultimate effect of lowering the human rights standards of migrants reaching the EU in an unauthorised manner.

D. Suggested Reading and Selected Bibliography:

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6. DIGITAL PUSHBACKS AT EUROPEAN BORDERS: AN ONGOING THREAT TO THE RULE OF LAW IN THE SCHENGEN AREA

Romain Lanneau

A. Introduction

The classic picture of pushbacks is that of a family or individuals being physically, and in some cases violently, prevented from entering the territory of a state. Media reports cover it extensively at the external borders of the European Union, in the Mediterranean Sea but also at land borders in the forests of Eastern Europe. *Non-refoulement* is the cornerstone of asylum law. In a broad sense, derived from human rights law, *non-refoulement* entails an absolute prohibition of returning anyone to a place where there might be a risk of torture, inhuman or degrading treatment or punishment. Article 18 of the Charter of the European Union guarantees the right to access asylum and respect for the 1951 Geneva Convention on Refugees. Member States of the European Union have agreed on an asylum policy with common standards for fair and efficient asylum procedures, notably in Article 78 of the Treaty on the Functioning of the European Union (TFEU). The establishment of common rules on border control and asylum applications supposes that any Member State will assess the demand for protection of an individual with the same respect for fundamental rights protection. Refusal decisions of asylum applications are exchanged between national administrative authorities dealing with migration and border control to be commonly enforced across the European Union.

In this piece, I paint another picture of pushbacks, not taking place in a remote forest of Eastern Europe but inside a border guards office in Northern Europe: a so-called digital pushback. The term means the perpetuation of the infringement of EU law at the external border, amounting to a pushback, by another Member State because of information exchanged about a third-country national. This definition follows from the remarks of advocate general Kokott in 2005 on the case *Commission v. Spain* (that will be described below). She noted a "structural shortcoming in the management of data" if the alert exchanged between Member States is illegal, "without further verification the recourse to the alert would perpetuate the infringement of EU law committed in the first place by the MS issuing the alert and this lead to a new breach of EU law".

As noted by Iris Goldner Lang and Boldizsár Nagy, there is a new development in the enforcement of European law with the open defection from EU rules on asylum and migration by some Member States contesting the common values of the Union. Asylum policies are one of the many faces of the rule of law crisis in Europe, argues Lilian Tsourdi. The electoral objectives of some governments and the policy changes they carry are fueled by a restrictive policy on migration and asylum at odds with the harmonized European standards. Hungary is an illustrative example of this trend because of the well-documented reports of NGOs and several cases to the Court of Justice of the European Union (CJEU) concerning violations of the obligation of granting access to fair asylum procedures at the external border. Despite those well-known violations, Hungary keeps recording asylum refusal decisions and exchanging them with the other Schengen States. Therefore, there is a risk, for individuals, of being denied fair procedural standards for their asylum demands across the Schengen area.

This research investigates if the current legal standards, in the jurisprudence of the CJEU, on the protection of the right to an effective remedy, Article 47 of the Charter of the EU, can prevent digital pushbacks. The first part will describe the term "digital pushbacks", taking Hungary's border practices as an example of the current risk to individuals' fundamental rights. The second part will question the jurisprudence of the CJEU on the right to an effective remedy for information-driven decision-making in asylum policies.

The Schengen entry ban and digital pushbacks recorded by Hungary

An entry ban is a key measure of European migration and asylum laws. It has been introduced in the Return Directive of 2008, as an administrative or judicial decision or act prohibiting entry into and stay on the territory of Schengen States for a specified period, accompanying a return decision. Third-country nationals' personal information will be recorded in the Schengen Information System to be accessible to other Schengen national border and migration authorities (Article 24 of the Return Directive). The migration and border control authorities of a Member State can also record an entry and residence ban by assessing that the personal circumstances of the presence of that third-country national on its territory pose a threat to public policy, public security or national security (Article 24.1). The ban can last up to 5 years and it has a European dimension preventing entry and staying into all Member States of the European Union. The Schengen Information System is the most widely used, the oldest (26 March 1995) and the largest information sharing system for security and border management in Europe. Of interest for this study is the migration control function of the system. Border guards, migration and asylum authorities will consult the European information system with the personal information of a person. In case there is a match with an alert, the national authority can deny entry or stay to the concerned person. In some humanitarian cases, the national authorities can consult the other national authority that recorded the alert and afterwards decide to grant a residence permit. The keystone of the Schengen information system is mutual trust between the Member States, the presumption of compliance with rights' obligation of another authority decision (see the work of Ermioni Xanthopoulou).

In Hungary, since 2015, the border, migration, security and asylum policies took a parallel development and distanced themselves from European standards. In 2018 the European Commission started an infringement procedure against Hungary before the European Court of Justice arguing that the country was violating the right of access to the asylum procedure enshrined in Article 6 of the Asylum Procedures Directive. The CJEU condemned Hungary in *Commission v. Hungary (2020)*. The Luxembourg judges decided that the rule of first entry applied by Hungarian authorities as an inadmissibility ground for asylum applications did not respect European standards of procedural fairness, Article 47 of the Charter of the EU. Serbia, from where most asylum seekers transit before arriving at the Hungarian borders, is deemed a safe third country where those persons can seek protection. The CJEU condemned the lack of guarantee that asylum seekers would have their demand for protection adequately assessed in Serbia and that they won't be returning to a state where they would be in danger. Those decisions of the CJEU and the subsequent litigation brought about the reforms of the Hungarian government, worsening the condition of access to asylum, clearly showing that asylum refusal decisions taken by Hungarian authorities since 2015 did not respect European asylum procedural standards.

Nonetheless, Hungary keeps registering entry and residence bans in the Schengen Information System, preventing individuals from seeking asylum in another Schengen country. This has been detailed in the report of the Asylum Information Database on Hungary of 2020 on page 29. According to the annual reports of the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice, the authority managing the operation of the Schengen Information System, there have been approximately 6154 alerts on third-country nationals to be refused entry or stay registered in the last three years[23].

Judicial review of digital pushbacks

The Schengen information system regulation has taken into account the necessity to monitor the exchange of alerts between national administrative authorities with the creation of SIRENE offices (which stands for Supplementary Information Request at the National Entries). National offices record alerts into the system and assesses the quality of alerts received by other Member States. The State that registered the alert in the SIS is responsible for ensuring that the data entered into the Schengen Information System is accurate, up-to-date and lawful (Article 44, Regulation (UE) 2018/1861). In case there is a doubt about the quality (the lawfulness or accuracy) of an alert, the SIRENE office can request supplementary information from the state that registered the alert. SIRENE offices are part of law enforcement authorities. A parallel can be made with the analysis of Laura Dreschler on the verification of the respect for fundamental rights protection by a law enforcement authority in the context of international data transfer. She established that because it is done secretly between law enforcement authorities it is not transparent and creates legal uncertainty for individuals' fundamental rights protection.

In 2006, the CJEU was called on by the European Commission to decide whether border guards could automatically refuse entry after finding a match in the Schengen information system with alerts registered by another Member State (case C-503/03). Two persons were refused entry at the Spanish border, despite being family members of European citizens, because they were registered in the SIS. The CJEU decided that border guards should not automatically refuse entry but ask for sufficient information from the authority having registered the alert to do an individual and proportional assessment. Every member state has discretion in deciding who should be allowed on its territory, as far as it respects European law, including fundamental rights protection. Individuals contesting a decision informed by an alert stored in the SIS are faced with the limited jurisdiction of national courts. The principle of territoriality prevents a court from reviewing the reasoning of another national administration. In the case of Moon, an individual was contesting in several countries a decision of refusal of entry motivated by an entry and residence ban registered in the SIS by Germany. In most cases, the national Court refused to apply a transnational review of the correct application of European law by the German authority, precluding Moon from obtaining an effective remedy.

The most recent jurisprudence of the CJEU concerning data-driven decision-making in the migration context is still in its infancy. Of interest, the recent case *R.N.N.S. and K.A.* concerned the consultation procedure for a visa refusal. Before granting a short-term visa, national administrative authorities

[23] The calculation of the number of alerts on third-country nationals entry and residence bans registered by Hungary in the SIS over three years has been made by dividing the annual number of alerts on persons registered in the country (2) and the overall percentage of Article 24 alert in the European Union (2.1). This is an approximate calculation since there is no percentage of Article 24 alert for Hungary. The reason is that there is no other public data available.

will consult the other Member States that can object to the entry of the person into the Schengen area.

The Luxembourg judges made clear the minimal information required to be given to the applicant to respect its right to an effective remedy. It required the Member State taking the refusal decision to substantiate it with: "the specific ground for refusal based on that objection, accompanied, where appropriate, by the essence of the reasons for that objection". To further contest the reason for the objection, the individual must be informed about the national authority at the origin of the information where they can launch a judicial proceeding. In the context of digital pushbacks originating from Hungary, this would mean for the applicant to contest the asylum refusal in Hungary. It leads to obvious problems, such as the fact that the person prevented from entry into the Hungarian territory will not be able to be present at the trial. Also, there have been reports of serious limitations in the access to justice of third-country nationals as well as attacks on the judicial system's independence in general.

Preliminary questions to the CJEU in C-528/21: an opportunity to affirm the prohibition of digital pushbacks?

The serious problem in the respect for EU law as well as the limits of national judicial authorities are very apparent in a recent case of the Budapest High Court that referred preliminary questions to the Court of Justice of the European Union in 2021 in *M.D.*, C-528/21, still pending. After having lived in Hungary for sixteen years, a father of a two-year-old child was denied his residence permit. He was ordered to leave the country based on the opinion of an administrative authority. The applicant was deemed to represent a real, immediate and serious threat to security because of a previous conviction for offering assistance to illegal migrants to cross the border without permission. The entry and residence ban was promptly registered in the Schengen Information System II.

The Budapest High Court referred preliminary questions to the CJEU, asking whether the protection of the right to an effective remedy, under Article 47 of the Charter, should guarantee the judicial review of the reason for the decision and a consideration of the personal circumstances. Moreover, the Hungarian authorities refused to comply with a final judgement ordering immediate judicial protection against the enforcement of the entry ban because its description was already entered into the Schengen Information System. The consequence of this entry ban barred the applicant from exercising his right to appeal or to enter Hungary. The Budapest High Court asked whether this practice was violating Article 13 of the Return Directive and the right to a fair trial enshrined in Article 47 of the Charter.

The Budapest High Court has taken a courageous stand in asking preliminary questions to the CJEU on such a contentious subject. The policy of Victor Orban's government to prevent contestation of national policies threaten the independence of judges. The Hungarian Constitutional Court declared recently a request to the European Court of Justice for advice on the interpretation of European laws unlawful. The judge was placed under a disciplinary process, even though the CJEU clearly stated, in *IS*, C-564/19 (2021), that judges cannot be forbidden from seeking guidance from the Court: "EU law precludes disciplinary proceedings from being brought against a national judge on the ground that he or she has referred for a preliminary ruling to the Court of Justice." The mere decision of the

Hungarian government to take action against a judge asking for an interpretation of European laws has a serious deterrence effect on the judiciary in the country.

One could hope that the CJEU in the case *M.D.* will decide that as long as Hungary is not respecting the protection of the right of an effective remedy and a fair trial, Article 47 of the Charter as well as individuals' protection in the return directive, the country should be banned from entering alerts in the Schengen information system. This would however be a strong stand from the Court deviating from the questions asked by the Budapest Court.

As for now, the Luxembourg judges have been careful not to decide on a blanket ban on national authorities' decisions in cases of violation of the rule of law. There have been two major types of cases decided by the CJEU regarding the exchange of information between Member States and the consequences for individuals' fundamental rights. In the context of the Dublin regulation, the questions to the Court are about returning asylum seekers to a country where they would suffer from fundamental rights violations because of the condition of reception, as well as the risk for the individual to be sent back to a country where there is a real risk of being subjected to persecution, torture, inhuman or degrading treatment or any other human rights violation. The Court recognized that in the circumstances of serious deficiency in the other Member State the person should not be returned. (*N.S.*, 2011; see the work of XANTHOPOULOU on this topic)

The CJEU decided on another line of cases concerning the impact of the rule of law backsliding in some countries for a person to be returned because of a European arrest warrant. The individual pending trial and, in some cases, detention in the other Member State is at risk because of the lack of independence of the judiciary. The Luxembourg judges decided that the national court could assess whether the individual situation of a person warrants the suspension of their return (ARANYOSI and CĂLDĂRARU, 2016). However, despite rule of law problems that keep strengthening in some European countries, the CJEU does not allow for a blanket ban on the enforcement of all administrative authority decisions coming from those countries.

B. Conclusive thoughts on human rights responsibility from EU Institutions

There are digital pushbacks recorded in the Schengen information system and there is a risk that the Member States enforce those decisions perpetuating rule of law violations at their borders. Individuals contesting in court data-driven decision-making are faced with the territorial jurisdictional limits of national courts. The CJEU has built a jurisprudence meant to protect individuals but its impact is ultimately limited by the lack of access to justice for those persons (as illustrated at §§51-52 of *R.N.N.S. and K.A.*). Indeed, third-country nationals contesting at the borders the enforcement of a digital pushback can only contest the reasons for the decision in the country that registered the alert. As explained above the rule of law problem in Hungary prevents asylum seekers from obtaining an effective remedy.

The upcoming case of *M.D.* will, most likely, be an example of the limited impact of the Court to redress current fundamental rights violations. The Court can condemn Hungary for its lack of fairness in the procedure by requesting the authorities to respect the Court's decision to allow the individual back into the country for its hearing. Nonetheless, the Court decision will only consider the individual case whereas there are a large number of digital pushbacks stored in the Schengen information system. In his newly published book, Michal Krajewski has suggested that extrajudicial authority

could compensate for the shortcoming of European judicial review, in particular concerning technically or scientifically complex legal acts.

The European Commission and EU Lisa are the authority responsible for managing the operation of the Schengen information system. The European Commission, specifically the Directorate General for Migration and Home Affairs (DG HOME), has overall responsibility for the development and funding of the information systems. Since 2012, the Commission has tasked the European Union Agency for the Operational Management of Large-Scale Information systems in the Area of Freedom, Security and Justice ("eu-LISA") with storing data and maintaining SIS II, Eurodac, and VIS (Court of Auditors, Special Report No 20/2019) p. 14).

Respect for European law, and fundamental rights protection in the Charter, are conditions for the use of this system. Before being allowed to be part of the Schengen information systems, Member States had to set up a national data protection framework in accordance with European standards of protection (Article 117 of the Convention on the implementation of the Schengen Agreement). Melanie Fink's research on human rights positive obligations derived from Article 53(3) of the EU charter showed that there is a responsibility for omissions. When the violation of a fundamental right is known from an institutional actor, for example, Frontex in the research of Fink, human rights responsibility forces the institution to act to prevent an individual from having their rights violated. In the context of SIS operation, it would mean that the European Commission and EU Lisa would be responsible for digital pushbacks if they do not act to prevent them from being enforced.

The Schengen Evaluation and Monitoring Mechanism (SEMM) has been created to review the respect by Schengen states of European law in their operations at the borders, including in their SIS operations. SEMM organises visits to the country and publishes a confidential report addressed to the country, the European Commission and the Council of the European Union with recommendations and observations.

One of the recommendations for action discussed for the reform of the SEMM by the European Parliament has been the automatic triggering of the infringement procedure by the Commission in case of serious deficiency at the border. Another measure that could be taken is the decision of EU Lisa to stop its operation on managing the quality of the SIS data of Hungary. In 2021, Frontex pulled back its operation from Hungary because of fundamental rights violations at the borders. In case, EU Lisa stopped reviewing the quality of data from Hungary, it should mean, at minimum, that all alerts stored by Hungary would be flagged for not having the required standards of quality, with the further consequence to force those Member States that want to inform their decision at the border with Hungarian alert to conduct an individual assessment of the proportionality of using such an alert.

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