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ACCESS TO ASYLUM IN TIMES OF CRISIS, FORCE MAJEURE AND INSTRUMENTALIZATION IN THE EU: RESTRICTIVE TRENDS IN ASYLUM LAW AND IN THE CASE-LAW

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1. Introduction

The political construction of migration as a security issue is not new in Europe. Traces of migration as a destabilizing phenomenon impacting on State sovereignty and public order, on the one hand, and on the national identity, on the other hand, were already present in Western Europe's political debate in the aftermath of the economic stagnation

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caused by the oil price shock in 1973[1]. Since then, the political weight of migration in Europe, and particularly in the European Union (EU, the Union) has progressively increased, while (perceived) migration and refugee crises compounded with the impacts of economic and financial downturns, terrorist attacks, and the rise of extremist parties have contributed to exacerbating the upsurge of restrictive migration policies across the EU. As a consequence, the Union has over time invested considerable political and economic energies for the adoption of rigid norms aimed at curbing irregular migration and enhancing border control, while doing very little to establish regular migration channels and safe pathways to protection. According to the authors, the Member States' resort to emergency and derogatory measures in the field of migration and asylum law represents an emblematic example of this restrictive trend.

Recently faced with complex situations, indeed, the Union and its Member States have increasingly resorted to emergency legislation and derogatory measures to deter unwanted migration, in turn refraining from their obligations under refugee and human rights law. Most recent and illustrative examples include national policies in response to the instrumentalization of migration at the Greek-Turkish border; at the Member States' external border with Belarus and at the Finnish-Russian border; and the migration "crisis" in Cyprus. These emblematic cases show how alleged situations of crisis and migrants' instrumentalization have been exploited to constrain the right to access asylum and restrict protection safeguards, as the case-law has ascertained. The right to access asylum procedures, therefore, has been constricted through normative interventions, both at the national and EU level. These reforms, initially adopted in the name of the emergency, have progressively consolidated, turning exceptional measures of border management into an ordinary and tolerated practice. Such a restrictive trend has only partially been counteracted by European Courts, whose jurisprudence has arguably contributed to legitimizing such unlawful practices.

The analysis will proceed as follows. In light of the mentioned proliferation of restrictive migration policies that spurred across the EU, Section 2 offers a brief overview of some of the most emblematic cases where the Member States have derogated from EU asylum law amidst situations of crisis and instrumentalization. Considering the evident and negative impact that such measures have had on the right to asylum, Section 3 explores the role of judicial control in shaping and protecting the right to (access) asylum in the EU, with emphasis on the case-law by the ECtHR and the CJEU. The analysis engages with landmark cases where the right to access asylum has been first established and then consolidated, including with regard to migrants' instrumentalization. Yet, such protective judicial trends have been downturned by a more recent, conflicting jurisprudence, which is highlighted, with a particular focus on pushbacks, in Section 4. Section 5 examines the Regulation on Situations of Crisis, Force Majeure and Instrumentalization (hereinafter "the Crisis Regulation") and presents the main features of the derogatory regime introduced in the Common European Asylum System (CEAS)

[1] J. HUYSMANS, *The European Union and the Securitization of Migration*, in *Journal of Common Market Studies*, 2000, 38, pp. 751-777.

composed of three scenarios of crisis, *force majeure*, and instrumentalization[2]. Finally, Section 6 investigates whether, overall, the case-law of the judges in Strasburg and Luxemburg has represented an obstacle or, rather, a justification to the most controversial measures envisaged in the Crisis Regulation. This contribution argues that the Courts' restrictive or limited jurisprudence on the matter has contributed to – and to a certain extent has even shaped – the adoption of the problematic derogatory regime set forth in the recently adopted Crisis Regulation, which risks eroding further the right to (access) asylum in the EU.

2. The proliferation of emergency migration policies in times of crisis across the EU

2.1. Instrumentalization at the Greek-Turkish border

Over the years, Türkiye has become a strategic partner of the Union and played a key role in managing (or curbing) migration flows heading to the EU. It hosts the one of the largest number of refugees in the world and, at the time of the "refugee crisis" in 2015, was the main channel of transit and influx into the EU. This, in turn, made Greece the epicenter of the EU migratory crisis. The highly controversial and criticized 2016 EU-Türkiye Statement followed, namely the agreement aimed at preventing irregular migration via Türkiye to the EU[3]. The 2016 deal was considered to be legally flawed and politically weak, and in fact showed its cracks very early and led to strategies of "instrumentalization of migrants" by Türkiye[4]. Notably, in March 2020, Türkiye unilaterally decided to suspend the deal and allowed large numbers of asylum-seekers to cross the border with Greece. The Greek government "responded with mass pushbacks,

[2] Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 *addressing situations of crisis and force majeure in the field of migration and asylum* and amending Regulation (EU) 2021/1147.

[3] The EU-Turkey Statement has been widely criticized. For a recent analysis and commentary, see G. OVACIK, M. INELI-CIGER, ORÇUN ULUSOY, *Taking Stock of the EU-Turkey Statement in 2024*, in *European Journal of Migration and Law*, 2024, n. 2, pp. 154-178. For further analyses and comments see, among others, M. DEN HEIJER, T. SPIJKERBOER, *Is the EU-Turkey Refugee and Migration Deal a Treaty?*, in *EU Law Analysis*, 7 April 2017; S. PEERS, *The draft EU/Turkey Deal on Migration and Refugees: Is it Legal?*, in *EU Law Analysis*, 16 March 2016; H. LABAYLE, P. DE BRUYCKER, *The EU-Turkey Agreement on migration and asylum: False pretences or a fool's bargain?*, in *EU Immigration and Asylum Law and Policy*, eumigrationlawblog.eu, 1 April 2016; B. BENVENUTI, *The migration paradox and EU-Turkey relations*, in *IAI Working Papers*, No. 17/05, January 2017; G. FERNANDEZ ARRIBAS, *The EU-Turkey agreement: a controversial attempt at patching up a major problem*, in *European Papers*, 2016, no. 3, pp. 1097-1104; C. FAVILLI, *La cooperazione UE-Turchia per contenere il flusso dei migranti e richidenti asilo: obiettivo riuscito?*, in *Diritti Umani e Diritto Internazionale*, 2016, no. 2, pp. 405-426.

[4] Instrumentalization of migrants, or "coercive engineered migrations", can be defined as "cross-border population movements that are deliberately created or manipulated in order to induce political, military and/or economic concessions from a target state or states". See K.M. GREENHILL, *Weapons of Mass Migration*, New York, 2016, p. 13. See further, by the same Author, K.M. GREENHILL, *When Migrants Become Weapons*, in *Foreign Affairs*, March/April 2022. Although it is not a new phenomenon, in the recent years instrumentalization or "weaponization" of migrants is on the rise in Europe.

unlawful detention, and the use of excessive force"[5]. In addition, Greece adopted an emergency legislative decree where the right to asylum was suspended by law[6]. More into detail, the decree foresaw the suspension of the registration of asylum applications for one month and ordered the immediate deportation of migrants in irregular position to their countries of origin or to Türkiye without an individual assessment. This decision has been censored as unlawful under international human rights law and, in particular, in breach of the principle of non-refoulement[7]. It is worth noting, moreover, that Greece invoked Article 78(3) TFEU as a way to justify the suspension of the right to asylum. This provision enables the Council to adopt temporary solidarity measures in favor of a Member State, which is "confronted by an emergency situation characterized by a sudden inflow of nationals of third countries". Yet, it cannot be invoked as a self-reliant mechanism by a Member State, and, to say the least, self-activated to legitimize the adoption of norms in violation of EU primary law, including Article 18 of the EU Charter of Fundamental Rights. Confronted with pushbacks allegations by Frontex, the Greek Ministry of Maritime Affairs and Insular Policy argued that the State's non-refoulement obligations need to be assessed "against the general background of the situation at the eastern Aegean as well as the specific conditions of the event"[8]. Accordingly, the COVID-19 pandemic and the orchestrated mass influx of asylum-seekers from Türkiye were relevant factors to be taken into account as part of the assessment. In the Ministry's opinion, "The organized and massive character of the migration flows at the eastern Aegean […] escalated the phenomenon to a hybrid nature threat, directly affecting the EU internal stability. Moreover, it climaxed the situation to the dimension of an offence against Greece's national security, which necessitated to be counter addressed as such"[9]. Despite the evident breach of basic fundamental rights enshrined in EU law, the Commission has not initiated an infringement procedure against Greece, despite several attempts by the European Parliament to shed light on blatant violations of the EU Charter[10].

In June 2021, Greece designated Türkiye as a "safe third country" for asylum-seekers from Syria, Afghanistan, Pakistan, Bangladesh and Somalia, without providing any legal

[5] M. GKLIATI, *Let's Call It What It Is: Hybrid Threats and Instrumentalisation as the Evolution of Securitisation*, in D. VITIELLO, S. MONTALDO (eds.) *Migration Management Instrumentalisation of Migrants, Sanctions Tackling Hybrid Attacks and Schengen Reform in the Shadows of the Pact*, in *European Papers*, 2023, no. 2.

[6] Government Decree on suspension of the submission of asylum applications, in Gov. Gazette A' 45/2.3.2020.

[7] OHCHR, *Press Release: Greece: Rights violations against asylum seekers at Turkey-Greece border must stop – UN Special Rapporteur*, 23 March 2020, https://www.ohchr.org/en/press-releases/2020/03/greece-rights-violations-against-asylum-seekers-turkey-greece-border-must - :~:text=Greece decided on 1 March,without registration or individual assessment.

[8] Letter from I. Plakiotakis (Hellenic Republic Ministry of Maritime Affairs and Insular Policy) to F. Leggeri (Frontex Executive Director), https://www.statewatch.org/media/1941/greece-2.pdf

[9] *Idem*.

[10] A. SZUCS, *EU Parliament leader demands to warn Greece against illegal pushbacks*, in *AA*, 18 June 2022, https://www.aa.com.tr/en/europe/eu-parliament-leader-demands-to-warn-greece-against-illegal-pushbacks/2615276.

reasoning as to why Türkiye was considered as safe for these five nationalities[11]. This resulted in thousands of applicants having their claims dismissed as inadmissible and being ordered to return to Türkiye. The inclusion of Türkiye in the national list of safe third countries *de facto* impinges access to asylum procedures and renders the making of an asylum claim impossible.

2.2. Instrumentalization at the EU-Belarus border and at the Finnish-Russian border

In response to the sanctions imposed by the EU on Belarus after the 2020 fraudulent Belarusian presidential election, Belarus implemented practices to artificially increase migration flows and destabilize the EU and its neighboring Member States as part of a strategy of hybrid attacks[12]. Starting from the summer 2021, Lithuania, Latvia and Poland experienced a sharp increase in migration inflows from Belarus and enhanced pressure at their external borders. Indeed, the number of International protection claims increased by 414% in Latvia, 1050% in Lithuania and 493% in Poland compared to 2020[13]. Yet such a remarkable increase in arrivals needs to be contextualized. Indeed, it is relevant to note that these countries used to receive a very small number of asylum applicants. Hence, it is debatable whether 2.676 asylum applications in Lithuania, 579 applications in Latvia and 6.730 applications in Poland could constitute a "crisis" of such a magnitude that could not only destabilize their asylum system, but also put the security of the State in jeopardy. In such a chaotic context, the EU Commissioner for Home Affairs Ylva Johansson accused Belarusian President Lukashenko of using human beings in an act of aggression against the EU, while the President of the EU Commission von der Leyen blamed Belarus

[11]Joint Ministerial Decision of the Deputy Minister of Foreign Affairs and the Minister of Migration and Asylum, JMD 42799/03.06.2021, in Gov. Gazette 2425/B/7-6-2021, 7 June 2021, https://asylumineurope.org/reports/country/greece/asylum-procedure/the-safe-country-concepts/safe-third-country/#_ftnref3.

[12] On the notion of "hybrid attack" see M. STARITA, *"Hybrid attack": un concetto dalle ricadute giuridiche incerte. Considerazioni a margine della crisi umanitaria alla frontiera bielorusso-polacca*, in *ADiM Blog*, Analisi & Opinioni, Dicembre 2021. On the instrumentalization strategies put in place by Belarus and their repercussions for the EU, see C. SCISSA, *Misure emergenziali al confine tra UE e Bielorussia: uno scontro tra 'titani' con gravi ripercussioni per i migranti*, in *European Papers*, 2022, no. 1, pp. 43-49; M. FORTI, *Questioni giuridiche e problemi di tutela dei diritti fondamentali nella risposta dell'Unione europea alle pratiche di strumentalizzazione dei flussi migratori*, in this *Journal*, 2022, no. 3, pp. 245-265; S. MARINAI, *L'Unione europea risponde alla strumentalizzazione dei migranti: ma a quale prezzo?*, in *ADiM Blog*, Editoriale, dicembre 2021; D.V. KOCHENOV, B. GRABOWSKA-MOROZ, *The EU's Face in Łukašenka's Mirror: Inhuman Treatment of Afghan Hostages at the Polish-Belarusian Border and the Promise of EU Values*, in *VerassungsfBlog*, 26 August 2021. Lastly and most recently on the matter, see I. GOLDNER-LANG, *Instrumentalization of Migrants: it is necessary to act, but how?*, in *EU Immigration and Asylum Law and Policy*, 15 October 2024.

[13] See, Council of the European Union, *Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland*, n. 14692/21, 25 January 2022; Joint Communication, *responding to state-sponsored instrumentalisation of migrants at the EU external border*, JOIN(2021) 32 final, 23 November 2021, p. 2.

for launching a hybrid attack against the EU through instrumentalized migration[14]. Few months later, twelve Member States declared that "[…] all our external borders must be protected with maximum level of security. At the same time, our migration and asylum policy must be abuse-resistant"[15]. To that end, they called for enhanced border management and advocated for the possibility to erect walls and fences to effectively "prevent any threat to the Member States' internal security, public policy, public health and international relations"[16]. In their opinion, "physical barrier appears to be an effective border protection measure that serves the interest of whole EU, not just Member States of first arrival"[17].

Lithuania, Latvia and Poland considered such an unprecedented inflow as a threat to their national security and integrity to which they all responded by declaring the state of emergency and by passing *ad hoc* national laws. The extraordinary measures enshrined therein allowed them to nullify the exercise of the right to access asylum, by imposing the rejection of all international protection claims made by migrants who irregularly crossed, or attempted to cross, their national border. In addition, the right to appeal was banned and resort to illegal pushbacks was legalized. Instead of initiating an infringement procedure against the three Member States for having adopted national measures in breach of EU asylum law, the Commission advanced a proposal for a Council Decision that similarly would have allowed Poland, Latvia and Lithuania to derogate from ordinary asylum procedures, by extending the time frame for registration of international protection applicants, applying the border procedure to all claimants, including children, and expanding the deadline within which to take a decision on their admission in their territory[18]. The proposal has never been formally adopted by the Council. Yet, it remains

[14] EURONEWS, *Is Belarus using migrants as part of a 'hybrid war' against the EU?*, 11 August 2021, https://www.euronews.com/2021/08/11/is-belarus-using-migrants-as-part-of-a-hybrid-war-against-the-eu; European Commission, *2021 State of The Union Address by Commission President von der Leyen*, 15 September 2021, https://state-of-the-union.ec.europa.eu/document/download/c62c9cb5-6031-4bb0-89b6-dceb00537413_en?filename=soteu_2021_address_en.pdf.

[15] Joint letter, *Adaptation of the EU legal framework to new realities, 7 October 2021 signed by Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Greece, Hungary, Lithuania, Latvia, Poland, Slovak Republic*, 7 October 2021, https://www.politico.eu/wp-content/uploads/2021/10/07/Joint-letter_Adaptation-of-EU-legal-framework-20211007.pdf?utm_source=POLITICO.EU&utm_campaign=78aac25596-EMAIL_CAMPAIGN_2021_10_08_04_59&utm_medium=email&utm_term=0_10959edeb5-78aac25596-190537903.

[16] Communication, *A strategy towards a fully functioning and resilient Schengen area*, COM(2021) 277 final, 2 June 2021.

[17] A. BRZOZOWSKI, *Twelve member states ask Commission to finance 'physical barriers' as border protection measures*, in *Euractiv*, 8 October 2021, https://www.euractiv.com/section/justice-home-affairs/news/twelve-member-states-ask-commission-to-finance-physical-barriers-as-border-protection-measures/. See also, M. COMETTI, *La "strumentalizzazione" delle persone migranti: la risposta dell'Unione europea e la reazione lituana a confronto. Un'occasione per riflettere (anche) sull'operato dell'Agenzia dell'UE per l'asilo*, in *European Papers*, 2022, no. 1, pp. 287-304; A. DI PASCALE, *I migranti come "arma" tra iniziative di contrasto e obblighi di tutela dei diritti fondamentali Riflessioni a margine della crisi ai confini orientali dell'UE*, in *Eurojus*, 2022, no. 1, pp. 259-290.

[18] Commission, *Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland*, COM(2021) 752 final, 1 December 2021.

quite telling of the Commission's attitude towards border control and migration management.

Similarly, in April 2024, Finland declared to indefinitely extend the closure of its land border with the Russian Federation in its entirety, including to asylum applicants. The Government already shut four border crossings with Russia in November 2023 amid a growing number of migrants entering from Russia. The arrival of 1.300 asylum seekers, mainly from Yemen, Somalia and Syria between August and December 2023, led Finland to accuse the Russian Federation of using migrants as a weapon to destabilize Finland and the EU[19]. Yet, the Finnish reaction and countermeasures had repercussions on migrants' human rights, as certified by the United Nations Committee against Torture in its May 2024 report on Finland's implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[20]. The Committee warned Finland about the potential human rights violations linked to its decision to close the border with Russia to deter migrants. In particular, the Committee was concerned that this move might breach the principle of non-refoulement and the prohibition of collective expulsions. It urged Finland to "introduce safeguards to ensure all asylum-seekers and others in need of international protection arriving at its eastern border have access to fair and efficient refugee status determination procedures and non-refoulement determinations"[21].

During the same month, however, the Finnish Government proposed a new bill to push back migrants attempting to cross the Finnish-Russian border without processing their asylum applications, despite the fact that, since March 2024, there had been no new arrivals until July, when *one* person crossed the border and sought asylum[22]. Prime Minister Petteri Orpo justified such a proposal on the grounds that it would only be applied for a limited time and under exceptional circumstances and that such a legislation was necessary given that "Unfortunately the EU legislation does not yet provide us with effective tools to tackle the problem"[23]. In July the new legislation (Act on Temporary Measures to Combat Instrumentalised Migration) entered into force[24]. It allows Finnish border guards, under certain circumstances, to reject asylum applications at the crossing points with Russia. The new law also allows Finland to restrict asylum applications for

[19] E. LEHTO, *Finland extends Russia border closure indefinitely*, in *Reuters*, 4 April 2024, https://www.reuters.com/world/europe/finland-extends-russia-border-closing-indefinitely-2024-04-04/.
[20] UNITED NATIONS, *Press Release: UN Committee against Torture publishes findings on Austria, Azerbaijan, Finland, Honduras, Liechtenstein, and North Macedonia*, 10 May 2024, https://www.ohchr.org/en/press-releases/2024/05/un-committee-against-torture-publishes-findings-austria-azerbaijan-finland.
[21] *Ibidem*.
[22] ECRE, *Finland: Proposed Legislation Could Breach International Human Rights Commitments — Frontex Extends Operation on Finland-Russia Border — UN Urges Finland to Introduce Safeguards for Accessing Asylum Procedures*, 24 May 2024, https://ecre.org/proposed-legislation-could-breach-international-human-rights-commitments-%e2%80%95-frontex-extends-operation-on-finland-russia-border-%e2%80%95-un-urges-finland-to-intr/.
[23] *Ibidem*.
[24] FINNISH GOVERNMENT, *Finland enacts legislation to combat instrumentalised migration*, 16 July 2024, https://valtioneuvosto.fi/en/-/1410869/finland-enacts-legislation-to-combat-instrumentalised-migration.

one month in specific areas in cases where the country's sovereignty and national security could be at risk. Only vulnerable asylum-seekers, such as children or people with disabilities, are permitted to seek protection. The new legislation is expected to remain in force for one year. Although the Finnish government declared that the bill would be used only if needed, as it serves as a preventive law to deter Russia from pushing migrants at the Finnish border, this law seems to target migrants instead of Russia:

"If the act is applied, applications for international protection would not, apart from certain exceptions, be received in the area subject to the restriction, and instrumentalised migrants would be prevented from entering the country. A migrant who has already entered the country would be removed from the country without delay and instructed to travel to a place where applications for international protection are being received"[25].

One could in fact wonder how exactly hindering asylum-seekers to access asylum and forcing them to return to life-threatening situations would convince Russia to stop launching hybrid attacks against Finland and the EU. At the same time, it is not clear how 1.300 individuals in evident need of protection could destabilize a developed EU country with a well-functioning asylum system, a population of more than 5.5 million people and a GDP of almost 283 billion USD.

2.3. Migration "crisis" in Cyprus spurring the EU-Lebanon Deal

In April 2024, Cyprus declared a "state of crisis" and suspended the processing of asylum applications made by Syrians amid an increase in their number arriving from Lebanon in light of "enduring unbearable conditions in Lebanon and Syria"[26]. Indeed, more than 2.000 Syrian asylum-seekers arrived from Lebanon by sea in the first three months of 2024, compared to just 78 in the same period in 2023[27]. Cyprus stated that the declaration "was intended to pressure the EU to designate some parts of Syria as a safe zone to facilitate deportations"[28]. In addition, police patrol boats were deployed to prevent Syrians from reaching the country by sea. In light of the lamented crisis, in May 2024 the EU announced a 1 billion euro aid package over three years to support the country's economy as well as to prevent migration to the EU[29]. The so-called deal also envisaged return assistance to alleged "safe areas" in Syria. The fact that, since 2019, Lebanese authorities have been deporting Syrian refugees back to Syria, including through forced

[25] *Ibidem*.
[26] THE NEW HUMANITARIAN, *Cyprus halts Syrian asylum applications*, 15 April 2024, https://www.thenewhumanitarian.org/news/2024/04/15/cyprus-halts-syrian-asylum-applications.
[27] ALJAZEERA, *Cyprus suspends asylum applications for Syrians as arrivals rise*, 14 April 2024, https://www.aljazeera.com/news/2024/4/14/cyprus-suspends-asylum-applications-for-syrians-as-arrivals-rise.
[28] ECRE, *Press Release: EU External Partners*, 26 April 2024, https://ecre.org/eu-external-partners-ombudsman-renews-inquiry-into-eu-tunisia-deal-%e2%80%95-auditors-raise-concerns-about-implementation-of-eu-deal-with-turkiye-%e2%80%95-eu-migration-deal-with-lebanon-may-be-immin/.
[29] This financial package is part of the Neighbourhood, Development and International Cooperation Instrument (NDICI). See, European Commission, Factsheet: EU-Lebanon cooperation, https://neighbourhood-enlargement.ec.europa.eu/document/download/66a65644-99a7-4e86-b320-4a10abe70c60_en.

returns at the border, raises severe concerns over the respect of fundamental rights under the EU-Lebanon migration deal, including the right to asylum and the principle of non-refoulement[30].

Overall, the use of legal and physical barriers to asylum (such as the suspension of the right to asylum or the closure of borders) and protracted derogation to basic human rights due to (perceived) migration emergencies have severely limited, if not denied, the fundamental right to (access) asylum. Most recent examples confirm this trend: such as the German plan "to reject more migrants directly at German borders" and to send asylum-seekers to Rwanda, along with the Denmark-Rwanda and UK-Rwanda Deals, which all raise severe concerns[31].

3. The role of judicial scrutiny in shaping the right to access asylum in the EU

Although the right to asylum is a fundamental right recognized at the international level, it has no clear codification in international law (and it is not expressly enshrined in the ECHR)[32]. Its contours remain uncertain also in the EU legal order, where the right to asylum is codified in EU primary law (Article 78 of the Treaty on the Functioning of the EU - TFEU; Article 18 of the EU Charter on Fundamental Rights), as well as in EU secondary law[33]. For instance, the CJEU had at least two occasions to elucidate the scope of Article 18 of the EU Charter, although in the particular context of the Dublin system, but in both cases it did not enter into the merit[34]. At the very least, there is substantial agreement that the right to asylum includes a procedural and substantial dimension, where the person has the entitlement to *access* an adequate evaluation procedure and the right to *receive protection* when the conditions for its recognition are met[35].

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[30] HUMAN RIGHTS WATCH, *"I Can't Go Home, Stay Here, or Leave". Pushbacks and Pullbacks of Syrian Refugees from Cyprus and Lebanon*, 4 September 2024, https://www.hrw.org/report/2024/09/04/i-cant-go-home-stay-here-or-leave/pushbacks-and-pullbacks-syrian-refugees-cyprus - :~:text=Human Rights Watch calls on,effectuated punishment for irregular migration.

[31] A. RATZ, S. MARSH, *Germany tightens controls at all borders in immigration crackdown*, in *Reuters*, 10 September 2024, https://www.reuters.com/world/europe/germany-put-temporary-controls-all-land-borders-source-says-2024-09-09/; ALJAZEERA, *German official says Rwanda deportation plan using UK facilities considered*, 7 September 2024, https://www.aljazeera.com/news/2024/9/7/german-official-says-rwanda-deportation-plan-using-uk-facilities-considered.

[32] On the foundations and subsequent evolution of the international refugee law and governance, see V. CHETAIL, *International Migration Law*, Oxford, 2019; C. COSTELLO, M. FOSTER, J. MCADAM, *The Oxford Handbook of International Refugee Law*, Oxford, 2021.

[33] On the asylum system and governance under EU Law, see E. TSOURDI, P. DE BRUYCKER, *Research Handbook on EU Migration and Asylum Law*, Cheltenham, 2022; D. THYM, *European Migration Law*, Oxford, 2023; V. MORENO-LAX, *The EU Right to Asylum: An Individual Entitlement to (Access) International Protection, Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford, 2017.

[34] Court of Justice of the EU, Grand Chamber, judgment of 21 December 2011, *N.S. v United Kingdom and M.E. v Ireland*, C-411-10 and C-493-10; Court of Justice of the EU, judgment of 30 May 2013, *Halaf*, in case C-528/11.

[35] V. MORENO-LAX, *The EU Right to Asylum*, cit.

Courts in Strasbourg and Luxembourg have the utmost task of ensuring and monitoring the compliance with the law in the interpretation and implementation of the treaties under their mandate. Both the ECtHR and the CJEU have been asked to secure the right to asylum as well as related legal obligations, such as the principle of non-refoulement, to make that right effective, especially in the face of the legal and physical barriers erected by the EU and its Member States. As Costello put it, "refugee protection depends, in practice, on access to a place of refuge"[36].

3.1. The role of the ECtHR in preserving the right to access asylum

Although not expressly enshrined in the ECHR, the ECtHR found the right to *access* asylum, hence the procedural dimension of the right to asylum, to be implicit in the Convention[37]. In *Amuur*, concerning a group of asylum-seekers detained in the international zone of a French airport, the ECtHR acknowledged the "right to gain effective access to the procedure for determining refugee status"[38].

The procedural dimension of the right to asylum came at the forefront in the case-law of the ECtHR also when confronted with denial to access asylum based on so-called fictions of non-entry or non-presence. In this context, the Strasburg Court has over time expanded the concept of jurisdiction under Article 1 ECHR and made clear that States' human rights obligations do not cease to exist in scenarios beyond the "ordinary and essentially territorial notion of jurisdiction"[39].

In addition, the Court had the opportunity to shape the right to access asylum in several cases in the context of practices of pushbacks and States' deficiencies in their asylum and reception systems. Among many others, three rulings deserve particular attention.

First is the landmark case *Hirsi Jamaa and Others v. Italy*, where the ECtHR dealt with an informal practice of collective expulsion in international waters orchestrated by the Italian coast guard to intercept and remove migrants back to Libya in the framework of the 2007 Italy-Libya bilateral agreement providing for, *inter alia*, cooperation on the

[36] C. COSTELLO, *Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored*, in *Human Rights Law Review*, 2012, no. 2, p. 288.

[37] For an overview of the initial "silence" of the ECHR on the right to asylum and its subsequent entry into the Strasbourg protection system, see M.B. DEMBOUR, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford, 2015; M.B. DEMBOUR, *The Migrant Case Law of the European Court of Human Rights: Critique and Way Forward*, in B. ÇALI, L. BIANKU, I. MOTOC (eds.), *Migration and the European Convention on Human Rights*, Oxford, 2021, pp. 19-40; H. LAMBERT, *The position of aliens in relation to the European Convention on Human Rights*, Human Rights Files No. 8, Strasbourg, 2007, p. 83; D. ROUGET, *Les étrangers et la Convention européenne des droits de l'homme: une protection limitée et contrastée*, in *Revue Québécoise de Droit International*, Vol. 13-1, 2000, pp. 219-245.

[38] European Court of Human Rights, judgment of 25 June 1996, App. No. 19776/92, *Amuur v. France*, para. 43.

[39] European Court of Human Rights, judgment of 12 December 2001, App. No. 52207/99, *Banković v. Belgium*, para. 61.

fight against irregular migration and border controls[40]. The applicants, who were immediately returned to Tripoli after being intercepted by Italian authorities, stated they had no opportunity to challenge their return to Libya. In addition, no identification procedure or personal assessment of their conditions were carried out. In such circumstances, it was impossible to make a formal asylum claim. The Italian government justified the interception at sea as a conduct requested by the implementation of the bilateral agreement with Libya, with the aim to curb irregular migration. The ECtHR found Italy accountable for violation of Articles 3 and 13 ECHR and of Article 4 Protocol 4 ECHR. With reference to Article 3, the Court found that, when removing migrants back to Libya, "Italian authorities knew or should have known that, as irregular migrants, they would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country"[41]. Not only were migrants exposed to ill-treatment in Libya (direct refoulement), but also to the risk of arbitrary repatriation to their countries of origin, which was also found in breach of the Convention (so-called chain or indirect refoulement). As for Article 4 Protocol 4 ECHR, the Court ruled that the migrants' transfer to Libya, carried out without any form of examination of each applicant's individual situation, is sufficient to ascertain the existence of a collective expulsion. In addition, the ECtHR highlighted that the military ships did not have on board personnel specifically trained to conduct individual interviews, nor interpreters or legal advisers. This is a key passage of the ruling, as the Court seems to imply that the right to access asylum does not only entail the existence of negative duties for the State (prohibitions of refoulement and collective expulsions), but also positive obligations. Indeed, the presence of competent and well-trained personnel able to grant access to asylum and registration procedures at the borders is key to ensure an effective and adequate exercise of the right to asylum.

In assessing the violation of this provision, the judges pointed out "that problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the Convention"[42]. Finally, because of the

[40] European Court of Human Rights (Grand Chamber), judgment of 23 February 2012, App. No. 27765/09, *Hirsi Jamaa and Others v. Italy*. It is a landmark judgment in the framework of international and European asylum and migration law, which has been widely commented and analyzed in the literature. Among others, see M.B. DEMBOUR, *Interception-at-Sea: Illegal as Currently Practiced – Hirsi and Others v. Italy*, in *Strasbourg Observers*, 1 March 2012; M. DEN HEIJER, *Reflections on Refoulement and Collective Expulsion in the Hirsi Case*, in *International Journal of Refugee Law*, 2013, no. 2, pp. 265-290; M. GIUFFRÉ, *Watered-Down Rights on the High Seas: Hirsi Jamaa and Others v Italy (2012)*, in *International and Comparative Law Quarterly*, 2012, no. 3, pp. 728-750; A. LIGUORI, *La Corte Europea dei Diritti dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: il caso Hirsi*, in *Rivista di Diritto Internazionale*, 2012, no. 2, p. 415 ff.; F. MESSINEO, *Yet Another Mala Figura: Italy Breached Non-refoulement Obligations by Intercepting Migrants' Boats at Sea, says ECtHR*, in *EJIL: Talk!*, 24 February 2012; B. NASCIMBENE, *Condanna senza appello della "politica dei respingimenti"? La sentenza della Corte europea dei diritti dell'uomo* Hirsi e altri c. Italia, in *Istituto Affari Internazionali*, Documenti IAI, marzo 2012.

[41] *Ibidem*, para. 131.

[42] *Ibidem*, para. 185.

lack of any identification procedure and individual assessment of the situation of the applicants, the rights to an effective remedy and to access asylum were equally impaired.

Second is the *M.S.S. v. Belgium and Greece* case, which concerned the transfer of an Afghan asylum-seeker from Belgium to Greece under the Dublin II Regulation. In this landmark case, the ECtHR found Greece responsible for the violation of, respectively, Article 3 ECHR and Article 13 read in conjunction with Article 3[43]. With reference to the first matter, the Court ruled that the applicant's degrading conditions in which he was forced to live because of the State's negligence led to a violation of the prohibition of torture, inhuman and degrading treatment. In addition, the ECtHR held Greece accountable for the deficiencies of its asylum system, which resulted in a *de facto* denial of the applicant's right to access to asylum, the absence of any examination of the merits of his asylum claim and the complete lack of access to an effective remedy[44]. In particular, the Court found severe deficiencies in the asylum procedure undertaken in Greece, whereby most applications were rejected at first instance because they were considered to be grounded on economic reasons. Decisions taken at first instance "were mostly negative and worded in a stereotyped manner" with no reference to Country of Origin Information, no explanation of the facts on which the decision was based and no legal reasoning[45]. Such severe flaws consequently exposed the applicant to a heightened risk of being expelled to Afghanistan in violation of the Convention. At the same time, the Strasburg Court also found Belgium responsible for a violation of Article 3 ECHR inasmuch as, by sending the applicant back to Greece, it knowingly exposed him to the risks linked to the deficiencies in the asylum procedure, detention and living conditions there that were in breach of the Convention. The disruptive repercussions of *M.S.S.* cannot go unnoticed. Indeed, what the Strasbourg Court did in this case was to dismantle the assumption that EU Member States provide equivalent standards of safeguards and protection of rights in their asylum systems and certified the systematic deficit of the Greek asylum and reception system. This led the CJEU to share the ECtHR findings in *N.S. and M.E*, a ruling which, in turn, prompted legislative amendments of the Dublin Regulation, as the issue of systemic deficiencies in the national asylum system was explicitly included as an obstacle to Dublin transfer. Finally, in *Sharifi and Others v. Italy and Greece*, the Strasburg Court found the two Member States responsible for the violation of the Convention for having collectively and informally returned large numbers

[43] European Court of Human Rights (Grand Chamber), judgement of 21 January 2011, App. No. 30696/09, *M.S.S. v Belgium and Greece*. For an analysis of the judgment, including with regard of its repercussions on the EU Dublin system, see L. MAGI, *Protezione dei richiedenti asilo "par ricochet" o protezione par moitié?: La Grande Camera ripartisce tra gli Stati contraenti le responsabilità per violazione della Convenzione europea conseguenti al trasferimento di un richiedente asilo in attuazione del regolamento "Dublino II*, in *Rivista di diritto internazionale*, 2011, p. 824; M. MARCHEGIANI, *Regolamento "Dublino II" e Convenzione europea dei diritti umani: il caso "M.S.S." c. "Belgio" e "Grecia"*, in *Studi sull'integrazione europea*, 2011, p. 357 ff.; P. MALLIA, *Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation*, in *Refugee Survey Quarterly*, 2011, p. 107 ff.

[44] The deficiencies of the Greek asylum system also cover the age assessment and failures in providing children seeking asylum with adequate services. Please see, ECtHR, judgment of 18 January 2024, App. No. 16112/20, *K. v. Greece*.

[45] European Court of Human Rights, *M.S.S. v. Belgium and Greece*, cit., para. 184.

of migrants from Italy to Greece, before the applicants could lodge an asylum claim. The Italian government attempted to justify such unlawful practices as a way to speed up Dublin transfers and argued that the readmission of irregular "economic migrants" was legitimate under a (unpublished) bilateral readmission agreement signed in 1999 with Greece[46]. The judges in Strasburg asserted that the immediate expulsion of migrants without an examination of their personal circumstances "deprived the persons concerned of any effective opportunity to submit an application for international protection and of any other procedural and material guarantee"[47]. In this regard, the Court noted the lack of linguistic, legal and material assistance, the provision of minimum information regarding the asylum and border procedures in a language they could understand.

If the above judgements contribute to *ascertaining* the existence of the right to access asylum in the ECtHR case-law, more recent rulings help understanding the essential role of the Strasburg Court in *safeguarding* it in the context of migrants' instrumentalization. In *M.K. and Others v Poland*, the ECtHR ruled on the repeated refusal of Polish border authorities to let Russian asylum-seekers from Chechnya, both adult and minors, enter into the territory and examine applications for international protection[48]. Each time they sought protection in Poland, border authorities issued individual decisions denying their entry because of the lack of formal authorization to do so and because they considered that the reasons of flight were economic in nature. The ECtHR found that such decisions did not adequately reflect the applicants' fear of being persecuted. Relevantly, the Court acknowledged that practices of pushbacks at the border and the misrepresentation of the predicament of asylum-seekers constitute an administrative practice, designed and orchestrated by the Polish government, to keep migrants away from the national territory. In other words, Poland was aware of the life-threatening risks migrants would be exposed to if deported and the consequent violation of key fundamental rights – including but not limited to the right to access asylum, the prohibitions of collective expulsion and of refoulement –, but intentionally decided to implement such unlawful measures anyway. The Court observed that automatically expelling groups of migrants to Belarus without an individual evaluation of their protection claim amounted to collective expulsions and to a risk of being subjected to degrading treatment, in breach of Article 4 Protocol 4 ECHR and Article 3 ECHR respectively. The Court concluded that Poland had failed to evaluate the applicants' asylum claims, in violation of their procedural obligations. Moreover, in expelling the applicants pending the examination of their applications, the Polish authorities were aware that this would have exposed asylum-seekers to a serious

[46] J. LENART, *'Fortress Europe': Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms*, in *Merkourios*, 2012, no. 75, pp. 4-19.
[47] European Court of Human Rights, judgment of 21 October 2014, App. No. 16643/09, *Sharifi and Others v. Italy and Greece*, para. 215.
[48] European Court of Human Rights, judgment of 23 July 2020, App. Nos. 40503/17, 42902/17, 43643/17, *M.K. and Others v Poland*. For analyses and commentaries of the judgment, see F.L. GATTA, *Systematic push back of 'well behaving' asylum seekers at the Polish border: M.K. and Others v. Poland*, in *Strasbourg Observers*, 7 October 2020; U. BRANDL, P. CZECH, *A human right to seek refuge at Europe's external borders: The ECtHR adjusts its case law in M.K. vs Poland*, in *EU Migration Law Blog*, September 2020.

risk of *chain-refoulement* from Belarus, in violation of Article 3 ECHR. In addition, Poland had violated their right to an effective remedy under Article 13 ECHR and Article 34 ECHR; the latter because Poland did not implement the interim measures ordered by the Court in relation to the prohibition of the expulsion of third-country nationals to Belarus. Finally, the ECtHR noted that if a State removes an asylum-seeker to a third country without a thorough examination of their application, it must at least assess whether they would have access to an adequate asylum procedure in the receiving third country, protecting them against refoulement. However, Belarus is not bound by the ECHR and cannot be considered to be a safe third country for Chechen asylum-seekers.

The findings in *M.K.* have been consolidated in similar judgements. In *A.B.*, the refusal to let Russian nationals from Chechnya, both adult and minors, to enter into Poland for the purposes of making an asylum claim twenty-four times in 2017 led the ECtHR to condemn Poland for severe violations of the Convention's rights[49]. This relevant acknowledgment has been confirmed in the recent case *Sherov and Others v. Poland*, where the applicants were four citizens of Tajikistan who, between December 2016 and February 2017, had repeatedly attempted to enter Poland via Ukraine. Once again, the ECtHR found a violation of Articles 3 and 13 ECHR as well as of Article 4 Protocol 4. In particular, the facts that the applicants had no access to asylum procedures and that they were sent back to Ukraine "without an examination of whether the receiving State was safe for them and whether they would have access to an effective and adequate asylum procedure there, or whether they would be exposed to a risk of chain *refoulement* and treatment prohibited by Article 3 of the Convention, constituted a violation of the procedural limb of that Article"[50].

Despite such landmark judgments, it is relevant to note that, on several occasions, the ECtHR has refrained from examining the alleged violation of substantial Convention's rights, including Articles 2 and 3, and 4 of Protocol 4, of hundreds of migrants collectively expelled by Italy because of procedural flaws in their applications to Strasbourg, such as the lack of continuous contact between the applicants and their lawyers once deported[51]. In striking out the applications made by tens of migrants expelled without an individual assessment of their asylum claim, the Strasburg Court in *Hussun* acknowledged the considerable obstacles of administrative and practical nature faced by Italy in managing

[49] European Court of Human Rights, judgment of 30 June 2022, App. No. 42907/17, *A.B. and Others v. Poland*. For similar circumstances, see European Court of Human Rights, judgment of 30 June 2022, App. No. 39028/17, *A.I. and Others v. Poland*; European Court of Human Rights, judgment of 11 December 2018, App. No. 59793/17, *M.A. and Others v. Lithuania.*

[50] European Court of Human Rights, judgment of 4 April 2024, App. Nos. 54029/17 and 3 others, *Sherov and Others v. Poland*, para. 50.

[51] Among others, European Court of Human Rights, judgment of 19 January 2010, App. Nos. 10171/05, 10601/05, 11593/05, 17165/05, *Hussun and Others v. Italy*; ECtHR, decision of 12 April 2007, App. No. 4697/05, *Gomaa Hamed and Others 196 v. Italy*, concerning around 200 applicants from Africa and the Middle East. For a thorough analysis of the jurisprudence of the ECtHR in the field of collective expulsion, please see F. L. GATTA, *Il divieto di espulsione collettiva di stranieri nel diritto internazionale e dell'Unione europea*, Napoli, 2023.

migration flows. Such an empathy with the Member States has played a central role in the jurisprudence post-2015.

3.2. The role of the CJEU in safeguarding the right to asylum

When it comes to the conceptualization and the interpretation of the right to asylum in EU law, it is important to remind the content of Article 78(1) TFEU, namely that "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection *with a view to offering appropriate status to any third-country national requiring international protection* and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties"[52]. In addition, the Common European Asylum System sets out the essential components of the right to asylum that comprise common rules to establishing a uniform status of international protection, common procedures, common reception standards, and common criteria to determine the Member States' responsibility for international protection claims. In particular, the Preamble of the Qualification Directive illustrates that it "[…] seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members", whereas its scope "is to lay down standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection-*granted*"[53].

Whereas the right to asylum is not absolute in EU law, as it is subject to a number of exceptions amid reasons of security and public order as well as to the use of the safe third country notions, the EU legal framework seems to outline the substantial right to be *granted* protection, when relevant conditions are met. In addition, the right to asylum under EU law guarantees common procedural standards. Indeed, both the Dublin III Regulation and the Asylum Procedures Directive aim to ensure effective access to asylum procedures, although scholars have warned about the risk of erosion of such guarantees under the reforms of the New Pact on Migration and Asylum[54].

Concerning the procedural aspect of the right to asylum, the CJEU corroborates the key relevance of an individualized assessment of the asylum claim enshrined in the Qualification Directive. In *A, B, C* the Luxemburg judges explain that an individual assessment needs to take into account the individual situation and the personal circumstances of the claimant, with particular reference to their social status, sex, age in order to assess whether, on such a basis, their predicament might substantiate a well-

[52] Emphasis added.
[53] Emphasis added.
[54] V. CHETAIL, M. FEROLLA VALLANDRO DO VALLE, *The Asylum Procedure Regulation and the Erosion of Refugee's Rights*, in *EU Migration Law Blog*, May 2024.

founded fear of persecution or serious harm[55]. The same rationale applies in the case of exclusion from the refugee status[56].

At the same time, the CJEU has developed a strong judicial trend aimed at cementing the due process safeguards linked to the right to asylum and the respect for the principle of non-refoulement, including the right to be heard and the right to receive a written removal decision[57]. For instance, in *M.M. (1) and (2)*, the Court established the obligation upon the Member States to ensure a right to be heard within the procedure assessing the subsidiary protection claim, and that this should be separated from the refugee status procedure[58]. In *Mukarubega* and *Boudjlida*, the CJEU, in Moraru's words, has played a "legislative gap-filling role", where it recognized a "new" right to be heard to returnees under the Return Directive, which stemmed from the EU general principle of rights of defense[59].

In addition, the CJEU has intervened to stop Dublin transfers to Greece due to systemic failures of its asylum procedure reception conditions, which are incompatible with migrants' fundamental rights[60]. In particular, the CJEU posited that the Member States, including the national courts, may not carry out a Dublin transfer "where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter"[61].

In some cases, the CJEU played also a key role in condemning unlawful practices of pushbacks at the EU-Belarus border, in spite of the Commission's inertia on the matter. Indeed, the Commission decided to stay silent and not to initiate an infringement procedure under Article 258 TFEU in relation to national responses to migrants' instrumentalization. Yet, the CJEU was asked to pronounce itself on the compliance of Lithuania's emergency law with EU asylum law via a preliminary ruling lodged by a Lithuanian court. In *M.A. v. Valstybės sienos apsaugos tarnyba*, the CJEU ruled that the

[55] Court of Justice of the EU, judgment of 22 February 2024, *ABC Projektai UAB v Lietuvos bankas*, C-661/22.
[56] Court of Justice of the EU (Grand Chamber), judgment of 9 October 2010, *Bundesrepublik Deutschland v B and D*, C-57/09 and C-101/09.
[57] *Inter alia*, Court of Justice of the EU, judgment of 5 November 2014, *Mukarubega*, C-166/13; judgment of 11 December 2014, *Boudjlida*, C-249/13; judgment of 5 June 2014, *Mahdi*, C-146/14 PPU. See, M. MORARU, M. CLEMENT, *Judicial interactions upholding the right to be heard of asylum seekers, returnees and immigrants: the symbiotic protection of the EU Charter and general principles of EU law*, in M. MORARU, F. CASAROSA (eds.), *The Practice of Judicial Interaction in the Field of Fundamental Rights*, Cheltenham, 2022, pp. 1-22.
[58] Court of Justice of the EU, judgement of 22 November 2012, *MM v. Minister for Justice, Equality and Law Reform and Others*, case C-277/11; judgement of 9 February 2017, *M v. Minister for Justice and Equality*, C-560/14.
[59] M. MORARU, *The European Court of Justice Shaping the Right to be Heard for Asylum Seekers, Returnees, and Visa Applicants: An Exercise in Judicial Diplomacy*, in V. FEDERICO, M. MORARU, P. PANNIA, *Adjudicating migrant's rights: what are European Courts saying?*, in *EJLS Special Issue*, May 2022, p. 35.
[60] Court of Justice of the EU, *N.S. and M.E.*, cit., para. 77.
[61] *Idem*, para. 94.

procedural guarantees, which ensure an effective access to an individual assessment of the asylum claim, cannot be derogated against even in the event of a declaration of an emergency due to a mass arrivals if asylum-seekers are effectively deprived of the right to access the asylum procedure[62]. In the specific case, the Court found that national emergency law prevented migrants from making an international protection claim, thus nullifying the right to asylum. The CJEU censored the unlawful practice of pushbacks together with the systematic use of automatic detention of asylum-seekers.

As it will be demonstrated in the following Sections, however, the rich safeguards surrounding the right to asylum for migrants already *in the EU* contrast with the lack of provisions concerning its application *beyond* the EU borders.

4. Deterioration of human rights guarantees at borders and restrictive trends in the European Courts: the case of pushbacks

The situation of the rule of (human rights) law in the EU has deteriorated considerably in the recent years, especially with regard to the external borders of its Member States, which, in several cases, have become "*zones de non-droit*"[63]. The worrying erosion of the basic guarantees and rights enjoyed by migrants at the borders has been widely documented and criticized by many authoritative international observers, including within the EU, since a few years now[64].

Such a phenomenon is especially evident in relation to the impressive propagation of pushback practices all along the external perimeter of the EU. Pushbacks, indeed, possibly represent the most emblematic example of annihilation of the legal-procedural "armor" which, under international and EU law, surrounds and accompanies the asylum seeker on the move in search of protection. More generally, pushbacks imply a denial of their inherent human dignity, as, by intentionally ignoring the individual situation of the asylum seekers, the State legally de-humanizes them.

In this vein, the pushback can be considered as an aggravated form of collective expulsion. The latter is defined as "any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a *reasonable and objective examination* of the particular case of each individual alien of the group"[65]. As such, the

[62] Court of Justice of the EU, First Chamber, Judgment of 30 June 2022, *M.A. v. Valstybės sienos apsaugos tarnyba*, C-72/22, para. 75.
[63] J-Y CARLIER, F. CREPEAU, *De la "crise" migratoire Européenne au Pacte mondial sur les migrations: exemple d'un mouvement sans droit?*, in *Annuaire Français de Droit International*, Paris, 2017, LXIII, p. 462. Similar considerations on the border as a paradigm of the deterioration of the rule of law and other fundamental values of the EU are expressed in B. NASCIMBENE, A. DI PASCALE, *Le frontiere nel diritto dell'Unione europea: norme, evoluzione, significato,* in *Eurojus*, 2020, no. 3, p. 51 ff.
[64] See, for example, EU FUNDAMENTAL RIGHTS AGENCY (FRA), *Migration: Fundamental Rights Issues at Land Borders*, Report, Luxembourg, 2020.
[65] European Commission on Human Rights, decision of 3 October 1975, App. no. 7011/75, *Becker v. Denmark*, p. 236 (emphasis added). This first definition of collective expulsion has been reiterated by the ECtHR ever since, in its subsequent case-law.

prohibition against this conduct, requires national authorities to carry out an individualized assessment of the alien. The key question will be, then, whether such an individualized assessment has been sufficient, i.e., reasonable and objective. Pushbacks, on the contrary, entail a more severe violation of human rights law in so far as they encompass "all measures, actions or policies effectively resulting in the removal of migrants, individually or in group, *without an individualized assessment*"[66]. Here, thus, it is not a matter of the quality of the individual assessment, and of "measuring" how reasonable and objective it has been, simply because such an assessment has not taken place at all. The pushback is, typically, a conduct which leaves no traces behind, being inherently characterized by the lack of any procedure (not even the identification of the alien), the lack of formal decision by the State authorities and the lack of transparency. And this is precisely why it is so advantageous for the States.

Within the alarming phenomenon of proliferation of pushbacks in Europe, four main characterizing trends are observable. Firstly, resorting to pushbacks is no longer exceptional or episodic, rather it has become a common, ordinary practice of border management. Secondly, an increasing number of States are "legalizing" pushbacks, by passing domestic legislation which makes for border agents admissible (or even mandatory) to perform these conducts. Thirdly, pushback practices are often accompanied by an increased use of violence, and sometimes even lethal force, vis-à-vis migrants. Lastly, pushbacks often take place with an "hybrid mode", as multiple (State and non-State) actors are involved in the practical implementation of the conduct, which renders its imputability extremely complicated from a legal and a judicial point of view.

Against this background, the following paragraphs intend to explore whether and how the European courts have dealt with such developments.

4.1. Strasbourg: from the "relaxation" of the protection standards to the actual admissibility of pushbacks

The case-law of the ECtHR is quite telling of the involution of the ECHR standards of protection against collective expulsions, pushbacks and restrictive border control techniques. The approach of the Court has switched significantly after 2015, i.e., the peak of the so-called European refugee crisis. The judicial watershed in this respect can be identified in the 2016 Grand Chamber judgment *Khlaifia and Others v. Italy*[67]. The case

[66] UN Special Rapporteur on the Human Rights of Migrants, Felipe Gonzalez Morales, *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, 12 May 2021, UN Doc. A/HRC/47/30, §35 (emphasis added). See also the definition provided for by the EU Fundamental Rights Agency, which reads as follows "a person is apprehended after an irregular border crossing and summarily returned to a neighbouring country *without assessing their individual circumstances* on a case-by-case basis". EU FUNDAMENTAL RIGHTS AGENCY (FRA), *Migration: Fundamental Rights Issues at Land Borders*, Report, 2020, p. 4, emphasis added.

[67] European Court of Human Rights (Grand Chamber), judgment of 15 December 2016, App. No. 16483/12, *Khlaifia and Others v. Italy.* The judgment represents a turning point in the migration-related case-law of the ECtHR, as such, it has been widely commented (and criticized) in the literature. Among other contributions, see P. BONETTI, *Khlaifia contro Italia: l'illegittimità di norme e prassi italiane sui*

concerned the simplified, de-proceduralized, fast-track return procedure to repatriate Tunisian nationals from Italy, as provided for in a (secret) bilateral agreement between the two countries. Essentially, the verification of the Tunisian nationality was the only procedural step requested to trigger the removal by the Italian authorities. The Chamber ruling of 2015 had declared that the mere identification of the alien represented a minimum but *insufficient* requirement to exclude the existence of a collective expulsion[68]. The Grand Chamber in 2016 overturned the judgment, considering the Italian accelerated identification procedures, adopted with no individual interviews, and leading to standardized decisions with the same reasoning, as compatible with the prohibition of collective expulsions.

One can note the turn of the Grand Chamber in the time span of just a few years. In *Hirsi Jamaa*, discussed above, it had unanimously established that States are to provide migrants with effective procedural guarantees, including by putting at their disposal personnel "trained to conduct individual interviews" and by making sure they are "assisted by interpreters or legal advisers"[69]. Having trained staff at borders, ready to provide linguistic and legal assistance, quite logically implies the right to access to an individual interview and examination of one's personal situation. In *Khlaifia*, however, the Grand Chamber concluded that the prohibition of collective expulsions "does not guarantee the right to an individual interview in all circumstances"[70].

While the mentioned Italian cases concerned pushbacks conducted by sea (by the Coast guard in *Hirsi*) and by air (via organised flights in *Khlaifia*), in the notorious 2020 ruling *N.D. & N.T. v. Spain* the ECtHR dealt for the first time with a land pushback. The applications reached, once again, the Grand Chamber, following the Spanish government's request of referral, given that the 2017 Chamber ruling had unanimously declared the violation of the prohibition of collective expulsion[71]. In *N.D. & N.T.* the

respingimenti e trattenimenti degli stranieri, in *Quaderni Costituzionali*, 2017, no. 1, pp. 176-180; A.I. MATONTI, *Garanzie procedurali derivanti dall'art. 4 del Protocollo 4 CEDU: il caso Khlaifia,* in *Diritti umani e diritto internazionale*, 2017, no. 2, pp. 523-531; A. SACCUCCI*, I 'ripensamenti' della Corte europea sul caso Khlaifia: il divieto di trattamenti inumani e degradanti e il divieto di espulsioni collettive 'alla prova' delle situazioni di emergenza migratoria*, in *Rivista di diritto internazionale*, 2017, no. 2, pp. 552-565; A.R. GIL, *Collective Expulsions in Times of Migratory Crisis: Comments on the Khlaifia Case of the ECHR*, in *EU Immigration and Asylum Law and Policy*, 11 February 2016; J.I. GOLDENZIEL, *Khlaifia and Others v. Italy, App. No. 16483/12, European Court of Human Rights (Grand Chamber), December 15, 2016*, in *The American Society of International Law, International Decisions*, 2018, no. 2, pp. 274-280; L. TSOURDI, *Refining the Prohibition of Collective Expulsion in Situation of Mass Arrivals: A Balance Well Struck?*, in *Newsletter EDEM*, janvier 2017; D. VENTURI*, The Grand Chamber's Ruling in Khlaifia and Others v Italy:One Step Forward, One Step Back?, in Strasbourg Observers*, 10 January 2017; S. ZIRULIA, S. PEERS, *A Template for Protecting Human Rights during the 'Refugee Crisis'? Immigration Detention and the Expulsion of Migrants in a Recent ECtHR Grand Chamber Ruling*, in *EU Law Analysis*, 5 January 2017.

[68] European Court of Human Rights, judgment of 1 September 2015, App. No. 16483/12, *Khlaifia and Others v. Italy*. See, in particular, para. 156: "La Cour est cependant d'avis que la simple mise en place d'une procédure d'identification ne suffit pas à exclure l'existence d'une expulsion collective".

[69] European Court of Human Rights (Grand Chamber), *Hirsi Jamaa and Others v. Italy*, cit., para. 185.

[70] European Court of Human Rights (Grand Chamber), *Khlaifia and Others v. Italy*, cit., para. 248.

[71] The growing involvement of the Grand Chamber in applications concerning pushbacks at borders shows how problematic and delicate the legal (and political) questions are.

applicants had been collectively expelled, being forcibly and summarily removed to Morocco by the Spanish *Guardia Civil*, with no procedure whatsoever (not even the identification). These are bare facts. And the Grand Chamber could not deny the self-evident clarity of the events. It thus resorted to a judicial invention, by coining the "exception of the migrants' culpable conducts". Simply put, States are *permitted* to perform pushbacks, and will be justified and exempted from their responsibility under the ECHR, if the applicant aliens have irregularly crossed the border, *en masse* and with force, instead of making use, without a cogent reason, of the means of legal entry provided by the State. With regard to this latter aspect, in particular, in *N.D. and N.T.* the Grand Chamber merely relied on the *de jure* existence of legal avenues for accessing the Spanish territory, while refraining from verifying their *de facto* (un)availability for the applicants[72].

The erosion of the protection against collective expulsions and pushbacks further unfolded with the 2020 ruling *Asady and Others v. Slovakia*, where the Court watered down the standards of the guarantee of an individual assessment[73]. In that case, it examined the summary procedures applied by Slovakian authorities to Afghan asylum seekers expelled to Ukraine: the applicants were apprehended near the border, questioned by the police during the night, under pressure, with a 10-minute interview each, based on standardized questions and yes/no answers, without adequate linguistic assistance. Identical expulsion orders were issued, allowing the removal of the applicants within a few hours from their arrest. The ECtHR considered such *modus operandi* as compatible with the ECHR despite its questionable – to say the least – capacity to offer a "reasonable and objective examination" of each applicant's individual situation.

One can grasp the process of erosion of the protection against collective expulsions: while in *Khlaifia* (GC, 2016) the Court ruled on the "if" of the personal interview, stating that it is not an absolute guarantee and can be excluded; in *Asady* it dealt with the "how"

[72] The Grand Chamber judgment generated a vast echo of comments and analyses in the literature. Among others, see C. BOSCH MARCH, *Backsliding on the Protection of Migrants' Rights? The Evolutive Interpretation of the Prohibition of Collective Expulsion by the European Court of Human Rights*, in *Immigration, Asylum and Nationality Law*, 2021, no. 4; S. CARRERA, *The Strasbourg Court Judgement N.D. and N.T. v Spain A Carte Blanche to Push Backs at EU External Borders?*, in *EUI Working Paper*, RSCAS 2020/21; M. DI FILIPPO, *Walking the (Barbed) Wire of the Prohibition of Collective Expulsion: An Assessment of the Strasbourg Case Law*, in *Diritti umani e diritto internazionale*, 2020, no. 2, pp. 479-509; C. HRUSCHKA, *Hot returns remain contrary to the ECHR: ND & NT before the ECHR*, in *EU Immigration and Asylum Law and Policy*, 28 February 2020; A. LÜBBE, *The Elephant in the Room: Effective Guarantee of Non- Refoulement after ECtHR N.D. and N.T.?*, in *Verfassungsblog*, 19 February 2020; N. MARKARD, *A Hole of Unclear Dimensions: Reading ND and NT v. Spain*, in *EU Immigration and Asylum Law and Policy*, 1 April 2020; C. OVIEDO MORENO, *A Painful Slap from the ECtHR and an Urgent Opportunity for Spain*, in *Verfassungsblog*, 14 February 2020; M. PICHL, D. SCHMALZ, *"Unlawful" may not mean rightless: The shocking ECtHR Grand Chamber judgment in case N.D. and N.T.*, in *VerfBlog*, February 2020; D. THYM, *A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR's N.D. & N.T.-Judgment on 'Hot Expulsions'*, in *EU Migration Law Blog*, February 2020.

[73] European Court of Human Rights, judgment of 24 March 2020, App. No. 24917/15, *Asady and Others v. Slovakia*. For an analysis of the judgment, see F.L. GATTA, *'Tell me your story, but hurry up because I have to expel you" – Asady and Others v. Slovakia: how to (quickly) conduct individual interviews and (not) apply the ND & NT "own culpable conduct" test to collective expulsions*, in *Strasbourg Observers*, 6 May 2020.

of the individual examination, whose quality standards have been extremely poorly interpreted, the personal interview essentially resulting in no more and no less than a mere formality. In other words, the individual assessment via the personal interview, which is not always *necessary* (*Khlaifia* 2016, GC), becomes *sufficient* to exclude a violation of the prohibition of collective expulsion, despite being carried out in a very summary way (*Asady*).

The most recent line of case-law concerns systemic practices of collective expulsions performed at the Eastern European borders with non-EU countries such as Belarus, Serbia and Ukraine. Poland and Hungary are the protagonists of this judicial saga, which made them, statistically, the Council of Europe (CoE) and EU members with the highest number of violations of Article 4, Protocol no. 4 ECHR[74].

The case-law against Poland has already been examined above[75]. Here, it is worth reiterating that the Court found the polish pushbacks to be an administrative practice, that is, a systemic, officially tolerated and ordinarily applied technique of border management. A routine of human rights violations, knowingly put in place, and no longer an episodic series of events.

Similar conclusions have been reached with regard to Hungary, in a line of case-law which disclosed a widespread, methodical strategy of border management based on collective expulsions of aliens intercepted at the borders with Serbia. The 2021 ruling *Shahzad v. Hungary* is the first case where a violation of Article 4, Protocol no. 4 ECHR was declared vis-à-vis Hungary[76]. The ECtHR found a violation of the Convention due to the measure of interception and subsequent expulsion ("apprehension and escort", in the terminology used under Hungarian law) of aliens apprehended within a 8-km area established in between the Serbian-Hungarian border[77]. In the 2022 ruling *H.K. v. Hungary*, the Court reached similar conclusions, certifying a wider framework of deterioration of the rule of law at the Hungarian borders, where it certified "the lack of any formal procedure accompanied by appropriate safeguards governing the admission of individual migrants"[78]. These findings have been reiterated and consolidated in subsequent judgments, such as those in the applications *R.N. v. Hungary* and *M.M. v. Hungary* decided in 2023[79]. Most recently, in 2024, the ECtHR has found multiple violations of the ECHR due to the treatment of asylum seekers in the transit zones at the

[74] On this subject, see F. L. GATTA, *"You shall not pass! Poland and Hungary and the routine of collective expulsions at their borders"*, in *Cahiers de l'EDEM*, November 2022.
[75] *Supra*, para. 3.1.
[76] European Court of Human Rights, judgment of 8 July 2021, App. No. 12625/17, *Shahzad v. Hungary*.
[77] The practice is identified and described by the ECtHR as follows: "migrant's push-back to a narrow strip of State territory on external side of a border fence amounting to expulsion" (*Ibidem*, summary of the judgment).
[78] European Court of Human Rights, judgment of 22 September 2022, App. No. 18531/17, *H.K. v. Hungary*, para. 11.
[79] Respectively, European Court of Human Rights, judgment of 4 May 2023, App. No. 71/18, *R.N. v. Hungary*; and European Court of Human Rights, judgment of 4 May 2023, App. No. 26819/15, *M.M. v. Hungary*.

borders with Serbia, such as in the applications *F.O. and Others v. Hungary*; *H.L. v. Hungary*; and *S.H. v. Hungary*.[80]

While the ECtHR had no choice but to declare violations of the ECHR in such blatant episodes of disrespect of the basic human rights guarantees at the Polish and Hungarian borders, previous findings (*Khlaifia; N.D. and N.T.; Asady*; *inter alia*) remain highly problematic and impactful on the proception against pushbacks. The Court will soon have the chance to clarify its inconsistent case-law in this area: at the time of writing a package of relevant applications regarding pushbacks is pending before the Grand Chamber[81]. They all originate from relinquishment requested by the Chambers, which most likely perceived the complexity of the human rights issues entailed in the cases. The applications, indeed, concern the above-discussed instrumentalization strategies perpetrated by Belarus against EU and CoE Member States[82]. A new chapter, thus, is about to be written: it will be up for the Grand Chamber to choose whether to pursue and consolidate the restrictive approach inaugurated in the post-2015 refugee crisis era, or to go back to the previous, more protective and human rights-oriented line of case-law.

4.2. Luxemburg: the incomplete judicial oversight over pushbacks

The deterioration of human rights guarantees at the European external borders has not gone unnoticed in the EU. Institutions and organisms, such as the European Parliament and the European Ombudsman, have been particularly active in criticizing and denouncing pushbacks performed by States with the participation of the EU Agency Frontex[83]. While these extra-judicial initiatives are commendable, in so far as they contributed to raise awareness and sensitize the public opinion, they remain inherently limited in terms of ascertaining and sanctioning the legal responsibility for human rights violations.

One must look thus, in this respect, at the CJEU and its involvement in cases of pushbacks and collective expulsions at the EU external borders. The case-law stemming therefrom is rather recent and involves two actors, i.e. Member States and Frontex, and, as it will be seen, is quite different in terms of final outcome. This is explainable, partially, with the different judicial avenues provided for by EU litigation law, which serve to "feed" the Court with cases.

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[80] Respectively, European Court of Human Rights, judgment of 20 June 2024, App. No. 9203/18, *F.O. and Others v. Hungary*; European Court of Human Rights, judgment of 20 June 2024, App. No. 37641/19, *H.L. v. Hungary*; European Court of Human Rights, judgment of 20 June 2024, App. No. 47321/19, *S.H. v. Hungary*.

[81] See the applications *C.O.C.G. and Others v. Lithuania* (no. 17764/22); *H.M.M. and Others v. Latvia* (no. 42165/21); *R.A. and Others v. Poland* (no. 42120/21).

[82] *Idem*, para. 3.1.

[83] On this topic, please see, in I. INGRAVALLO, *Il rispetto dei diritti fondamentali nell'azione dell'Agenzia europea della guardia di frontiera e costiera*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.), *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli, 2022, pp. 111-140; I. INGRAVALLO *The role of the new FRONTEX in contrasting irregular immigration along the Atlantic route*, in A. DI STASI, I. CARACCIOLO, G. CELLAMARE, P. GARGIULO (eds.), *International Migration and the Law. Legal Approaches to a Global Challeng*e, London, New York, Torino, 2024, pp. 537-552.

Rulings concerning Member States' national borders legislation and pushback practices mostly come from (the few) infringement procedures initiated by the European Commission on the one hand, and from references for preliminary rulings by particularly active and "brave" domestic courts, on the other. On the contrary, the case-law concerning Frontex and pushbacks has been generated by strategic litigation launched via the actions "against the Union" provided for under the EU treaties, i.e., failure to act, annulment and, more recently, damages actions. Such a configuration also influences the "geographical" characterization of this case-law: the first line of cases concerns Eastern European Member States, such as Hungary, Poland and Lithuania; while the cases against Frontex pertain to the Agency's participation in pushbacks occurred in the Mediterranean Sea, notably in Greece and Italy. This latter connotation may be explained notably with the inactivism and negligence of both the European Commission, which refused to open infringement procedures, and of domestic courts, which have refrained from referring preliminary questions to the CJEU, which is especially true, as it has been demonstrated, in the case of Greek courts[84].

Turning the attention to the case-law involving Member States' pushbacks, in the 2020 ruling *Commission v. Hungary*, the CJEU, sitting as Grand Chamber, found Hungary to be in breach of EU law given its border practices legally and factually curbing access to asylum procedures, with a combination of systematic detention in transit zones and subsequent collective expulsions to Serbia[85]. The Hungarian system was based on administrative practices applied in disregard of the relevant due process guarantees provided for under EU law. As pointed out by the Advocate General Pikamäe, indeed, at Hungarian borders "detention in the transit zones…occurs *automatically, without any assessment of the individual circumstances of the applicants*, without a written decision being issued"[86]. Such a practice then led to summary and unlawful expulsions. In *Shahzad*, discussed above, and regarding similar facts occurred in the very same transit zone, the ECtHR consistently found that "during the police procedure…the applicant was removed from Hungary *without being subjected to any identification procedure or examination of his situation* by Hungarian authorities"[87]. It is worth stressing here the attempt to "legalize" the described unlawful border practice in the domestic law, which was adopted with the intention to furnish a formal, "legal cover" to an administrative conduct systematically put in place by the Hungarian police and border authorities.

Significantly, later on, in 2022, the CJEU found that this kind of "legalization" of pushbacks is incompatible with EU law even if the pertinent domestic provisions have

[84] See the studies conducted in V. PASSALACQUA, *Legal mobilization via preliminary reference: Insights from the case of migrant rights*, in *Common Market Law Review*, 2021, no. 3, pp. 751-776; V. PASSALACQUA, *Empirical insights on preliminary rulings in the EU migration law field*, in *ADiM Blog*, Analyses and Opinions, February 2021

[85] Court of Justice of the European Union (Grand Chamber), judgment of 17 December 2020, *Commission v. Hungary*, C-808/18.

[86] Opinion of Advocate General Pikamäe, delivered on 25 June 2020, *Commission v. Hungary*, C-808/18, para. 115 (emphasis added).

[87] European Court of Human Rights, *Shahzad v. Hungary*, cit., para. 60 (emphasis added).

been introduced as part of an emergency legislation passed to cope with a critical situation. In *M.A. v. Lithuania*, discussed above, the Court reiterated the significance of the procedural guarantees provided for under the pertinent EU secondary law, based on the logic of a fair and individualized assessment of the asylum seeker, which admits no derogation[88]. As a consequence, legal automatisms, *de jure* presumptions and similar mechanisms leading to a denial of an effective examination of the personal situation are incompatible with EU law, including when provided for under an emergency legislation adopted in a state of (real or perceived) migratory crisis.

Finally, in the more recent 2024 ruling *X v. Staatssecretaris van Justitie en Veiligheid*, the Court assessed the practice of pushbacks at Polish-Belarusian border[89]. The referring Dutch court raised the question of the legitimacy of the Dublin transfer of a Syrian asylum seeker from the Netherlands to Poland, given the presence, in the latter country, of widespread – and arguably systemic – practices of detention at borders and summary expulsions to Belarus. Interestingly, the CJEU considers, for the first time, the State conduct of a pushback, which is defined as follows: "the practice…which effectively removes persons seeking to make an application for international protection from the territory of the European Union or removes them from that territory before an application made on entry has been examined as provided for by EU legislation"[90]. In this vein, by linking the pushback with the concrete possibility to request asylum, such a practice is declared as incompatible with EU Law from a dual point of view. On the one hand, and specifically from the asylum seeker's perspective, it is contrary to Article 6 of Directive 2013/32/EU (right to access to the procedure) and Article 18 of the EU Charter (right to asylum). On the other hand, and more broadly, pushbacks impact on the overall operation of the EU system of asylum management, as they impair the ordinary functioning of the Dublin legal-procedural machinery. In the CJEU's own words: "a practice of pushbacks is incompatible with that fundamental element of the Common European Asylum System, in that it prevents the right to make an application for international protection from being exercised, and, accordingly, prevents the progress, in accordance with the rules laid down by EU legislation, of the process of making and examining such an application"[91].

The Court, however, did not state that a Dublin transfer to a Member States that has been performing pushbacks is prohibited *per se*. The transfer has to be ruled out only if there are substantial grounds for believing that the asylum seeker would face a real risk of being subjected to pushbacks, leading to "a situation of extreme material poverty that

[88] *Supra*, para. 3.2.
[89] Court of Justice of the European Union, judgment of 29 February 2024, *X v. Staatssecretaris van Justitie en Veiligheid*, C-392/22.
[90] Ibidem, para. 50.
[91] Ibidem, para. 52. In this respect, the referring Dutch court too pointed to the repercussions of pushbacks on the overall well-functioning of the CEAS, observing that "[pushbacks] are contrary to the obligation to process every application for international protection and undermine the principle of mutual trust and the operation of that system, inter alia, because they have the effect of encouraging third-country nationals to circumvent the Member States which adopt those practices" (Ibidem, para. 19).

it may be equated with the inhuman or degrading treatment prohibited by Article 4 of the Charter"[92].

When it comes to litigation concerning Frontex-tolerated pushbacks of asylum seekers from an EU Member State to a third country, the outcomes of the Court have been different[93]. The case-law here has shown all the difficulties that surround the effective "justiciability" of the Agency's conduct. As a consequence, the various legal actions brought by NGOs and other actors have so far had essentially an unsuccessful outcome.

The first attempts to judicially attack Frontex took place via actions for failure to act pursuant to Article 265 TFEU. The first case to be decided was *S.S. and S.T. v. Frontex*, concerning multiple pushbacks perpetrated by the Greek coast guard in an operational context participated by Frontex. According to the applicants, the Agency had failed to act in the sense of withdrawing its support to the Greek State, in a situation of well-known and well-documented human rights violations, including the prohibition of collective expulsions. The General Court dismissed the application in 2022 on procedural grounds[94]. Yet, in its order, the judges questionably set a high threshold that must be met in order to trigger Frontex's obligation to withdraw from a context of pushbacks and other human rights violations, requiring "incidents of a certain level of seriousness or likely to persist" instead of "isolated incidents"[95]. The evidentiary material concerning pushbacks in the Aegean sea is so abundant, and the documentation so countless, that one is left wondering what would it take to achieve such a level of seriousness and diffusion of human rights violations requested by the General Court.

Actions for annulment as per Article 263 TFEU have also been explored as a possible way to unveil the Agency's responsibility for pushbacks. While in *S.T. v Frontex*, decided in 2023, the application was dismissed on procedural grounds, given the applicant's failure to demonstrate a vested and present interest in the annulment of the contested decision[96]; with the 2024 judgment in *Naass and Sea-Watch v Frontex* the General Court annulled Frontex's decision to deny access to photo and video materials related to an aerial operation it conducted in the Central Mediterranean Sea in the summer 2021[97]. While such an outcome represents a progress and a positive development in terms of transparency in the Agency's actions, the questions concerning its responsibility and involvement in pushbacks and other severe human rights violations remain unsolved.

This is true also with regard to the last and most recent judicial channel that has been used, that is, actions for damages. With two decisions delivered in 2023, in the cases *W.S.*

[92] *Ibidem*, para. 65.
[93] Many scholars have investigated the scarce effectiveness of the CJEU's judicial scrutiny over Frontex, trying also to explore possible non-judicial alternatives. In this respect, see, most recently, E. GUILD, *Frontex and access to justice: The need for effective monitoring mechanisms*, in *European Law Journal*, Vol. 30, No. 1-2, 2024; pp. 136-148.
[94] General Court, order of 7 April 2022, *S.S. and S.T. v. Fronte*, T-282/21.
[95] *Ibidem*, para. 26.
[96] General Court, order of 28 November 2023, *ST v Frontex*, T-600/22.
[97] General Court, judgment of 24 April 2024, *Naass and Sea-Watch v Frontex*, T-205/22.

and Others v Frontex[98] and *Hamoudi v Frontex*[99], the General Court has dismissed the actions, essentially on the ground of the applicants' failure to adduce evidence of a sufficiently direct causal link between the damage invoked and the conduct of which Frontex was accused. At the time of writing, however, an appeal is pending before the CJEU with regard to both cases[100].

5. The Regulation on Situations of Crisis, Force Majeure and Instrumentalization

At the time when the New Pact on Migration and Asylum was launched in 2020, the Commission advanced a Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum[101]. After the hybrid attack by Belarus and the rise in migrants' arrivals in EU neighboring countries, the Commission acknowledged that said proposal was not designed to deal with situation threatening the Union's integrity and set forth another Proposal envisaging a separated derogatory regime to be activated in case of migrants' instrumentalization. In addition, it presented a proposal to reform the Schengen Border Code accordingly. During the negotiations on the New Pact, however, the Swedish Presidency of the Council merged these two proposals together. In its Communication of January 2023, the Commission invited the Parliament and Council to examine the two proposals together in light of the similar objective and *ad hoc* measures contained therein. In November 2023, the Council reached a common position on the joint proposal. Poland and Hungary voted against it, while Austria, the Czech Republic and Slovakia abstained. In December 2023, the European Parliament and the Council reached an agreement on the Crisis Regulation. In May 2024, it was adopted together with other key reforms of the CEAS and will enter into application from 1 July 2026.

The Crisis Regulation introduces specific norms for managing three extraordinary situations: crisis, *force majeure*, and instrumentalization. These norms allow Member States to derogate from EU asylum law through temporary measures to be applied in a limited manner and only in exceptional circumstances. The Crisis Regulation therefore introduces multiple derogatory regimes permanently available to the Member States in addition to the existing emergency framework set forth by Article 78.3 TFEU, which allows the Union to adopt provisional measures to the benefit of the Member State(s) affected by a migration-related emergency. In commenting this new piece of legislation, ECRE posited that "The Regulation is an example of initially exceptional and temporary measures designed for limited use in emergency situations being integrated into

[98] General Court, judgment of 6 September 2023, *WS and Others v Frontex*, T-600/21.
[99] General Court, order of 13 December 2023, *Hamoudi v Frontex*, T-136/22.
[100] See, respectively, case C-679/23 P, *WS and Others v Frontex* and case C-136/24 P, *Hamoudi v Frontex*.
[101] For an overview, see R. PALLADINO, *Il nuovo* status *di protezione immediata ai sensi della proposta di regolamento concernente le situazioni di crisi e di forza maggiore: luci ed ombre*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (eds.), *Migrazioni internazionali. Questioni giuridiche aperte*, op. cit., pp. 593-616.

permanent law"[102]. In all three scenarios, the *iter* to be followed starts with a reasoned request by the interested Member State to the Commission, where it shall diligently explain the situation, it is affected by. The Commission is the sole institution responsible for assessing whether a situation of crisis, instrumentalization or *force majeure* actually exists. If so, the Commission then shall advance a proposal for a Council implementing decision, which sets out the solidarity measures and/or derogations to be authorized according to the situation at stake.

According to Article 1(4), a situation of crisis includes two possible scenarios. The first one deals with mass arrivals, defined as follows:

"an exceptional situation of mass arrivals of third-country nationals or stateless persons in a Member State by land, air or sea, including of persons that have been disembarked following search and rescue operations, of such a scale and nature, taking into account, inter alia, the population, GDP and geographical specificities of the Member State, including the size of the territory, that it renders the Member State's well-prepared asylum, reception, including child protection services, or return system non-functional, including as a result of a situation at local or regional level, such that there could be serious consequences for the functioning of the Common European Asylum System".

In comparison with the definition of "mass arrivals" enshrined in the Temporary Protection Directive, this formulation clarifies certain benchmarks against which the situation at hand must be confronted (the Member State's population, GDP and geographical specificities, including the size of the territory) and specifies that these arrivals can occur at any of the country's borders. This means that the situation at hand must be confronted with the specificities of the country at stake. A mass arrival in one Member State may not be so in another Member State. The need to ensure flexibility might be a reason why the definition of "mass arrivals" does not provide for a numerical quantification of how many migrants actually constitute a mass arrival. The second part of the definition is the one that, according to the authors, raises more concerns. Accordingly, arrivals must be of such a scale and nature that they render a *well-prepared* Member State's asylum, reception *or* return system non-functional. First, the definition does not elucidate the concept of well preparedness. Second, both the ECtHR and the CJEU have repeatedly halted transfers in Italy and Greece as their asylum systems have been deemed as flawed[103]. Hence, although the condition of well preparedness should be the rule in the Union, there are actually relevant exceptions. Now, could frontline Member States, such as Italy and Greece, declare a situation of crisis in light of mass arrivals if their asylum system is not well-prepared in the first place? These Member States may argue that it is exactly the mass arrival of migrants that has made their asylum systems non-functional. Yet, such a statement cannot be considered as valid in the context of

[102] ECRE, *ECRE comments on the Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum and amending regulation (EU) 2021/1147*, May 2024, p. 1.

[103] European Court of Human Rights, *MSS v. Belgium and Greece*, cit.; Court of Justice of the EU, *N.S. v. United Kingdom and M.E. v. Ireland*, cit. See also, European Court of Human Rights, Grand Chamber, judgment of 4 November 2014, App. No. 29217/12, *Tarakhel v. Switzerland*.

current arrivals, which are affected by weak asylum systems, whose functionality has been under pressure in the context of *past* arrivals. In addition, the non-functionality of the Member State refers to its asylum, reception *or* return system, so it would suffice that *either* of these three systems is affected for a Member State to argue it is faced with mass arrivals. According to Ineli-Ciger, situations making the return system non-functional should play no role in establishing the existence of a crisis because "the return capacity of the host state alone has nothing to do with the existence of a mass influx and cannot justify derogating from state responsibilities under international or EU law"[104].

The second scenario concerns the instrumentalization of migrants, meaning a situation:

"where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security".

The Preamble specifies that, although the demarcating line between the Republic of Cyprus and the Turkish Republic of Northern Cyprus does not constitute an external border, a situation meeting all the elements of Article 1(4)b taking place across that line can also be considered as instrumentalization. The Preamble also stipulates that situations in which non-state actors are involved in organized crime, such as smuggling, should not be considered as instrumentalization of migrants when there is no aim to destabilize the Union or a Member State. Similarly, humanitarian assistance should not be considered as instrumentalization of migrants *when there is no aim to destabilize the Union or a Member State*. This seems to suggest that the Union does not totally exclude the possibility that humanitarian assistance might actually be exploited to threaten the stability of the Union.

The definition of instrumentalization is particularly problematic[105]. First, it does not clarify what "hostility" means and why the term has been associated only with non-State actors. In addition, no objective criteria are provided as to verify whether a situation can amount to instrumentalization. In particular, no numerical or otherwise clear identifiable indicators are provided to qualify the arrival of people as a situation of instrumentalization. This may imply that situations marked by very low numbers of migrants could also be covered, such as those in the cases of Poland, Lithuania, and Latvia at the border with Belarus, as well as in the case of Finland, which enacted its emergency law against instrumentalization from Russia after the arrival of one person in July 2024. Consequently, one could wonder whether, in the absence of any quantifiable criteria, for a situation to be considered as instrumentalization it is sufficient that the Member State in question *believes* that it is under attack. Finally, the definition is silent as to what the

[104] M. Ineli-Ciger, *Navigating the Labyrinth of Derogations: A Critical Look at the Crisis Regulation*, in *EU Migration Law Blog*, June 2024.
[105] A. Ancite-Jepifánova, *Migrant Instrumentalisation: Facts and Fictions: Realities On the Ground at the EU-Belarus Border*, in *VerfBlog*, September 2023.

verbs "encourage" and "facilitate" actually mean. Such an absence contrasts with other pieces of migration legislation – such as the Council Directive 2002/90/EC defining the facilitation of unauthorized entry, transit and residence – where such concepts have been defined[106].

Article 1(5) focuses instead on the concept of *force majeure*, which is a political term that has never been applied before in the context of migration and asylum law[107]. It is used to refer to:

"abnormal and unforeseeable circumstances outside a Member State's control, the consequences of which could not have been avoided notwithstanding the exercise of all due care, which prevent that Member State from complying with obligations" under the Regulation on Asylum and Migration Management (RAMM) and the Qualification Regulation.

The Preamble cites pandemics and natural disasters as emblematic examples of a situation of *force majeure*, which could have consequences not only in that Member State, but in the Union as a whole.

Part of the definition has been transposed by the CJEU case-law that, in *C and CD v Syyttäjä*, generally defined *force majeure* "as referring to abnormal and unforeseeable circumstances which were outside the control of the party by whom it is pleaded and the consequences of which could not have been avoided in spite of the exercise of all due care"[108]. It is also interesting to note that, whereas a situation of crisis or instrumentalization is deemed so when it puts the essential functions of the State at risk, (including those in the field of asylum, reception and return), a situation of *force majeure* can be such only if it prevents the State to comply with the standards set out in two specific legislations, namely the RAMM and the Qualification Regulation. Hence, it could be inferred that abnormal and unforeseeable circumstances beyond a Member State's control cannot be seen as *force majeure* if it impacts on, say, its return system.

5.1. Derogatory regimes under the Crisis Regulation

An analysis of the general provisions of the Crisis Regulation is beyond the scope of this article, whose aim is rather to specifically look at derogatory regimes under this legislation[109]. In the following, therefore, an in-depth and critical analysis of the three specific derogation regimes at the heart of the Crisis Regulation is provided. At the outset,

[106] Articles 1 and 2 of the Directive in question defines the facilitation, instigation, participation and attempt of unauthorized entry, transit and residence of migrants.
[107] C. SCISSA, *The (new) Commission's approach on temporary protection and migration crisis*, in *ADiM Blog*, Analyses & Opinions, November 2020.
[108] Court of Justice of the EU, judgment of 28 April 2022, *C, CD v Syyttäjä*, C-804/21 PPU, para. 44.
[109] The scholarship offers a number of in-depth analyses on the Crisis Regulation which could be consulted. Please refer to, inter alia, ECRE, *ECRE comments on the Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum*, cit.; D. VITIELLO, S. MONTALDO (eds.), *Migration Management Instrumentalisation of Migrants, Sanctions Tackling Hybrid Attacks and Schengen Reform in the Shadows of the Pact*, cit.; M. INELI-CIGER, *Navigating the Labyrinth of Derogations: A Critical Look at the Crisis Regulation*, cit.

it is worth mentioning that the Member State can ask permission to apply one or more derogations to respond to an emergency situation, although these measures are not always available in all three derogatory regimes.

Overall, the permissible derogations that a Member State confronted with a situation of crisis, *force majeure*, or instrumentalization can request are: Extended registration of asylum claims (Article 10.1 of the Crisis Regulation); prolongation of the border procedure (Article 11.1); exemption from – or restriction or expansion of the scope of – the border procedure (Article 11.2-11.6); extension of time limits for transfer requests, replies and completion (Article 12); suspension of Dublin transfers (Article 13).

5.2. Extended registration of asylum claims

The first derogation, available in all three scenarios, is the possibility for the Member State to extend the term for registering asylum applications up to four weeks from the day the application was made. Member States can therefore derogate from Article 27 of the Asylum Procedures Regulation that establishes that registration should take place within 5 days, a period which could be extended up to 15 days in case of a disproportionate number of applications[110].

In such a context, the Member State shall prioritize the registration of asylum applications made by children and their families, as well as persons with special reception needs, namely persons with disabilities, elderly persons, pregnant women, LGBTIQI persons, single parents with minor children, victims of trafficking in human beings, persons with serious illnesses, persons with mental disorders including post-traumatic stress disorder, persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in addition to minors and unaccompanied minors[111]. In applying this derogation, Member States may also prioritize the registration of asylum applications likely to be well-founded. Yet, no criteria to establish the well-founded presumption are elaborated.

Article 10.4 foresees a difference in the maximum length of this derogation depending on the situation at stake. In the case of mass arrivals, the Member State can apply this measure for a maximum of three months[112]. In cases of instrumentalization or *force majeure*, instead, the Member State can extend it for up to 12 months. Such delays in the registration of asylum claims risk putting the right to access asylum in jeopardy. Indeed, several studies show the extensive resort to pushbacks by EU Member States. For instance, the NGO 11.11.11 has recorded 225.533 pushbacks carried out at the EU's

[110] Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 *establishing a common procedure for international protection in the Union* and repealing Directive 2013/32/EU.
[111] Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 *laying down standards for the reception of applicants for international protection*, Article 24.
[112] Actually, Recital 24 specifies that the Member State asking the permission to derogate from EU asylum law pursuant to the Crisis Regulation can activate the derogation under Article 10 for a maximum of ten days even in absence of an expressed authorization by the Council to do so. The term starts from the day following the request to the Commission.

external borders solely in 2022[113]. In just three months, from 1 September to 31 December 2023, additional 8.403 pushbacks have been documented[114]. Delays in registration may exacerbate the risk of being exposed to collective expulsions and refoulement, in turn denying migrants' effective access to asylum. The State's duty to ensure that applicants are able to access and exercise their reception rights in an effective manner as soon as they make an application, pursuant to Article 10.5, does not seem enough to dissuade such concerns[115].

A reference to derogations in case of instrumentalization is also present in the amended Schengen Border Code[116]. Amended Article 5.3 allows the Member States to "take the necessary measures to preserve security, law and order", where "a large number of migrants attempt to cross their external borders in an unauthorised manner, en masse and using force". In addition, Article 5.4 authorizes the Member States to temporarily close, or limit the opening hours of specific border crossing points if confronted with a situation of instrumentalization.

These provisions draw on certain cases decided by the ECtHR, most emblematically on *N.D. and N.T. v. Spain*, where the Court introduces questionable criteria and exceptions to the application of the prohibition of collective expulsions. The combination of the two provisions introduced by the amended Schengen Border Code may cause a significant restriction of the right to access asylum as border closure may render the making of an asylum claim impossible, since people could be forced to walk long distances to reach an open border crossing, which might be located even hundreds of kilometers away[117]. These measures combined with delayed registrations permissible under the Crisis Regulation could further constrain the right to asylum and the principle of non-refoulement.

5.3. Prolongation, exemption from – or restriction or expansion of the scope of – the border procedure

The second derogatory measure Member States can implement concerns the prolongation, expansion or restriction of the asylum border procedure, which is also differently applied according to the situation at stake.

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[113] NGO 11.11.11, *Illegality without borders – Pushback report 2023*, https://pers.11.be/translation-over-200000-illegal-pushbacks-at-eus-external-borders-in-2022.

[114] PRAB, *Pushbacks at Europe's borders: a continuously ignored crisis*, January 2024, https://www.asgi.it/wp-content/uploads/2024/02/PRAB-Report-September-to-December-2023-_-final.pdf

[115] This includes the right to be duly informed in a language which they understand, *or are reasonably supposed to understand*, about the measure applied, the location of the registration points, including the border crossing points accessible for registering and lodging an application for international protection, and the duration of the measure.

[116] Regulation amending Regulation (EU) 2016/399 of 13 May 2024*on a Union Code on the rules governing the movement of persons across borders*.

[117] S. PEERS, *Restoring the Borderless Schengen Area: Mission Impossible? Summary of a new report*, in *EU Law Analysis*, 8 May 2024.

Under the Asylum Procedures Regulation, border procedures entail asylum border procedures and return border procedures. The former concern asylum procedures applied with derogations in terms of rights and standards, insofar as they prevent the applicant from entering the territory, restrict their freedom of movement, and constrain the rights to asylum and to an effective remedy[118]. Indeed, most applicants subjected to border procedures are not allowed to formally enter the territory of the State, despite the fact that they are physically there, and are often detained or confined at the external border or transit zones. In addition, the right to an effective remedy is severely compromised as the suspensive effect of appeals against a decision of rejection of an asylum claim is excluded under several grounds of dubious conformity with international refugee law[119]. Finally, claims assessed under asylum border procedures are processed quickly, without looking into their full substance, thus exacerbating the risk of violation of the principle of non-refoulement.

The Asylum Procedures Regulation foresees both mandatory and optional grounds for the use of asylum border procedures. Member States shall apply asylum border procedures when asylum-seekers mislead the authorities by providing false information or destroying documents; pose a security risk; or come from countries with low recognition rates (20% or lower) at first instance. The latter ground is based on the artificial presumption that certain nationalities are not in need of protection, in spite of individual circumstances that might make a country not safe for certain individuals or groups. This implies that people coming from Afghanistan, Venezuela, Iraq, Somalia, and even Ukraine would be subjected to border procedure as their recognition rates at first instance in 2023 have been lower that 20%[120]. In addition, Member States may apply asylum border procedures when an asylum claim is made at an external border crossing point or in a transit zone; in case of apprehension in connection with an unauthorized crossing of the external border; after disembarkation following a SAR operation; or in the context of relocation. As conceived, Member States could apply asylum border procedures to the vast majority of asylum-seekers with the aim of keeping them at the border and impeding them from entering the Union's territory.

Pursuant to Article 11.1 of the Crisis Regulation, Member States may prolong the maximum duration of the border procedure from 12 to 18 weeks from registration. In addition, Article 11.2 exempt Member States affected by a situation of *force majeure* to examine, in a border procedure, applications made by third country-nationals or stateless persons coming from a country for which the proportion of decisions of international protection is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower. The same applies in a situation of crisis. This means that, in 2023 for instance, only Syrians would have met the Eurostat threshold (31% of positive first

[118] E.L. TSOURDI, *The new screening and border procedures: Towards a seamless migration process?*, Friedrich-Ebert-Stiftung and European Policy Centre, Brussels, 2024.
[119] V. CHETAIL, M. FEROLLA VALLANDRO DO VALLE, *The Asylum Procedure Regulation and the Erosion of Refugee's Rights*, cit.
[120] EUROSTAT, *Asylum decisions - annual statistics*, June 2024, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_decisions_-_annual_statistics.

instance and final decisions of protection)[121]. Solely in a situation of crisis, Member States may further reduce the threshold to 5% or lower. This means that the mandatory use of the border procedure would extend to all applicants coming from countries with a 5% or lower protection rate. Only if confronted with a crisis, Member States may also increase the threshold from 20% to 50%, meaning that they could examine in a border procedure all asylum claims made by applicants coming from a country with up to a 50% protection rate. Finally, solely in case of instrumentalization, Member State may decide, in a border procedure, on the merits of all applications that are made by any asylum-seeker who is subject to instrumentalization, except for minors under the age of 12 and their family members, as well as persons with special procedural or special reception needs (Article 11.7). Similarly, Member States shall cease to apply the border procedure to minors under the age of 12 and their family members; and vulnerable persons with special procedural or special reception needs when their asylum claim is likely to be well-founded (Article 11.7).

When applying the derogations referred to in Article 11, the Crisis Regulation reminds that the right to asylum and the principle of non-refoulement shall apply to ensure that the rights of those who seek international protection, including the right to an effective remedy, are protected. Yet, scholars and institutions have warned against the use of asylum border procedures, in general, and in the context of the Crisis Regulation, in particular[122]. Although asylum border procedures should be applied solely in extraordinary cases, for instance involving security threats, they are instead applied in at least seven cases under the Asylum Procedures Regulation. The legislation links the border procedure to a refusal of entry, which could inevitably lead to large-scale detention and lower procedural safeguards, with a consequent increased risk of refoulement for asylum-seekers.

Under the Crisis Regulation, States are allowed to further extend the use of asylum border procedures to almost all asylum-seekers. As envisaged, asylum border procedures concretely affect asylum seekers' right to access asylum and to an effective examination of their claim, while procedural safeguards are further curtailed. Member States affected by crisis, *force majeure*, or instrumentalization may indeed restrict asylum-seekers' access to legal advice and counselling, even to those held in detention facilities or contained at border crossing points, for reasons of security, public order or administrative management of a detention facility. As argued by Ineli-Ciger, if not counteracted with strong protection measures, such as the expedited recognition procedures for well-founded claims,

"[…] the Crisis Regulation risks deterring or delaying access to protection for persons seeking refuge in mass influx situations in Europe. This would render the Crisis

[121] *Ibidem*.

[122] V. CHETAIL, M. FEROLLA VALLANDRO DO VALLE, *The Asylum Procedure Regulation and the Erosion of Refugee's Rights*, cit.; ECRE, *ECRE comments on the Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum*, cit., p. 45; V. MORENO-LAX, *Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Access to Protection in the EU*, cit.

Regulation a less valuable addition to the EU's legal instruments for mass influx governance"[123].

5.4. Derogations to Dublin transfers

The fourth derogation available under the Crisis Regulation intersects the Dublin system and concerns the extensions of time limits to take charge of transfer requests, take back notifications and transfers in a situation of crisis, only due to mass arrivals, and *force majeure*.

According to Article 12, the time limit to submit a take charge request for an asylum-seeker is extended from two months under the RAMM Regulation to four months. Similarly, responses to take charge requests are also extended and may last up to two months (instead of one month under the RAMM Regulation), and the deadlines for take back notifications and receipt are extended from two weeks to one month. Member States will have up to one year, instead of six months, to carry out Dublin transfers when facing mass arrivals. Finally, the Crisis Regulation provides for the suspension of Dublin transfers to States affected by a crisis exclusively caused by mass arrivals until the Member State is no longer facing that situation (Article 13).

This means that a Member State confronted with a situation of crisis, instrumentalization, or *force majeure* can delay the registration of asylum applications for 4 weeks, and then apply the border procedure to several categories of asylum-seekers for up to 18 weeks. This means an overall period of 22 weeks of containment at the border, probably spent in detention, with limited safeguards and guarantees of protection. In the meantime, the Member State can be exempted from carrying out Dublin transfers or enjoy extended time limits.

6. European case-law: an obstacle or a justification to derogatory regimes?

This contribution shed light on the extensive use of restrictive asylum policies in the EU, which represents an alarming and yet widespread trend exploited by governments to deal with (perceived) migratory emergencies and crises. Against this background, it then examined the role of the ECtHR and the CJEU in relation to the establishment and consolidation of the procedural and substantial guarantees at the heart of the right to asylum in tense political contexts. Finally, it analyzed the normative side, by focusing on the various derogation measures enshrined in the recently adopted Crisis Regulation, which States could request to apply in situations of crisis, instrumentalization and *force majeure*.

[123] M. Ineli Ciger, *Unpacking the crisis regulation: a valuable addition to the European legal framework governing mass influx situations?*, in *EUI RSC Working Paper*, No. 40. Migration Policy Centre, 2024, p. 19.

The analysis demonstrates that European Courts struggle in finding a balance between requiring the full respect of migrants' fundamental rights while ensuring that States keep accepting their authority in pronouncing on sovereignty matters.

Despite a robust case-law where both the ECtHR and the CJEU have repeatedly found severe violations of the ECHR and EU law due to unlawful emergency practices jeopardizing the prohibition of refoulement and the right to asylum, several Member States have not foregone the resort to such measures to deal with migration inflows. Poland and Hungary represent the most notable examples in this respect. The Union, for its part, has similarly not abandoned the narrative of treating migration as an emergency, and has introduced additional derogatory measures into EU asylum law, beyond those already provided by the Treaties. The authors argue that the "stubborn" resort to derogatory measures by the Union and its Member States also partially depends on, and has possibly been prompted by, the controversial case-law of European Courts themselves, which have from time to time "tolerated" national unlawful practices, thereby letting emerge a more restrictive approach to the right to asylum. This has arguably facilitated the Member States' continuous use of emergency measures, whose adoption could have also been justified on the basis of such restrictive judicial trends.

Remarkably, by way of example, after the CJEU quashed the Lithuanian emergency legislation banning the right to asylum as unlawful under EU law, Lithuania decided to mostly ignore the indications of the Luxemburg Court. Whereas, in April 2023, the Lithuanian Parliament reintroduced the right to apply for asylum to comply with the Court's ruling, other amendments to national law have resulted in perpetuating the practices that have been found as unlawful. Indeed, the Law on the State Border was amended so as to authorize the Government to deny admission on a case-by-case analysis in a situation of an emergency, vis-à-vis those who intended to cross or have crossed the border irregularly from Belarus. The Law also stipulated that those apprehended at the border were deemed not to be on the territory of Lithuania, in a sort of fiction of "non-presence". These amendments came into force on 3 May 2023 and were made immediately applicable[124]. So conceived, this law does not only impinge the right to asylum during emergencies, but it also affects the overall registration process of asylum applications. As shown by UNHCR's data, indeed, only 12 asylum claims were registered in Lithuania in 2021, 90 in 2022, and only 7 in 2023[125]. Currently, practical obstacles in reaching and entering border crossing points are still in place and make it impossible to access asylum procedures. Indeed, asylum-seekers are forced to walk long distances in order to reach the only two border crossing points that are still open.

Lithuania has referred to the *N.D. and N.T.* judgment to justify the resort to practices of non-admission of asylum-seekers in its national law. Such a reference is emblematic, and hints to the severe concern raised by the authors in the previous sections. Namely,

[124] UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the case of *A.S. and Others v. Lithuania* (Application No. 44205/21) before the European Court of Human Rights, 14 March 2024.
[125] *Ibidem*.

the risk that States will progressively restrict the right to (access) asylum and invoke the ECtHR restrictive jurisprudence as a legitimate and authoritative legal basis authorising such a limitation. Notwithstanding some attempts to narrow the scope of application of the *N.D. and N.T.* criteria[126], the ECtHR has recently adopted a deferential approach towards States, by declaring certain practices of collective expulsions admissible and excusable, thereby surrendering to the pressure exercised by governments with a view to (re)establishing their sovereign prerogatives. The controversial exceptions and derogations introduced by the Grand Chamber in Strasbourg appear as legally flawed, based on unsound reasoning and are probably more politically-constructed, rather than inspired by the respect of the rights enshrined in the Convention.

Similarly, the Crisis Regulation further integrates three derogation regimes into EU law to allow Member States to deal with situations of crisis, instrumentalization and *force majeure*. According to the new provisions, the procedural and substantial guarantees at the core of the right to asylum (registration and individual examination of asylum claims, length of the procedure, the use of detention as a measure of last resort) have been severely curtailed, enhancing the risk of refoulement and ill-treatment of asylum-seekers. Such a restrictive approach seems to have found its justification in the reasoning of the ECtHR in controversial judgments (such as *Khlaifia, N.D. & N.T* and *Asady*), which have dramatically lowered the minimum procedural standards of the right to access to asylum, while creating fictional criteria that allow to consider evident refoulement situations as not in breach of the Convention. This is mostly visible in Article 5.3 of the amended Schengen Border Code where such criteria are expressly mentioned to justify the resort to "necessary measures" to preserve law and order. The group of applications concerning border practices of Member States faced with instrumentalization strategies, which are pending before the ECtHR Grand Chamber, will probably constitute a decisive test for the right to asylum, the prohibitions of refoulement and collective expulsions[127]. Looking at the most recent case-law concerning border control and migration management certainly does not seem to authorize much optimism in relation to human rights protection. As brilliantly summed up by Federico, Moraru and Pannia, restrictive asylum policies adopted by States in the context of crises, emergencies or force majeure:

"[…] gradually erode the right to asylum, transforming it into a theoretical construct, accessible in practice to only the very few refugees who are not caught by these containment practices. States combine external migration control practices that reduce legal entry pathways and escape the radar of judicial review with more subtle forms of internal migration control. Everywhere in Europe, states have structured their welfare

[126] For instance, the CJEU's Advocate General Emiliou recalled in *M.A.* that the *N.D. and N.T.* judgment cannot be interpreted as justifying a State's overall denial to consider an asylum application merely because the asylum-seekers concerned have entered the territory irregularly in the context of a mass influx of migrants, as it rather depends on the context at stake. CJEU, Opinion of Advocate General Emiliou, published on 2 June 2022, *M.A. v. Valstybės sienos apsaugos tarnyba*, C-72/22 PPU.

[127] Public hearings are scheduled to take place before the Grand Chamber on 12 February 2025.

systems to reflect and consolidate choices and perceptions about 'wanted' and 'unwanted' migrants (i.e. based on the supposed burden they place upon the state)".[128]

European Courts will have to heavily engage in their subsequent pronouncements to shield from such a risk.

ABSTRACT: The Regulation on Situations of Crisis, Force Majeure and Instrumentalisation, recently adopted as part of the New Pact on Migration and Asylum, has provoked mixed reactions among the international community and the scholarship. The greatest concern shared by commentators refers to the derogations allowed by the Regulation, which seem to prioritize the security prerogatives of the Member States over the respect for the fundamental rights of migrants, resulting in the risk of severely compressing, *inter alia*, the right to asylum and to access the asylum procedure. This turn of the screw is part of an established trend at both the European and national levels to adopt restrictive migration policies. But what role is European case law playing in ensuring access to asylum? Has the interpretation of the standards set to protect this right by the European Court of Human Rights and the EU Court of Justice been an obstacle or a justification for the most problematic measures contained in the Regulation?

KEYWORDS: Asylum – Crisis – Force Majeure – Instrumentalization – EU law.

[128] V. FEDERICO, M. MORARU, P. PANNIA, *The growing but uneven role of European courts in (im)migration governance: A comparative perspective*, in V. FEDERICO, M. MORARU, P. PANNIA, *Adjudicating migrant's rights: what are European Courts saying?*, cit., p. 5.