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Migration and Rule of (Human Rights) Law in the EU: A "Constitutional" Crisis

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Abstract

This paper focuses on the interrelationship between two European 'crises': the 'refugee crisis' and the crisis of the principle of the rule of law. The two crises find their point of connection in the responses to migratory flows put in place by the EU and some of its Member States. The migratory pressure against European external borders has induced some governments to adopt a restrictive and security-driven approach, carried out, on the one hand, by reinforcing border controls and, on the other, by seeking the cooperation of non-EU countries in order to contain departures and to tackle movements of migrants towards Europe. These 'securitization' and 'externalization' strategies are in contrast with the principle of the rule of law from perspectives: they violate some of its essential components, such as transparency, legal-procedural certainty, democratic participation and control; and they breach the same principle insofar as they lead to severe human rights violations.

Keywords: Rule of law, refugee crisis, refoulement, collective expulsion, European Court of Human Rights, European Union

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Migration and Rule of (Human Rights) Law in the EU: A "Constitutional" Crisis

Francesco Luigi Gatta[1]

1. Introduction: the migration crisis as a "mirror" of the crisis of the rule of law

In recent years the European Union (EU) and its Member States have been confronted with an increasing migratory pressure. From 2011 onwards, in particular, migratory flows towards Europe have been intensifying, being fueled especially by relevant international events such as the 'Arab Spring' and the outbreak of the war in Syria. The 'refugee crisis' then reached its peak in 2015, when an estimated one million migrants irregularly entered the territory of the EU across the Mediterranean Sea.[2] Migration, thus, has inevitably become a common and long-lasting challenge in the EU, gaining prominence and representing one of the main concerns for European policymakers and a top priority on the EU's political agenda. The recent crisis in Afghanistan, moreover, may produce repercussions in humanitarian-migratory terms also for the EU. This would confirm that management of migration pressure is an issue that is here to stay for the future.

In the past years, while the EU institutions and the Member States were facing considerable migratory flows and trying to find a remedy to the situation, in parallel, another 'crisis' was gradually emerging in the EU: the principle of the rule of law, one of the founding values of the European integration experience and a cornerstone of its modern democracies, was undergoing a process of breakdown. A slow, gradual but inevitable process of deterioration, leading, from 2010 onwards, to an escalating row of episodes of attack to the rule of law, which started to appear and multiply in a number of EU Member States. Controversial measures and practices systematically put in place by some governments in different areas progressively led to the phenomenon of the 'rule of law backsliding'[3].

Such phenomenon is observable in the EU with regard to a variety of contexts, as the rule of law in itself represents a multifaceted concept, entailing various components in terms of guarantees and precepts.[4] Two countries, in particular, have been in the spotlight in this respect: Hungary and Poland, especially with regard to issues such as the functioning of the constitutional and electoral system, the institutional balance and the independence of the judiciary.[5] But other EU Member States as well display a worrying trend towards a

1 Francesco Luigi Gatta is research fellow at the Université Catholique de Louvain. He was a re:constitution Fellow 2020-21.

2 For detailed data and statistics on migratory flows and irregular arrivals in the EU during 2015, see Frontex, 'Annual Risk Analysis for 2016', Frontex 2499/2016 (2016). For an analysis of the reasons and the features of the European migration crisis, see Jean-Yves Carlier and François Crépeau, 'De la "Crise" Migratoire Européenne au Pacte Mondial sur les Migrations: Exemple d'un Mouvement sans Droit?' [2017] Vol1, Annuaire Français de Droit International, 461; Idil Atak and François Crépeau, 'Managing Migration at the External Borders of the European Union: Meeting the Human Rights Challenges' [2014] Journal Européen des Droits de l'Homme - European Journal of Human Rights (JEDH) 2014/5, 601; Marc Bossuyt, 'The European Union Confronted with an Asylum Crisis in the Mediterranean: Reflections on Refugess and Human Rights Issues' [2015] Journal Européen des Droits de l'Homme - European Journal of Human Rights (JEDH) 2015/5, 598.

3 For a definition of this notion, see Kim Lane Scheppele and Laurent Pech, What is Rule of Law Backsliding?, in Verfassungsblog, 2 March 2018, https://verfassungsblog.de/what-is-rule-of-law-backsliding/.

4 According to the United Nations, 'the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency'. See United Nations, United Nations and the Rule of Law, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>.

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

deterioration of the rule of law and other EU fundamental values, as it is the case of Romania and Bulgaria, where a growing number of significant issues are emerging, in particular concerning corruption and conflicts of interest.[6] Additional issues pertain to the freedom of association and expression[7], as well as to the protection of rights of persons belonging to minorities, migrants and asylum seekers.

Such problematic issues have increasingly attracted attention, raising the question of how the EU can effectively ensure the respect of its fundamental values and unveiling its deficiencies in the capacity to do so. The 'crisis of the rule of law', thus, has fuelled the debate on the protection of this principle, which, as the European Commission has admitted, 'is not properly protected in all Member States'.[8]

Against this background, this paper examines the possible connections between the two crises of the rule of law and of the migration management. The deterioration of the rule of law in the EU is also, and especially, observable in the migration domain and, specifically, in the responses to the migratory flows introduced by the EU and by some of its Member States. Such responses are in contrast with the principle of the rule of law, mainly from two points of view: first, in terms of conformity with legal and procedural requirements established under either EU or national law; second, in terms of respect of fundamental human rights, as protected by international and EU legal instruments.

The hypothesis is that the migration crisis has somehow acted as a 'catalyst' for the crisis of the rule of law, as it has urged the EU institutions and the governments of frontline Member States to react and take actions, which, however, have often been characterised by controversial features. Problematic issues have thus emerged in terms of compliance with the principle of rule of law and its essential components (e.g. legal and procedural certainty, transparency, accountability to the law, democratic control and participation in the decision-making process, avoidance of arbitrariness). In particular, the migration crisis has acted as a facilitator, leading to the breach of the rule of law as it is understood, on the one hand, in terms of legal and procedural certainty, and, on the other, as rule of (human rights) law.

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

Confronted with an intense migratory pressure, some frontline Member States, needing quick responses to the situation of emergency, have reacted by resorting to informal and atypical measures, adopted in a rather obscure manner and outside the traditional EU or national legal and procedural framework. By way of example,

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to-worse-regarding-the-rule-of-law-in-poland-part-i/>; Laurent Pech and Patryk Wachowiec, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part II)' (2019) Verfassungsblog 17 January 2019 <https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-ii/>.

6 On the rule of law backsliding in Bulgaria and Romania, see Sabina Pavlovska-Hilaiel, 'The EU's Losing Battle Against *Corruption* in Bulgaria', in *Hague Journal on the Rule of Law*, 2015, Vol 7 , Issue 2, pp 199 – 2017; Elena-Simina Tănăsescu, 'Romania - Another Brick in the Wall Fencing the Fight against Corruption', in *Verfassungsblog*, 19 March 2019, <https://verfassungsblog.de/romania-another-brick-in-the-wall-fencing-the-fight-against-corruption/>; Laurent Pech, 'How to Address Rule of Law Backsliding in Romania', Verfassungsblog, 29 May 2019, <https://verfassungsblog.de/how-to-adress-rule-of-law-backsliding-in-romania/>.

7 The Council of Europe has been reporting an increasing number of threats to academic and journalistic freedom of expression with regard, for example, to Malta and Italy, or, within a wider European context, Turkey and Russia. See Council of Europe, Democracy at Risk: Threats and Attacks Against Media Freedom in Europe (2019) Annual Report 2019 by the Partner Organisations to the Council of Europe Platform to Promote Protection of Journalism and Safety of Journalists.

8 European Commission, 'Further Strengthening the Rule of Law within the Union', COM(2019) 163 final, 3 April 2019, 2. An analysis of existing EU's rule of law toolbox of measures to address the rule of law backsliding is provided in Laurent Pech and Dimitry Kochenov, 'Strengthening the Rule of Law within the European Union: Diagnoses, Recommendations, and What to Avoid', (2019) Reconnect Policy Brief June 2019.

one might consider, emblematically, the so-called EU-Turkey Statement, discussed below, and the cooperation arrangements concluded by frontline Member States, like Italy and Spain, with third countries deemed as strategic for managing migratory flows. Such measures, which indeed have produced a tangible impact on the flows in terms of numbers, are nevertheless in contrast with the rule of law, insofar as they have been negotiated and adopted in a non-transparent way, circumventing legal and procedural guarantees, and without involving the control of parliaments, whether national or that of the EU. Their implementation is equally problematic, especially in terms of accountability for potential violation of migrants' fundamental rights.9

Besides this approach towards informalisation, the migration crisis has propelled another element of contrast with the rule of law, that is the proliferation in some Member States of practices and strategies which led to manifest violations of their human rights obligations. Such violations appear as particularly serious, as they are in breach of fundamental rights of the individuals, such as those to life and safety, personal liberty, protection against torture and inhuman – degrading treatment. The breach of these human rights obligations, which often entail an absolute character, appear thus as particularly significant symptoms of a deterioration of the principle of the rule of law, understood in terms of respect of human rights obligations.

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

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

The reaction to the 'refugee crisis' in Europe has mainly taken the shape of a robust operational and restrictive approach to flows, prioritising sectors considered as crucial in order to tackle the migratory pressure: border management and control, internal security and surveillance activities, fight against irregular migration. Actions undertaken in these frameworks seem to be characterised by two key-aspects: 'securitisation' and 'externalization'. As for the former, reinforcement of border controls has represented the main focus of the EU, as well as of many Member States, which have destined considerable financial and political energies to the securitisation of borders so as to ensure an increased level of security. To use the European Commission's own words, the EU's response to the refugee crisis has aimed, basically, at three main objectives: 'security *at* our borders, better management and control *within* our borders and stability *beyond* our borders'.[10]

The security-driven approach and the securitisation process of European external borders are well-exemplified by the creation of the European Border and Coast Guard (EBCG) in 2016, which was established and operationalized within less than one year.[11] Significantly, while other migration-related reforms have either

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

10 Frans Timmermans, Opening Remarks of First Vice-President of the European Commission on the Occasion of the Press Conference on the Way Forward for EU Migration Policy, Brussels, 7 December 2017 (SPEECH/17/5166), emphasis added.

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

taken considerable time to be adopted, or, on the contrary, following complex and long negotiations have remained stuck,[12] the transformation of Frontex into the new agency has been rapidly and positively carried out, the EBCG being now operative with significantly increased resources and capacities[13].

Border and migration controls have not only been reinforced but also 'externalized'.[14] Besides the securitisation, indeed, the EU and frontline Member States have also developed and implemented an externalization strategy, aimed at offshoring migration and border controls beyond the European territory with the view of curbing flows, preventing arrivals and thus avoiding the migrants' from contacting with the EU (this approach has been described as 'contact-less strategy') itself.[15] This has been done, in particular, through the cooperation with strategic third countries from a geographical and migratory point of view. They have been involved in migration management operations and pre-emptive surveillance activities, including, in particular, stricter control of points of departure, restrictive border management, push-back practices, interception of migrants on the high seas and return to their countries of origin.

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

As far as the EU is concerned, an emblematic example may be identified in the so-called 'EU-Turkey Statement' of March 2016, which, by curbing migratory flows between Turkey and the Greek islands, led to a considerable reduction of irregular crossings into the EU.[16] Such an agreement is in breach of the rule of law under different profiles: uncertainty as regards its legal nature (formally a 'statement', only available as press release on the website of the Council of the EU), lack of transparency about its exact content, as well as regarding who precisely negotiated it and how it has been adopted.[17] The EU-Turkey Statement, indeed, has been elaborated and concluded in an informal, de-proceduralised and non-transparent manner, outside the relevant EU legal framework (namely, the procedure laid down under Article 218 TFEU for concluding international agreements between the Union and third countries). Procedural and substantial guarantees have been circumvented, in particular by excluding the control and the supervision of the European Parliament.[18] Further legal issues

Frontex Reloaded?' [2016] EU Law Analysis, 16 October 2016; Vittoria Meissner, 'The European Border and Coast Guard Agency Frontex beyond Borders - the Effect of the Agency's External Dimension' [2017] TARN Working Paper, Series 16/2017, December 2017.

12 For example, the proposal for the establishment of a Union Resettlement Framework, put forward by the Commission in July 2016. See, European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council' (Communication) COM(2016) 468 final, 13 July 2016. For an analysis of the Commission proposal and of the different positions of the European Parliament and the Council, see Francesco Luigi Gatta, 'Legal Avenues to Access International Protection in the European Union: Past Actions and Future Perspectives' [2018] Journal Européen des Droits de l'Homme - European Journal of Human Rights (JEDH) 2018/3, 163.

13 The new Agency has been further strengthened by virtue of another reform, passed in 2019: see Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

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

15 Violeta Moreno-Lax and Mariagiulia Giuffré, 'The rise of consensual containment: from "contactless control" to "contactless responsibility" for forced migration flows', in S. Juss (ed.), *Research Handbook on International Refugee Law* (Edward Elgar, 2019).

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

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

18 According to Article 218(6) TFEU, the Council, following specific procedural steps, shall adopt the decision concluding the international agreement. This has to be done after either obtaining the consent of the European Parliament or after consulting it, depending on the cases.

concern the accountability and access to justice in case of human rights violations of migrants, including the effective accessibility of asylum procedures.[19] These problems have been addressed, but substantially left unsolved, by the General Court of the EU, which declared its lack of jurisdiction to hear and determine actions brought by asylum seekers against the migration management measures put in place under the EU-Turkey Statement.[20]

Similar problematic issues have arisen also in some frontline Member States, with regard to cooperation initiatives undertaken with specific African countries. The need to tackle the migratory pressure, indeed, has urged governments to launch collaborations with third countries in an informal, atypical and over-simplified ways, once again bypassing procedural safeguards and substantial guarantees provided for by their national legislation. This led to the proliferation of a variety of atypical acts, such as cooperation platforms, *ad hoc* working arrangements, memoranda of understandings, exchange of letters and notes, and so on. These instruments, adopted in the name of a migration-related 'emergency', avoided legal and procedural guarantees and, ultimately, breached the principle of the rule of law. Examples in this respect may be found in the relationships between Spain and Morocco,[21] Italy and Tunisia, Niger and Libya.[22]

The case of the Italy-Niger cooperation, in particular, deserves some remarks, as it is emblematic in revealing the contrast with the principle of the rule of law.[23] An 'agreement' was negotiated and signed between the two countries on 26 October 2017. It was not ratified, nor was it made publicly available by whatsoever mean. The agreement, thus, was concluded in an atypical and over-simplified manner, outside the legal and procedural framework prescribed by the Italian Constitution and the relevant national legislation. In particular, besides a complete lack of transparency, the negotiating and adoption processes have *de facto* avoided the parliamentary control, as well as that of the President of the Republic, who ratifies international agreements following, in certain cases, the authorisation given by the Italian Parliament.[24] The Italy-Niger cooperation agreement has been legally challenged before the Administrative Court of Rome, which in 2018 ordered the

Among other hypotheses, Article 218(6)(a) prescribes that the European Parliament shall give its consent in cases of agreements with important budgetary implications for the Union (iv). Although under the EU-Turkey Statement, the EU is to pay Turkey 6 billion EUR in different tranches, the consent of the European Parliament was no asked nor obtained.

19 On this subject, among others, see Maybritt Jill Alpes, S. Tunaboylu, Ilse Van Liempt, 'Human Rights Violations by Design: EU-Turkey Statement Prioritises Returns from Greece over Access to Asylum" (2017) Migration Policy Centre, Policy Brief, Issue 2017/29, November 2017; Maybritt Jill Alpes 'and others', 'Post-Deportation Risks under the EU-Turkey Statement: What happens after Readmission to Turkey?' (2017) Migration Policy Centre, Policy Brief, Issue 2017/30, November 2017; Elizabeth Collett, 'The Paradox of the EU-Turkey Refugee Deal' (2016) Migration Policy Institute, 2016; Bianca Benvenuti, 'The Migration Paradox and EU-Turkey Relations' (2017) IAI Working Papers, No. 17|05, January 2017; Ahmet İçduygu and Evin Millet, 'Syrian Refugees in Turkey: Insecure Lives in an Environment of Pseudo-Integration' (2016) Global Turkey in Europe Working Papers, No. 13, August 2016; Gloria Fernandez Arribas, 'The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem' (2016) European Papers, vol1, No3, 2016, 1097.

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

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

22 On the cooperation between Italy and Libya and Tunisia, see Delphine Perrin, 'Is it Time for Italy to Resume Cooperation with Libya in the Field of Migration?' [2012] Migration Policy Centre Blog, 7 May 2012; Alessandra Bajec, 'Working to Control Migration Flows: Italy, Libya and Tunisia' [2018] Aspenia International Analysis and Commentary, 9 November 2018. For an overview and a comparison between the Italian and Spanish cooperation initiatives with African countries on migration matters, see Carmen Gonzàlez Enriquez and others, 'Italian and Spanish Approaches to External Migration Management in the Sahel: Venues for Cooperation and Coherence', (2018) Elcano Royal Instute and IAI, Working Paper 13/2018, 20 June 2018.

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

24 Italian Constitution, Articles 80 and 87.

Italian Ministry of Foreign Affairs to disclose the relevant text of the agreement. The judges thus recognised the citizens' right to be informed in compliance with the principles of transparency, institutional balance and democratic control over the Government: typical and essential components of the wider principle of the rule of law.[25]

3. Migration and the crisis of the rule of (human rights) law in the EU: the case of Hungary

The European response to the migratory crisis raises concerns regarding the respect of the substantive understanding of the principle of the rule of law which includes the protection of human rights. Border control practices put in place during the refugee crisis' have determined serious repercussions on migrants' fundamental rights, leading to severe violations of human rights obligations stemming from international and EU law.

The issue has been highlighted by several international and European observers. The European Parliament, in particular, has specifically addressed the issue with regard to Hungary: on 12 September 2018, for the first time in the history of the EU, it voted in favour of launching the procedure under Article 7 of the Treaty on European Union (TEU) against the Hungarian State for the existence of a clear risk of a serious breach of the founding values of the Union, including respect for human rights.[26] Among the reasons that induced such unprecedented action, the Parliament expressed concerns relating to the issue of 'fundamental rights of migrants, asylum seekers and refugees', related to a number of initiatives put in place by the Hungarian government, including various policies spreading xenophobia and discrimination, legislative measures posing obstacles to access to asylum procedures, criminalisation of solidarity towards migrants, restrictive border practices and ill-treatment committed by border authorities.[27] This conclusion is not entirely new: the Parliament had already addressed the problematic issue of rule of law and respect for human rights of migrants in Hungary, especially highlighting the 'serious deterioration of the rule of law, democracy and fundamental rights' in that Member State.[28]

At EU level, concerns regarding the approach of the Hungarian government towards refugees and asylum seekers have been expressed also by the Fundamental Rights Agency (FRA)[29] and Frontex.[30] The European

25 Administrative Regional Tribunal of Lazio, judgment of 16 November 2018, n 11125.

26 European Parliament, Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded (2017/2131(INL)). The 'Rule of Law procedure' under Article 7 TEU entails three passages: the European Parliament, the European Commission or one third of the Member States may request the Council to determine whether there is a "clear risk of serious breach" of the founding values of the EU (para 1); the European Council may determine, by unanimity, the existence of a 'serious and persistent breach' of the values (para 2); sanctions may be imposed by the Council, consisting in the suspension of 'certain of the rights deriving from the application of the Treaties to the Member State in question' (para 3). For an analysis and a discussion of the procedure under Article 7 TEU and its phases, among others, see Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11/3 European Constitutional Law Review 512. For an analysis of the 'Rule of law procedure' applied to Hungary and a comment on its efficacy, see Sergio Carrera and Petra Bard, 'The European Parliament Vote on Article 7 TEU against the Hungarian Government. Too Late, too Little, too Political?' (2018) CEPS Commentary, 14 September 2018; Bojan Bugarič, 'Protecting Democracy Inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism', in Carlos Closa and Dimitry Kochenov (eds), Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press 2016).

27 The Hungarian government has challenged the resolution of the European Parliament by bringing an action for annulment before the General Court on 17 October 2018. See General Court, Case C-650/18 Hungary v. European Parliament, action brought on 17 October 2018.

28 See European Parliament, Resolution of 17 May 2017 on the Situation in Hungary (2017/2656(RSP)), para 2. See also European Parliament, Resolution of 16 December 2015 (2015/2935(RSP)) and of 10 June 2015 (2015/2700(RSP)) on the Situation in Hungary; European Parliament, Resolution of 3 July 2013 on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012) (2012/2130(INI)); European Parliament, Resolution of 16 February 2012 on the Recent Political Developments in Hungary (2012/2511(RSP)).

29 FRA, 'Beyond the Peak: Challenges Remain, but Migration Numbers Drop', annual review, March 2019.

30 Frontex, Consultative Forum on Fundamental Rights, Fifth annual report – 2017, see notably para 4.3.1.

Commission, for its part, decided to refer Hungary to the Court of Justice of the EU (CJEU) for non-compliance with its legal obligations relating to various migration-related issues, including relocation, criminalisation of solidarity and support of asylum seekers, and the non-compliance of national asylum and return legislation with EU law, as well as with the Charter of Fundamental Rights of the EU.

Outside the EU, several international actors have pointed out Hungary's problematic disrespect of the rule of law in the field of migration law, including, within the United Nations (UN), the United Nations High Commissioner for Refugees (UNHCR).[31] Within the Council of Europe (CoE), moreover, severe criticism has been expressed by the Special Representative of the CoE Secretary General on migration and refugees,[32] and the European Committee for the Prevention of Torture.[33] The CoE Commissioner for Human Rights,[34] furthermore, in a report focusing on Hungary released in May 2019,[35] highlighted issues such as inaccessibility of refugee protection, forcible removals and ill-treatment, unlawful detention of asylum seekers, treatment of unaccompanied minors, xenophobia and lack of integration measures.[36]

In addition to the reactions exemplified above, the repercussions of the response to the migration crisis put in place by some EU Member States may be 'measured' and evaluated by focusing on the growing case law of the Court of Strasbourg on migration and border control practices. In particular, illegal conducts such as collective expulsions of aliens, push-back and *refoulement* operations represent all significant symptomatic manifestations of non-compliance with the principle of rule of (human rights) law as associated with the migration domain. The growing engagement of the ECtHR may be regarded as a direct and emblematic consequence of the restrictive border policies put in place by EU frontline Member States in response to the migratory pressure.

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

Moreover, the analysis of the case law on collective expulsion of aliens appears as particularly significant in the light of the seriousness of the violation committed by States. While the power to expel an alien is part of the State sovereign prerogatives to control its borders and national territory (as long as it is exercised according

31 UNHCR, 'Hungary as a Country of Asylum. Observations on Restrictive Legal Measures and Subsequent Practice Implemented between July 2015 and March 2016', UNHCR, May 2016; UNHCR, 'Submission for the Office of the High Commissioner for Human Rights' compilation report', Universal Periodic Review, 25th session, Hungary.

32 Special Representative of the Secretary General of the Council of Europe on Migration and Refugees, 'First Report on the Activities', Council of Europe, February 2018, 10.

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

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

35 CoE Commissioner for Human Rights Dunja Mijatovic, 'Report Following her Visit to Hungary from 4 to 8 February 2018', Strasburg, 21 May 2019, CommDH(2019)13.

36 ibid, 8.

to certain conditions and requirements), collective expulsions are, on the contrary, always prohibited and entail an absolute character. Collectively expelling or pushing back a group of aliens as such, without examining their individual and personal position, represent a thus a quite serious human rights violation, which may typically occur, as the case law of the ECtHR shows, in circumstances of intense migratory pressure. *Refoulement* practices and collective expulsions represent the selected lenses through which the impact of migration and border control on the rule of (human rights) law is measured in the following paragraphs.

4. Push-back, expulsion and refoulement practices

In the face of the growing migratory pressure, several frontline EU Member States have reacted by putting in place practices aimed at pushing-back migrants. Such conducts may be in contrast with the principle of *non-refoulement,* the cornerstone of the international legal regime for the protection of migrants and refugees.[37] Essentially prohibiting States to extradite, expel or return (*'refouler'*) a person to another State where there are substantial risks for his or her personal safety or life, the principle of *non-refoulement* acts as a fundamental guarantee for migrants coming to Europe, as it entails an absolute character and an applicability that must be ensured also in cases of intense migratory pressure.[38] The ECtHR, indeed, has clarified that States have and maintain their sovereign prerogatives to conduct their own migration and border policies but, at the same time, they have to ensure that these are consistent with the obligations arising from Article 3 ECHR, which inherently enshrines the principle of *non-refoulement*.[39] Pursuant to Article 15(2) ECHR, Article 3 has an absolute character and admits no derogation. The ECtHR, finally, has affirmed on many occasions that the prohibition of torture and inhuman or degrading treatment under the terms of Article 3 'must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe'.[40]

Building on this principle and following a pragmatic and protection-oriented approach, the Court of Strasbourg has progressively developed and strengthened a system of protection of migrants against expulsions and push-backs through the obligation for the State to refrain from expelling an alien towards a country where he or she would be subjected to the risk of suffering treatment prohibited under Article 3 ECHR. The expulsion, if implemented, would become a decisive step in the chain of events leading to the treatment contrary to Article 3. Thus, such a violation becomes imputable to the State that carried out the expulsion. This applies also to the so-called indirect or 'chain *refoulement*': a State may be held responsible under Article 3 ECHR not only for directly expelling an individual to a country in which he/she will be concretely subjected to the risk of torture or inhuman treatment (direct *refoulement*), but also for removing him or her to an intermediate country, which,

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

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

39 *Soering v The United Kingdom* App 14038/88 (ECtHR, 7 July 1989) para 88. Article 3 ECHR entails a protection against *refoulement* that is broader in scope by comparison with other provisions (as those of the 1951 Geneva Convention), as it covers also persons who do not necessarily have to qualify as refugees or as beneficiaries of subsidiary protection. On the scope of the protection against *refoulement* ensured under Article 33 of the 1951 Geneva Convention, among others, see Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of non-refoulement: Opinion', in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law* (Cambridge Univeristy Press 2003); Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 2007); Jean-Yves Carlier and Dirk Vanheule (eds), *Europe and Refugees: A Challenge?* (Kluwer 1997); Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford Monograph in International Law 2009).

40 *MS v Belgium* App no 50012/08 (ECtHR, 31 January 2012), para 122.

in turn, could expel him/her to a third country where the person concerned would face the risk of treatment contrary to Article 3 (indirect or chain *refoulement*).

The Court of Strasbourg has then thickened the level of protection of migrants against expulsion by – , under certain conditions – extending the territorial scope of application of the ECHR in light of its Article 1, which lays down the fundamental obligation for States Parties 'to secure to everyone within their jurisdiction' the respect of the human rights protected in the Convention. Accordingly, although the notion of jurisdiction is to be considered as essentially territorial, in some exceptional circumstances and for the purposes of Article 1 ECHR, the State's conduct performed, or producing effects, outside the national territory may constitute an exercise of jurisdiction, thus potentially triggering its responsibility for possible violations of the Convention. It is intuitive that the potential extra-territorial scope of application of the Convention is particularly relevant in the field of migration control, where EU frontline Member States have increasingly resorted to practices aimed at offshoring control operations, intercepting and pushing-back migrants before their arrival in the national territory.

An emblematic example is provided by the leading case *Hirsi Jamaa and Others v. Italy*,[41] concerning the interception of migrants on the high seas and their following transfer to Libya by Italian authorities. The Grand Chamber of the ECtHR unanimously held that the applicants found themselves within the jurisdiction of the Italian State, with the consequence that the migrants concerned were *de jure* and *de facto* under the control of Italy.[42] Under such circumstances, with regard to externalized border and migration controls carried out on the high seas, the Court clarified that 'the special nature of the maritime environment cannot justify an area outside the law',[43] so that fundamental principles as the rule of law and protection of human rights must be respected.

Refusals of entry, non-admission practices, summary returns and push-back strategies have been detected and denounced also with regard to the external land borders of the EU, notably in the Eastern European area. Many observers have highlighted the worrying situation at the Croatian borders, repeatedly reporting *refoulement* practices and unlawful, collective expulsions of migrants to Serbia and also to Bosnia-Herzegovina. The CoE Commissioner for Human Rights, in particular, has specifically pointed out the incompatibility of such practices with the rule of law and the respect of fundamental rights of migrants.[44] While acknowledging 'the challenges facing Croatia in the migration field', the Commissioner underlined that 'all efforts to manage migration should be strictly in line with the rule of law and binding international legal principles'.[45] Similar concerns about systematic *refoulement* strategies at the Croatian borders have been expressed by the FRA[46] and various international NGOs, such as Human Rights Watch.[47] Finally, on 18 November 2021, with the judgment in the case *M.H. and Others v. Croatia,* the Court of Strasbourg found, *inter alia,* a violation of the prohibition of collective expulsions, relating to the push-back of an Afghan family at the Croatian-Serbian border[48].

Practices contrary to the rule of law and the prohibition of *refoulement* have also been reported in Hungary. At the UN level, the UN Human Rights Committee expressed serious concerns for push-backs being applied indiscriminately at the Hungarian-Serbian borders without providing asylum-seekers with the opportunity to

41 *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, Grand Chamber, 23 February 2012).
42 ibid, paras 76-82.
43 ibid, para 178.
44 CoE Commissioner for Human Rights, CommHR/DM/sf 080-2018, 20 September 2018.
45 ibid.
46 FRA, 'Periodic Data Collection on the Migration Situation in the EU, March Highlights' (2018) February 2018; FRA, 'Migration to the EU: Five Persistent Challenges' (2018) February 2018.
47 Human Rights Watch, 'Croatia: Migrants Pushed Back to Bosnia and Herzegovina' (2018) 11 December 2018.
48 *M.H. and Others v. Croatia* App nos 15670/18 and 43115/18 (ECtHR, 18 November 2021).

lodge their requests.[49] The UN Committee also noted the inadequacy of the legal system of protection of migrants, since the Hungarian normative regime 'does not afford full protection against *non-refoulement*'.[50] Coherently, the Coe Commissioner for Human Rights, following a fact-finding mission to Hungary, concluded that 'currently, it is very difficult to access refugee protection in Hungary. Very few asylum seekers are able to exercise their right to apply for international protection'.[51]

Similar protection deficiencies have also occurred in Poland, where continuing restrictions on access to the asylum procedure have been reported.[52] The ECtHR has certified the unlawful character of these practices in the judgments *M.K. and Others v. Poland*[53] and *D.A. and Others v. Poland*[54]. Similar issues have also been addressed by the Court of Strasbourg in its judgment *M.A. and Others v. Lithuania*.[55] In its decision, the ECtHR – although by a majority of 4 votes against 3 – found a violation of Article 3 ECHR relating to the failure to allow the applicants to submit asylum applications and to their removal to Belarus, in the absence of any examination of their claim that they would face a real risk of ill-treatment. Judge Pinto de Albuquerque, in his concurring opinion, stressed that 'it is particularly important that the prohibition of *refoulement* is applicable to any form of non-admission at borders and that the effective protection of the asylum-seeker's rights is ensured'.[56] For the Portuguese judge, jurisdiction matters and extra-territorialisation of border and migration controls should not enable States to circumvent their human rights obligations, with the consequence that, on the contrary, 'all forms of immigration and border control' should be consistent with the human rights standards set by the ECHR and thus subjected to the scrutiny of the ECtHR.[57]

By way of conclusion, it is worth noting that push-backs, non-admissions and other *refoulement* practices may take place not only at the external borders of the EU, but also inside the European Union itself and thus between its Member States. Indeed, practices covering push-backs and refusals of entry are in place also between EU Member States, as recently reported by the FRA, especially with regard to migrants being sent back to Italy at the French and Austrian borders.[58] Additional issues in terms of *refoulement* have been highlighted with regard to the intergovernmental cooperation initiatives on asylum matters having been put in place between some EU Member States. Given the long-lasting controversies over the allocation of responsibility for asylum management and the deadlock in the Dublin reform, some governments have preferred to autonomously conclude bilateral measures, as in the case of 'administrative agreements' signed by Germany and Portugal, Spain and Greece for the return of asylum seekers engaging in secondary movements within the EU, essentially introducing a fast track implementation of return procedures.

While Article 36 of the Dublin III Regulation explicitly allows Member States to cooperate on a bilateral basis and conclude agreements for the simplification of procedures and the shortening of time limits,[59] the mentioned 'administrative agreements' may actually qualify as international agreements, thus falling outside EU law and in this way circumventing its safeguards and guarantees.[60] The agreed procedures would go beyond

49 UN Human Rights Committee, 'Concluding Observations on the Sixth Periodic Report of Hungary', CCPR/C/HUN/CO/6.
50 ibid, para 47.
51 CoE Commissioner for Human Rights Dunja Mijatovic, 'Report Following her Visit to Hungary' (n 42) 8.
52 FRA, 'Monthly Data Collection on the Migration Situation in the EU, January 2017 Monthly Report' (2016) December 2016, notably para 11.
53 ECtHR, judgment of 23 October 2020, *M.K. and Others v. Poland,* Appl. Nos. n. 40503/17, 42902/17 e 43643/1.
54 ECtHR, judgment of 8 July 2021, *D.A. and Others v. Poland*, Appl. No. 51246/17.
55 *MA and Others v Lithuania* App no 59793/17 (ECtHR, 11 December 2018).
56 ibid, concurring opinion of Judge Pinto de Albuquerque, para 21.
57 ibid, para 10.
58 FRA, 'Migration to the EU: Five Persistent Challenges' (n 54) 7; FRA, 'Monthly Data Collection on the Migration Situation in the EU' (n 44) 87.
59 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (2013) OJ L180/31, Article 36, para 1.
60 Stathis Poularakis, 'The Case of the Administrative Arrangement on Asylum-Seekers between Greece and Germany: A tale of "para Dublin activity"?' (2018) EU Law Analysis <http://eulawanalysis.blogspot.com/2018/11/the-case-of-administrative-arrangement.html>; Constantin Hruschka, 'The Border Spell: Dublin Arrangements or Bilateral Agreements? Reflections on the Cooperation between Germany and Greece /

the allowed administrative cooperation on 'practical details', introducing practices that may violate procedural rights of asylum seekers, as well as *non-refoulement* obligations.

In this regard, it has to be recalled that the Court of Strasbourg has affirmed that Article 3 ECHR and the protection against *refoulement* are fully applicable also between EU Member States: conclusion that has been reached in case-law on 'Dublin cases', involving transfers of asylum seekers between EU Member States according to the EU Dublin rules. The ECtHR clarified that such rules on 'Dublin transfers' cannot be applied mechanically, without previously conducting a proper assessment of the reception conditions of the receiving Member State, which may not be compatible with Article 3 ECHR.[61] EU Member States, thus, have an obligation, before executing a Dublin transfer, to concretely and effectively verify the potential specific risks for the aliens concerned of being subjected to conditions contrary to Article 3 in the Member State of destination.[62]

5. Collective expulsions of aliens

Even if the individual expulsion of an alien is permitted, although in compliance with certain substantial and procedural guarantees, States, on the contrary, encounter an absolute prohibition to expel aliens collectively. Indeed, as confirmed in the UN Memorandum on Expulsion of Aliens, while a State has and maintains the sovereign right to expel an alien individually, the collective expulsion of a group of aliens 'is contrary to the very notion of the human rights of individuals and is therefore prohibited'.[63] Collective expulsions, in this sense, represent an aggravated form of violation of human rights and are firmly and widely prohibited at international level.[64] The rationale of prohibiting the collective character of the expulsion lies, essentially, in avoiding that removals from a certain State take place without a proper examination of the individual and specific situation of the persons concerned. Thus, one of the core purpose is to prevent States from removing aliens as a group, without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the expulsion measure.[65] A violation of the prohibition of collective expulsion of aliens thus appears as particularly serious in terms of respect of the principle of the rule of (human rights) law.

Spain in the Context of Control at the German-Austrian Border' (2019) EUmigrationlawblog <https://eumigrationlawblog.eu/the-border-spell-dublin-arrangements-or-bilateral-agreements-reflections-on-the-cooperation-between-germany-and-greece-spain-in-the-context-of-control-at-the-german-austrian-border/>. See also ECRE, 'Bilateral Agreements: Implementing or Bypassing the Dublin Regulation?' (2018) Policy Paper 5 <https://www.ecre.org/wp-content/uploads/2018/12/Policy-Papers-05.pdf>.

61 *MSS v Belgium and Greece* App no 30696/09 (ECtHR, Grand Chamber, 21 January 2011). For analyses and comments on the case, see Jean-Yves Carlier and Sylvie Sarolea, 'Le droit d'asile dans l'Union européenne controlé par la Cour européenne des droits de l'homme. À propos de l'arret *M.S.S. c. Belgique et Grèce*', (2011) Journal des Tribunaux 357; Francesco Maiani and Nèraudau, 'L'arret *M.S.S. c. Grèce et Belgique* de la Cour EDH du 21 janvier 2011. De la détermination de l'ètat responsible selon Dublin à la responsabilité des ètats membre en matière de protection des droits fondamentaux' (2011) Revue du droit des étrangers 7. The approach of the ECtHR in *M.S.S.* has also been followed by the Court of Luxembourg: see Court of Justice (Grand Chamber), joined Cases C-411/10 and C-493/10, *N.S.*, judgment of 21 December 2011, ECLI:EU:C:2011:865.

62 *Tarakhel v Switzerland* App no 29217/12 (ECtHR, Grand Chamber, 4 November 2014).

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

64 At regional level, collective expulsions are prohibited by the American Convention on Human Rights (Article 22(9)), the Arab Charter on Human Rights (Article 26(2)) and the African Charter on Human and Peoples' Rights (Article 12(5), which refers to 'mass expulsion of non-nationals'). At the EU level, collective expulsions are prohibited under Article 19(1) of the Charter of Fundamental Rights. At global level, the prohibition of collective expulsion is provided for in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, with regard to those specific categories of migrants (Article 22). The UN Draft Articles on the Expulsion of Aliens, adopted in 2014 by the International Law Commission, expressly establishes that 'the collective expulsion of aliens is prohibited' (Article 9). On the prohibition of collective expulsions in the ECHR system, see Jean-Yves Carlier and Luc Leboeuf, 'Collective Expulsion or not? Individualisation of Decision Making in Migration and Asylum Law' (2018) EU Immigration and Asylum Law Policy 8 January 2018 <https://eumigrationlawblog.eu/collective-expulsion-or-not-individualisation-of-decision-making-in-migration-and-asylum-law/>; Filippo Scuto, 'Aliens Protection against Expulsion and Prohibition of Collective Expulsion by the Jurisprudence of the European Court of Human Rights' (2018) Federalismi.it, Focus Human Rights 25 June 2018; Jean-Yves Carlier and Sylvie Sarolea, *Droits des étrangers* (n 46) 111; Francesco Luigi Gatta, 'The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: The Prohibition of Collective Expulsion of Aliens in the Case Law of the European Court of Human Rights', in Giovanni Carlo Bruno, Fulvio Maria Palombino and Adriana Di Stefano (eds), *Migration Issues before International Courts and Tribunals* (CNR 2019).

65 *Hirsi Jamaa*, cit., para 177.

As the case-law of the ECtHR on Article 4 of Protocol no. 4 ECHR demonstrates, migration control practices put in place in frontline European States have raised complex issues in terms of respect of the prohibition of collective expulsions. Following its inclusion in the Convention in 1963, such provision has remained 'inactive' for a longer period of time, with only a moderate engagement of the Strasbourg Court during the decades. Quite the contrary, litigation on collective expulsions has gained momentum in recent years, and notably since 2010 onwards, increasing in parallel with the growing migratory pressure in the Mediterranean and the consequent responses put in place by EU frontline Member States.

In the past, the vast majority of cases relating to Article 4 of Protocol No. 4 ECHR had involved aliens who had already been on the national territory of the State concerned: therefore, no question of territorial applicability arose.[66] The turning point was represented by the *Hirsi Jamaa* case, in which the ECtHR unanimously concluded for the extraterritorial applicability of Article 4 of Protocol No. 4, based on the interpretation of jurisdiction under Article 1 ECHR. What is particularly significant in the Court's reasoning, is establishing a link between the prohibition of collective expulsion and the types of border control practices, being in place at that time by States. The ECtHR acknowledged that 'migratory flows in Europe have continued to intensify, with increasing use being made of the sea' and that 'the interception of migrants on the high seas and their removal to countries of transit or origin are now means of migratory control in so far as they constitute tools for States to combat irregular migration'.[67]

The Court followed the same approach in the case *Sharifi and Others v. Italy and Greece*, concerning the deportation to Greece of migrants who had clandestinely boarded vessels for Italy.[68] The ECtHR condemned the immediate *refoulement* of the migrants arrived from Greece to Italy, establishing the applicability of Article 4 of Protocol No. 4 to cases of refusal to allow entry to the national territory to persons arriving illegally. The Court did not consider relevant to ascertain whether the migrants were expelled before or after physically reaching the Italian territory. In other terms, the prohibition of collective expulsion is potentially applicable also when aliens have not concretely 'touched' the national territory of the State.[69]

The extraterritorial applicability of Article 4 of Protocol No. 4 was addressed again in the case *N.D. and N.T. v. Spain.*[70]*,* concerning the immediate push-back of migrants intercepted in the attempt of crossing the Spanish-Moroccan borders in Melilla. As the Spanish government argued before the Court of Strasbourg, this border crossing is made up of a total of three enclosures and, as the applicants did not succeed in climbing and passing through all the three protective structures, they had not physically entered the Spanish territory, with the consequence that the events had occurred outside the jurisdiction of Spain. The Court did not share this view: it considered irrelevant and unnecessary to determine exactly whether the Spanish-Moroccan border crossing of Melilla was actually located in Spain or not. Rather, recalling *Hirsi Jamaa*, it pointed out that what matters for the applicability of the Convention is the circumstance that control is exercised, *de jure* and *de facto*, by the State over the individuals concerned. In *N.D. and N.T.*, as the migrants were brought down from the barriers, arrested and then expelled by the Spanish *Guardia Civil*, the events fell within the jurisdiction of Spain for the purposes of Article 1 ECHR.

66 See, for example, *KG v Germany* App no 7704/76 (European Commission of Human Rights, 11 March 1977); *Andric v Sweden* App no 45917/99 (ECtHR 23 February 1999); *Conka v Belgium* App no 51564/99 (ECtHR, 5 February 2002).
67 *Hirsi* Jamaa, cit., para 176.
68 *Sharifi and Others v Italy and Greece* App no 16643/09 (ECtHR*,* 21 October 2014).
69 ibid, paras 210-213.
70 *ND and NT v Spain* Apps nos 8675/15 and 8697/15 (ECtHR, Grand Chamber, 13 February 2020).

Besides frontline EU Mediterranean countries, such as Italy and Spain, which have already been – or currently are[71] – involved in cases of collective expulsions due to their border control practices aimed at tackling maritime migratory flows, the case law on Article 4 of Protocol No. 4 is now encompassing a number of cases involving potential human rights violations having occurred at land borders of Eastern European States, such as Croatia,[72] Latvia,[73] and Hungary.[74] This scenario offers a further confirmation of the potential repercussions on migrants' rights of States' border policies. The Court of Strasbourg is aware of the existing friction between the competing interests of governments and migrants, acknowledging the serious difficulties faced by national authorities in dealing with increasing migratory flows. In particular, it has emphasised that 'States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers', and that it 'does not underestimate the burden and pressure this situation places on the States concerned'.[75] As for the migration across the Mediterranean, the Court has affirmed to be 'particularly aware of the difficulties related to the phenomenon of migration by sea, involving for States additional complications in controlling the borders in Southern Europe'.[76] Having said that, however, the ECtHR, while reiterating, in general terms, the States' sovereign and legitimate right to control borders, at the same time, firmly affirms the necessity for national authorities to carry out migration control measures in full compliance with their international obligations arising from the Convention, even in cases of intense migratory pressure.

6. Concluding remarks

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

Such restrictive migration policies raise serious issues as regards the respect of the principle of the rule of law, under multiple perspectives. First of all, in terms of compliance with legal and procedural requirements and guarantees established under both EU law and national legislations. The proliferation of migration-related measures, which sound like 'legal' without actually being them, represents a worrying trend in some EU frontline Member States, which have been increasingly resorting to informal and non-legally binding processes of migration management in order to avoid legislative, procedural and democratic scrutiny Such approach, is ultimately not compatible with essential components of the principle of rule of law, such as legitimacy, transparency, legal and procedural certainty, transparency and democratic participation, coupled with gaps in judicial protection and issues in terms of accountability for potential human rights violations.

Additionally, the responses put in place by EU frontline Member States appear to be problematic also in terms of compliance with the rule of (human rights) law, due to the serious repercussions produced on migrants'

71 As for Spain, at the time of writing, cases of collective expulsions of aliens allegedly carried out at the border crossings of Ceuta and Melilla are pending before the ECtHR: *Balde and Abel v Spain*, App no 20351/17, communicated on 12 June 2017.
72 *MH and Others v Croatia*, App no 15670/18, communicated to the Government on 11 May 2018.
73 *MA and Others v Latvia*, App no 25564/18, communicated to the Government on 10 May 2019.
74 *HK v Hungary*, App no 18531/17; *Khurram v Hungary*, App no 12625/17, both communicated to the Hungarian Government on 13 November 2017 and concerning the expulsion of aliens to Serbia.
75 *MSS*, cit., para 223.
76 *Hirsi Jamaa,* cit., para 122.

fundamental rights, protected under relevant provisions of international and EU law. Some of them, like the prohibitions of *refoulement* and of collective expulsions, have an absolute character and admit no derogations and as such, their violations may seem to be even more serious in terms of rule of law, understood as duty to observe relevant human rights obligations.

Which response has been put forward in Europe to address such 'crisis' of the rule of law? Which reactions and remedies have been envisaged and adopted? At the EU level, the responses have been mainly political ones. Among the European institutions, initiatives have come from the European Commission and the European Parliament, which, in 2017 and 2018, decided to trigger, for the first time, the Article 7 TEU procedure, respectively, against Poland and Hungary. Many have manifested doubts and scepticism that this move would lead to tangible and effective results for the protection of the principle of the rule of law.[77] Still, it raises awareness about serious rule of law issues that are arising in Europe, also with regard to the treatment of migrants and asylum seekers, showing the consequent intention to address them.

The CJEU, for its part, has done little to address the protection of migrants and the repercussions on their rights with regard to the external dimension of the EU's and Member States' migration policy.[78] While it has adopted and maintained quite a strong approach in the defense of migrants' rights regarding their treatment inside the territory of the Union, it has proven to be rather absent outside of Europe, even when such treatment is prompted by the external dimension of the EU migration policy. The EU-Turkey Statement is the most emblematic example in this respect.

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

77 Among others, see Carrera and Bard, cit.
78 Carlier and Crépeau, cit.

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